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CONSULTING SERVICES AGREEMENT BETWEEN
THE MILPITAS ECONOMIC DEVELOPMENT CORPORATION AND
SHALLECK COLLABORATIVE INC.

THIS AGREEMENT for consulting services is made by and between the Milpitas Economic Development Corporation and the Milpitas Redevelopment Agency, collectively referred to herein as the ("Milpitas Economic Development Corporation"), and Shalleck Collaborative Inc. ("Consultant") as of June 21, 2011.

AGREEMENT

Section 1. SERVICES. Subject to the terms and conditions set forth in this Agreement, Consultant shall provide to Milpitas Economic Development Corporation the services described in the Scope of Work attached as Exhibit A at the time and place and in the manner specified therein. In the event of a conflict in or inconsistency between the terms of this Agreement and Exhibit A, the Agreement shall prevail.

- 1.1 **Term of Services.** The term of this Agreement shall begin on the date first noted above and shall end on June 30, 2013, the date of completion specified in Exhibit A, and Consultant shall complete all the work described in Exhibit A prior to that date, unless the term of the Agreement is otherwise terminated or extended, as provided for in Section 8. The time provided to Consultant to complete the services required by this Agreement shall not affect the Milpitas Economic Development Corporation's right to terminate the Agreement, as provided for in Section 8.
- 1.2 **Standard of Performance.** Consultant shall perform all services required pursuant to this Agreement in the manner and according to the professional standards normally observed by a practitioner of the profession in which Consultant is engaged in the geographical area in which Consultant practices its profession. Consultant shall prepare all work products required by this Agreement in a substantial manner and shall conform to the professional standards of quality normally observed by a person practicing in Consultant's profession.
- 1.3 **Professional Skill.** It is mutually agreed by the parties that Milpitas Economic Development Corporation is relying upon the professional skill of the consultant as a specialist in the work, and Consultant represents to the Milpitas Economic Development Corporation that its work shall conform to the normal professional standards of the profession. Acceptance of the Consultant's work by the Milpitas Economic Development Corporation does not operate as a release of Consultant's representations. It is intended that Consultant's work shall conform to normal standards of accuracy, completeness and coordination.

- 1.4 **Assignment of Personnel.** Consultant shall assign only competent personnel to perform services pursuant to this Agreement. Exhibit A shall name any specific personnel who shall be performing services. In the event that Milpitas Economic Development Corporation, in its sole discretion, at any time during the term of this Agreement, desires the reassignment of any such persons, Consultant shall, immediately upon receiving notice from Milpitas Economic Development Corporation of such desire of Milpitas Economic Development Corporation, reassign such person or persons.
- 1.5 **Time.** Consultant shall devote such time to the performance of services pursuant to this Agreement as may be reasonably necessary to meet the standard of performance provided in Section 1.1 above and to complete Consultant's obligations hereunder.

Section 2. COMPENSATION. Milpitas Economic Development Corporation hereby agrees to pay Consultant an amount not to exceed \$ 100,000.00 based on time and materials for all services to be performed and reimbursable costs incurred under this Agreement. Milpitas Economic Development Corporation shall pay Consultant for services rendered pursuant to this Agreement at the time and in the manner set forth herein. The payments specified below shall be the only payments from Milpitas Economic Development Corporation to Consultant for services rendered pursuant to this Agreement. Consultant shall submit all invoices to Milpitas Economic Development Corporation in the manner specified herein. Except as specifically authorized by Milpitas Economic Development Corporation, Consultant shall not bill Milpitas Economic Development Corporation for duplicate services performed by more than one person.

Consultant and Milpitas Economic Development Corporation acknowledge and agree that compensation paid by Milpitas Economic Development Corporation to Consultant under this Agreement is based upon Consultant's estimated costs of providing the services required hereunder, including salaries and benefits of employees and subcontractors of Consultant. Hourly rates for personnel performing services shall be as shown in Exhibit B. Consequently, the parties further agree that compensation hereunder is intended to include the costs of contributions to any pensions and/or annuities to which Consultant and its employees, agents, and subcontractors may be eligible. Milpitas Economic Development Corporation therefore has no responsibility for such contributions beyond compensation required under this Agreement.

- 2.1 **Invoices.** Consultant shall submit invoices, not more often than once a month during the term of this Agreement, based on the cost for services performed and reimbursable costs incurred during the billing period. Invoices shall contain the following information:
- Serial identification of bills;
 - The beginning and ending dates of the billing period;
 - A Task Summary containing the original contract amount, the amount of prior billings, the total due this period, the balance available under the Agreement, and the percentage of completion, if applicable;
 - At Milpitas Economic Development Corporation's option, for each work item in each task, a copy of the applicable time entries or time sheets shall

be submitted showing the name of the person doing the work, the hours spent by each person, a brief description of the work, and each reimbursable expense;

- The total number of hours of work performed under the Agreement by Consultant and each employee, agent, and subcontractor of Consultant performing services hereunder, as well as a separate notice when the total number of hours of work by Consultant and any individual employee, agent, or subcontractor of Consultant reaches or exceeds 800 hours, which shall include an estimate of the time necessary to complete the work described in Exhibit A;
- The Consultant's signature.

2.2 Monthly Payment. Milpitas Economic Development Corporation shall make monthly payments, based on invoices received, for services satisfactorily performed, and for authorized reimbursable costs incurred. Milpitas Economic Development Corporation shall have thirty (30) days from the receipt of an invoice that complies with all of the requirements above and is otherwise acceptable to the Milpitas Economic Development Corporation to pay Consultant. Ten (10) percent shall be retained by the Milpitas Economic Development Corporation from each Agreement billing until the completion of the Agreement unless authorized differently by Milpitas Economic Development Corporation. In the event that an invoice is not acceptable to the Milpitas Economic Development Corporation, said invoice shall be returned to Consultant within thirty (30) days of the Milpitas Economic Development Corporation's receipt of the invoice with a detailed explanation of the deficiency. Milpitas Economic Development Corporation's obligation to pay a returned invoice shall not arise earlier than thirty (30) days after resubmission of the corrected invoice.

2.3 Total Payment. Milpitas Economic Development Corporation shall pay for the services to be rendered by Consultant pursuant to this Agreement. Milpitas Economic Development Corporation shall not pay any additional sum for any expense or cost whatsoever incurred by Consultant in rendering services pursuant to this Agreement. Milpitas Economic Development Corporation shall make no payment for any extra, further, or additional service pursuant to this Agreement.

In no event shall Consultant submit any invoice for an amount in excess of the maximum amount of compensation provided above either for a task or for the entire Agreement, unless the Agreement is modified prior to the submission of such an invoice by a properly executed change order or amendment. In the event that Consultant identifies additional work outside the scope of services specified in Exhibit A that may be required to complete the work required under this Agreement, Consultant shall immediately notify the Milpitas Economic Development Corporation and shall provide a written not-to-exceed price for performing this additional work.

- 2.4 Additional Services. A contingency amount of eighteen thousand dollars (\$18,000) is included in the contract that may not be used without express written authorization by the Milpitas Economic Development Corporation.
- 2.5 **Hourly Fees.** Fees for work performed by Consultant on an hourly basis shall not exceed the amounts shown on Exhibit B.
- 2.6 **Payment of Taxes.** Consultant is solely responsible for the payment of employment taxes incurred under this Agreement and any other applicable federal or state taxes.
- 2.7 **Reimbursable Expenses.** Reimbursable expenses are shown on Exhibit B, and shall not exceed (\$3,000.00). Expenses not listed in Exhibit B are not chargeable to Milpitas Economic Development Corporation. Reimbursable expenses are included in the total not-to-exceed amount of compensation provided under this Agreement.
- 2.7 **Payment upon Termination.** In the event that the Milpitas Economic Development Corporation or Consultant terminates this Agreement pursuant to Section 8, the Milpitas Economic Development Corporation shall compensate the Consultant for all outstanding costs and reimbursable expenses incurred for work satisfactorily completed as of the date of written notice of termination. Consultant shall maintain adequate logs and timesheets in order to verify costs incurred to that date. The Milpitas Economic Development Corporation shall have no obligation to compensate Consultant for work not verified by logs or timesheets.
- 2.8 **Authorization to Perform Services.** The Consultant is not authorized to perform any services or incur any costs whatsoever under the terms of this Agreement until receipt of a written Notice to Proceed from the Milpitas Economic Development Corporation.

Section 3. FACILITIES AND EQUIPMENT. Except as set forth herein, Consultant shall, at its sole cost and expense, provide all facilities and equipment that may be necessary to perform the services required by this Agreement. Milpitas Economic Development Corporation shall make available to Consultant only the facilities and equipment listed in this section, and only under the terms and conditions set forth herein.

Milpitas Economic Development Corporation shall furnish physical facilities such as desks, filing cabinets, and conference space, as may be reasonably necessary for Consultant's use while consulting with Milpitas Economic Development Corporation employees and reviewing records and the information in possession of the Milpitas Economic Development Corporation. The location, quantity, and time of furnishing those facilities shall be in the sole discretion of Milpitas Economic Development Corporation. In no event shall Milpitas Economic Development Corporation be obligated to furnish any facility that may involve incurring any direct expense, including but not limited to computer, cellular telephone, long-distance telephone, or other communication charges, vehicles, and reproduction facilities.

If the performance of the work specified in Exhibit A requires destructive testing or other work within the Milpitas Economic Development Corporation's public right-of-way, Consultant, or Consultant's subconsultant, shall obtain an encroachment permit from the Milpitas Economic Development Corporation.

Section 4. INSURANCE REQUIREMENTS. Before beginning any work under this Agreement, Consultant shall procure "occurrence coverage" insurance against claims for injuries to persons or damages to property that may arise from or in connection with the performance of the work hereunder by the Consultant and its agents, representatives, employees, and subcontractors. Consultant shall provide proof satisfactory to Milpitas Economic Development Corporation of such insurance that meets the requirements of this section and under forms of insurance satisfactory in all respects to the Milpitas Economic Development Corporation. Consultant shall maintain the insurance policies required by this section throughout the term of this Agreement and shall produce said policies to the Milpitas Economic Development Corporation upon demand. The cost of such insurance shall be included in the Consultant's price. Consultant shall not allow any subcontractor to commence work on any subcontract until Consultant has obtained all insurance required herein for the subcontractor(s) and provided evidence thereof to Milpitas Economic Development Corporation. Verification of the required insurance shall be submitted and made part of this Agreement prior to execution.

- 4.1 Workers' Compensation.** Consultant shall, at its sole cost and expense, maintain Statutory Workers' Compensation Insurance and Employer's Liability Insurance for any and all persons employed directly or indirectly by Consultant. The Statutory Workers' Compensation Insurance and Employer's Liability Insurance shall be provided with limits of not less than ONE MILLION DOLLARS (\$1,000,000.00) per accident. In the alternative, Consultant may rely on a self-insurance program to meet those requirements, but only if the program of self-insurance complies fully with the provisions of the California Labor Code. Determination of whether a self-insurance program meets the standards of the Labor Code shall be solely in the discretion of the Milpitas Economic Development Corporation Attorney. The insurer, if insurance is provided, or the Consultant, if a program of self-insurance is provided, shall waive all rights of subrogation against the Milpitas Economic Development Corporation and its officers, officials, employees, and volunteers for loss arising from work performed under this Agreement.

An endorsement shall state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits, except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the Milpitas Economic Development Corporation.

4.2 Commercial General and Automobile Liability Insurance.

- 4.2.1 General requirements.** Consultant, at its own cost and expense, shall maintain commercial general and automobile liability insurance for the term of this Agreement in an amount not less than ONE MILLION DOLLARS (\$1,000,000.00) per occurrence, combined single limit

coverage for risks associated with the work contemplated by this Agreement. If a Commercial General Liability Insurance or an Automobile Liability form or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the work to be performed under this Agreement or the general aggregate limit shall be at least twice the required occurrence limit. Such coverage shall include but shall not be limited to, protection against claims arising from bodily and personal injury, including death resulting therefrom, and damage to property resulting from activities contemplated under this Agreement, including the use of owned and non-owned automobiles.

4.2.2 Minimum scope of coverage. Commercial general coverage shall be at least as broad as Insurance Services Office Commercial General Liability occurrence form CG 0001 (ed. 11/88) or Insurance Services Office form number GL 0002 (ed. 1/73) covering comprehensive General Liability and Insurance Services Office form number GL 0404 covering Broad Form Comprehensive General Liability. Automobile coverage shall be at least as broad as Insurance Services Office Automobile Liability form CA 0001 (ed. 12/90) Code 1 ("any auto"). No endorsement shall be attached limiting the coverage.

4.2.3 Additional requirements. Each of the following shall be included in the insurance coverage or added as an endorsement to the policy:

- a. Milpitas Economic Development Corporation and its officers, employees, agents, contractors, consultants, and volunteers shall be covered as insureds with respect to each of the following: liability arising out of activities performed by or on behalf of Consultant, including the insured's general supervision of Consultant; products and completed operations of Consultant; premises owned, occupied, or used by Consultant; and automobiles owned, leased, or used by the Consultant. The coverage shall contain no special limitations on the scope of protection afforded to Milpitas Economic Development Corporation or its officers, employees, agents, contractors, consultants, or volunteers.
- b. The insurance shall cover on an occurrence or an accident basis, and not on a claims-made basis.
- c. An endorsement must state that coverage is primary insurance with respect to the Milpitas Economic Development Corporation and its officers, officials, employees, contractors, consultants, and volunteers, and that no insurance or self-insurance maintained by the Milpitas Economic Development Corporation shall be called upon to contribute to a loss under the coverage.

- d. Any failure of CONSULTANT to comply with reporting provisions of the policy shall not affect coverage provided to MILPITAS ECONOMIC DEVELOPMENT CORPORATION and its officers, employees, agents, and volunteers.
- e. An endorsement shall state that coverage shall not be suspended, voided, or canceled by either party, reduced in coverage or in limits, except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the Milpitas Economic Development Corporation.

4.3 Professional Liability Insurance. If Consultant shall be performing licensed professional services, Consultant shall maintain for the period covered by this Agreement professional liability insurance for licensed professionals performing work pursuant to this Agreement in an amount not less than TWO MILLION DOLLARS (\$2,000,000) per claim and in the aggregate covering the licensed professionals' errors and omissions.

- 4.3.1** Any deductible or self-insured retention shall not exceed \$150,000 per claim.
- 4.3.2** An endorsement shall state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits, except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the Milpitas Economic Development Corporation.
- 4.3.3** The policy must contain a cross liability clause.
- 4.3.4** The following provisions shall apply if the professional liability coverages are written on a claims-made form:
 - a. The retroactive date of the policy must be shown and must be before the date of the Agreement.
 - b. Insurance must be maintained and evidence of insurance must be provided for at least three years after completion of the Agreement or the work, unless waived in writing by the Milpitas Economic Development Corporation.
 - c. If coverage is canceled or not renewed and it is not replaced with another claims-made policy form with a retroactive date that precedes the date of this Agreement, Consultant must provide extended reporting coverage for a minimum of five years after completion of the Agreement or the work. The Milpitas Economic Development Corporation shall have the right to exercise, at the Consultant's sole cost and expense, any extended reporting

provisions of the policy, if the Consultant cancels or does not renew the coverage.

- d. A copy of the claim reporting requirements must be submitted to the Milpitas Economic Development Corporation prior to the commencement of any work under this Agreement.

4.4 Requirements for All Policies.

4.4.1 Acceptability of insurers. All insurance required by this section is to be placed with insurers with a Bests' rating of no less than A.

4.4.2 Verification of coverage. Prior to beginning any work under this Agreement, Consultant shall furnish Milpitas Economic Development Corporation with certificates of insurance and with original endorsements effecting coverage required herein. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. The Milpitas Economic Development Corporation reserves the right to require complete, certified copies of all required insurance policies at any time.

4.4.3 Subcontractors. Consultant shall include all subcontractors as insureds under its policies or shall furnish separate certificates and endorsements for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein.

4.4.4 Deductibles and Self-Insured Retentions. Consultant shall disclose to and obtain the approval of Milpitas Economic Development Corporation for the self-insured retentions and deductibles before beginning any of the services or work called for by any term of this Agreement.

During the period covered by this Agreement, only upon the prior express written authorization of the Milpitas Economic Development Corporation, Consultant may increase such deductibles or self-insured retentions with respect to Milpitas Economic Development Corporation, its officers, employees, agents, contractors, consultants, and volunteers. The Milpitas Economic Development Corporation may condition approval of an increase in deductible or self-insured retention levels with a requirement that Consultant procure a bond, guaranteeing payment of losses and related investigations, claim administration, and defense expenses that is satisfactory in all respects to the Milpitas Economic Development Corporation.

4.4.5 Notice of Reduction in Coverage. In the event that any coverage required by this section is reduced, limited, or materially affected in any other manner, Consultant shall provide written notice to Milpitas Economic Development Corporation at Consultant's earliest possible opportunity and

in no case later than five days after Consultant is notified of the change in coverage.

- 4.5 Remedies.** In addition to any other remedies Milpitas Economic Development Corporation may have if Consultant fails to provide or maintain any insurance policies or policy endorsements to the extent and within the time herein required, Milpitas Economic Development Corporation may, at its sole option exercise any of the following remedies, which are alternatives to other remedies Milpitas Economic Development Corporation may have and are not the exclusive remedy for Consultant's breach:
- Obtain such insurance and deduct and retain the amount of the premiums for such insurance from any sums due under the Agreement;
 - Order Consultant to stop work under this Agreement or withhold any payment that becomes due to Consultant hereunder, or both stop work and withhold any payment, until Consultant demonstrates compliance with the requirements hereof; and/or
 - Declare Consultant in material breach of the Agreement and terminate the Agreement.
- 4.6 Waiver.** The Risk Manager of the Milpitas Economic Development Corporation has the authority to waive or vary any provision of Sections 4.2 through 4.5. Any such waiver or variation shall not be effective unless made in writing.

Section 5. INDEMNIFICATION AND CONSULTANT'S RESPONSIBILITIES. Consultant shall indemnify, defend with counsel reasonably acceptable to the Milpitas Economic Development Corporation, and hold harmless the Milpitas Economic Development Corporation and its officials, officers, employees, contractors, consultants, from and against any and all losses, liability, claims, suits, actions, damages, and causes of action arising out of any personal injury, bodily injury, loss of life, or damage to property, or any violation of any federal, state, or municipal law or ordinance, to the extent caused, in whole or in part, by the willful misconduct or negligent acts or omissions of Consultant or its employees, subcontractors, or agents, by acts for which they could be held strictly liable, or by the quality or character of their work. The foregoing obligation of Consultant shall not apply when (1) the injury, loss of life, damage to property, or violation of law arises wholly from the negligence or willful misconduct of the Milpitas Economic Development Corporation or its officers, employees, contractors, consultants, and (2) the actions of Consultant or its employees, subcontractor, or agents have contributed in no part to the injury, loss of life, damage to property, or violation of law. It is understood that the duty of Consultant to indemnify and hold harmless includes the duty to defend as set forth in Section 2778 and Section 2782.8 of the California Civil Code. Acceptance by Milpitas Economic Development Corporation of insurance certificates and endorsements required under this Agreement does not relieve Consultant from liability under this indemnification and hold harmless clause. This indemnification and hold harmless clause shall apply to any damages or claims for damages whether or not such insurance policies shall have been determined to apply. By execution of this Agreement, Consultant acknowledges and agrees to the provisions of this Section and that it is a material element of consideration.

In the event that Consultant or any employee, agent, or subcontractor of Consultant providing services under this Agreement is determined by a court of competent jurisdiction or the California Public Employees Retirement System (PERS) to be eligible for enrollment in PERS as an employee of Milpitas Economic Development Corporation, Consultant shall indemnify, defend, and hold harmless Milpitas Economic Development Corporation for the payment of any employee and/or employer contributions for PERS benefits on behalf of Consultant or its employees, agents, or subcontractors, as well as for the payment of any penalties and interest on such contributions, which would otherwise be the responsibility of Milpitas Economic Development Corporation.

Section 6. STATUS OF CONSULTANT.

- 6.1 Independent Contractor.** At all times during the term of this Agreement, Consultant shall be an independent contractor and shall not be an employee of Milpitas Economic Development Corporation. Milpitas Economic Development Corporation shall have the right to control Consultant only insofar as the results of Consultant's services rendered pursuant to this Agreement and assignment of personnel pursuant to Subparagraph 1.3. Otherwise, Milpitas Economic Development Corporation shall not have the right to control the means by which Consultant accomplishes services rendered pursuant to this Agreement. Notwithstanding any other Milpitas Economic Development Corporation, state, or federal policy, rule, regulation, law, or ordinance to the contrary, Consultant and any of its employees, agents, and subcontractors providing services under this Agreement shall not qualify for or become entitled to, and hereby agree to waive any and all claims to, any compensation, benefit, or any incident of employment by Milpitas Economic Development Corporation, including but not limited to eligibility to enroll in the California Public Employees Retirement System (PERS) as an employee of Milpitas Economic Development Corporation and entitlement to any contribution to be paid by Milpitas Economic Development Corporation for employer contributions and/or employee contributions for PERS benefits.
- 6.2 Consultant No Agent.** Except as Milpitas Economic Development Corporation may specify in writing, Consultant shall have no authority, express or implied, to act on behalf of Milpitas Economic Development Corporation in any capacity Milpitas Economic Development Corporation whatsoever as an agent. Consultant shall have no authority, express or implied, pursuant to this Agreement to bind Milpitas Economic Development Corporation to any obligation whatsoever.

Section 7. LEGAL REQUIREMENTS.

- 7.1 Governing Law.** The laws of the State of California shall govern this Agreement.
- 7.2 Compliance with Applicable Laws.** Consultant and any subcontractors shall comply with all laws applicable to the performance of the work hereunder.
- 7.3 Other Governmental Regulations.** To the extent that this Agreement may be funded by fiscal assistance from another governmental entity, Consultant and any

subcontractors shall comply with all applicable rules and regulations to which Milpitas Economic Development Corporation is bound by the terms of such fiscal assistance program.

7.4 **Licenses and Permits.** Consultant represents and warrants to Milpitas Economic Development Corporation that Consultant and its employees, agents, and any subcontractors have all licenses, permits, qualifications, and approvals of whatsoever nature that are legally required to practice their respective professions. Consultant represents and warrants to Milpitas Economic Development Corporation that Consultant and its employees, agents, any subcontractors shall, at their sole cost and expense, keep in effect at all times during the term of this Agreement any licenses, permits, and approvals that are legally required to practice their respective professions and to perform this Agreement. In addition to the foregoing, Consultant and any subcontractors shall obtain and maintain during the term of this Agreement valid business license from Milpitas Economic Development Corporation.

7.5 **Nondiscrimination and Equal Opportunity.** Consultant shall not discriminate, on the basis of a person's race, religion, color, national origin, age, physical or mental handicap or disability, medical condition, marital status, sex, or sexual orientation, against any employee, applicant for employment, subcontractor, bidder for a subcontract, or participant in, recipient of, or applicant for any services or programs provided by Consultant under this Agreement. Consultant shall comply with all applicable federal, state, and local laws, policies, rules, and requirements related to equal opportunity and nondiscrimination in employment, contracting, and the provision of any services that are the subject of this Agreement, including but not limited to the satisfaction of any positive obligations required of Consultant thereby.

Consultant shall include the provisions of this Subsection in any subcontract approved by the Milpitas Economic Development Corporation or this Agreement.

Section 8. TERMINATION AND MODIFICATION.

8.1 **Termination.** Milpitas Economic Development Corporation may terminate this Agreement at any time and without cause upon written notification to Consultant.

In the event of termination, Consultant shall be entitled to compensation for services performed prior to the effective date of termination as provided in Section 2. Milpitas Economic Development Corporation, however, may condition payment of such compensation upon Consultant delivering to Milpitas Economic Development Corporation any or all documents, photographs, computer software, video and audio tapes, and other materials provided to Consultant or prepared by or for Consultant or the Milpitas Economic Development Corporation in connection with this Agreement.

- 8.2** **Extension.** Milpitas Economic Development Corporation may, in its sole and exclusive discretion, extend the end date of this Agreement beyond that provided for in Subsection 1.1. Any such extension shall require a written amendment to this Agreement, as provided for herein. Consultant understands and agrees that, if Milpitas Economic Development Corporation grants such an extension, Milpitas Economic Development Corporation shall have no obligation to provide Consultant with compensation beyond the maximum amount provided for in this Agreement. Similarly, unless authorized by the Milpitas Economic Development Corporation, Milpitas Economic Development Corporation shall have no obligation to reimburse Consultant for any otherwise reimbursable expenses incurred during the extension period.
- 8.3** **Amendments.** The parties may amend this Agreement only by a writing signed by all the parties.
- 8.4** **Assignment and Subcontracting.** Milpitas Economic Development Corporation and Consultant recognize and agree that this Agreement contemplates personal performance by Consultant and is based upon a determination of Consultant's unique personal competence, experience, and specialized personal knowledge. Moreover, a substantial inducement to Milpitas Economic Development Corporation for entering into this Agreement was and is the professional reputation and competence of Consultant. Consultant may not assign this Agreement or any interest therein without the prior written approval of the Milpitas Economic Development Corporation. Consultant shall not subcontract any portion of the performance contemplated and provided for herein, other than to the subcontractors listed in the Consultant's proposal, without prior written approval of the Milpitas Economic Development Corporation.
- 8.5** **Survival.** All obligations arising prior to the termination of this Agreement and all provisions of this Agreement allocating liability between Milpitas Economic Development Corporation and Consultant shall survive the termination of this Agreement.
- 8.6** **Options upon Breach by Consultant.** If Consultant materially breaches any of the terms of this Agreement, Milpitas Economic Development Corporation's remedies shall include, but not be limited to, any or all of the following:
- 8.6.1** Immediate cancellation of the Agreement;
 - 8.6.2** Retention of the plans, specifications, drawings, reports, design documents, and any other work product prepared by Consultant pursuant to this Agreement prior to cancellation; and
 - 8.6.3** Retention of a different consultant at Consultant's cost to complete the work described in Exhibit A not finished by Consultant.

Section 9. **KEEPING AND STATUS OF RECORDS.**

9.1 Records Created as Part of Consultant's Performance. All reports, data, maps, models, charts, studies, surveys, photographs, memoranda, plans, studies, specifications, records, files, or any other documents or materials, in electronic or any other form, that Consultant prepares or obtains pursuant to this Agreement and that relate to the matters covered hereunder shall be the property of the Milpitas Economic Development Corporation. Consultant hereby agrees to deliver those documents to the Milpitas Economic Development Corporation at any time upon demand of the Milpitas Economic Development Corporation. It is understood and agreed that the documents and other materials, including but not limited to those described above, prepared pursuant to this Agreement are prepared specifically for the Milpitas Economic Development Corporation and are not necessarily suitable for any future or other use. Failure by Consultant to deliver these documents to the Milpitas Economic Development Corporation within the time period specified by the Milpitas Economic Development Corporation shall be a material breach of this Agreement. Milpitas Economic Development Corporation and Consultant agree that, until final approval by Milpitas Economic Development Corporation, all data, plans, specifications, reports and other documents are preliminary drafts not kept by the Milpitas Economic Development Corporation in the ordinary course of business and will not be disclosed to third parties without prior written consent of both parties.

9.2 Consultant's Books and Records. Consultant shall maintain any and all ledgers, books of account, invoices, vouchers, canceled checks, and other records or documents evidencing or relating to charges for services or expenditures and disbursements charged to the Milpitas Economic Development Corporation under this Agreement for a minimum of three (3) years, or for any longer period required by law, from the date of final payment to the Consultant to this Agreement.

9.3 Inspection and Audit of Records. Any records or documents that Section 9.2 of this Agreement requires Consultant to maintain shall be made available for inspection, audit, and/or copying at any time during regular business hours, upon oral or written request of the Milpitas Economic Development Corporation. Under California Government Code Section 8546.7, if the amount of public funds expended under this Agreement exceeds TEN THOUSAND DOLLARS (\$10,000.00), the Agreement shall be subject to the examination and audit of the State Auditor, at the request of Milpitas Economic Development Corporation or as part of any audit of the Milpitas Economic Development Corporation, for a period of three (3) years after final payment under the Agreement.

Section 10 MISCELLANEOUS PROVISIONS.

10.1 Attorneys' Fees. If a party to this Agreement brings any action, including an action for declaratory relief, to enforce or interpret the provision of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. The court may set such fees in the same action or in a separate action brought for that purpose.

- 10.2 Venue.** In the event that either party brings any action against the other under this Agreement, the parties agree that trial of such action shall be vested exclusively in the state courts of California in the County of Santa Clara or in the United States District Court for the Northern District of California.
- 10.3 Severability.** If a court of competent jurisdiction finds or rules that any provision of this Agreement is invalid, void, or unenforceable, the provisions of this Agreement not so adjudged shall remain in full force and effect. The invalidity in whole or in part of any provision of this Agreement shall not void or affect the validity of any other provision of this Agreement.
- 10.4 No Implied Waiver of Breach.** The waiver of performance or any breach of a specific provision of this Agreement does not constitute a waiver of any other breach of that term or any other term of this Agreement.
- 10.5 Successors and Assigns.** The provisions of this Agreement shall inure to the benefit of and shall apply to and bind the successors and assigns of the parties.
- 10.6 Use of Recycled Products.** Consultant shall prepare and submit all reports, written studies and other printed material on recycled paper to the extent it is available at equal or less cost than virgin paper.
- 10.7 Conflict of Interest.** Consultant may serve other clients, but none whose activities within the corporate limits of Milpitas Economic Development Corporation or whose business, regardless of location, would place Consultant in a "conflict of interest," as that term is defined in the Political Reform Act, codified at California Government Code Section 81000 *et seq.*

Consultant shall not employ any Milpitas Economic Development Corporation official in the work performed pursuant to this Agreement. No officer or employee of Milpitas Economic Development Corporation shall have any financial interest in this Agreement that would violate California Government Code Sections 1090 *et seq.*

Consultant hereby warrants that it is not now, nor has it been in the previous twelve (12) months, an employee, agent, appointee, or official of the Milpitas Economic Development Corporation. If Consultant were an employee, agent, appointee, or official of the Milpitas Economic Development Corporation in the previous twelve months, Consultant warrants that it did not participate in any manner in the forming of this Agreement. Consultant understands that, if this Agreement is made in violation of Government Code §1090 *et seq.*, the entire Agreement is void and Consultant will not be entitled to any compensation for services performed pursuant to this Agreement, including reimbursement of expenses, and Consultant will be required to reimburse the Milpitas Economic Development Corporation for any sums paid to the Consultant. Consultant understands that, in addition to the foregoing, it may be subject to criminal

prosecution for a violation of Government Code § 1090 and, if applicable, may be disqualified from holding public office in the State of California.

Consultant certifies that it has not paid any direct or contingent fee, contribution, donation or consideration of any kind to any firm, organization, or person (other than a bona fide employee of Consultant) in connection with procuring this Agreement, nor has Consultant agreed to employ or retain any firm, organization, or person in connection with the performance of this Agreement as a condition for obtaining this Agreement.

- 10.8 Solicitation.** Consultant agrees not to solicit business at any meeting, focus group, or interview related to this Agreement, either orally or through any written materials.
- 10.9 Contract Administration.** This Agreement shall be administered by Jorge Bermudez, who is authorized to act for, and on behalf of, Milpitas Economic Development Corporation. All correspondence shall be directed to or through the Contract Administrator or his or her designee.
- 10.10 Notices.** Any written notice to Consultant shall be sent to:
- Adam Shalleck, AIA
Shalleck Collaborative Inc.
400 Montgomery Street, Suite 500
San Francisco, CA 94104
- Any written notice to Milpitas Economic Development Corporation shall be sent to:
- Greg Armendariz
Public Works Director/City Engineer
455 East Calaveras Boulevard
Milpitas, California 95035
408-586-3317
- 10.11 Professional Seal.** Where applicable in the determination of the Milpitas Economic Development Corporation, the first page of a technical report, first page of design specifications, and each page of construction drawings shall be stamped/sealed and signed by the licensed professional responsible for the report/design preparation.
- 10.12 Integration.** This Agreement, including the exhibits, represents the entire and integrated agreement between Milpitas Economic Development Corporation and Consultant and supersedes all prior negotiations, representations, or agreements, either written or oral.
- 10.13 Exhibits.** All exhibits referenced in this Agreement are incorporated by reference herein.

MILPITAS ECONOMIC DEVELOPMENT CORPORATION OF MILPITAS

CONSULTANT

Thomas C Williams, President

ATTEST:

Mary Lavelle, Secretary

Taxpayer Identification Number

APPROVED AS TO FORM:

Michael J. Ogaz, Corporation Counsel

APPROVED AS TO CONTENT:

Greg Armendariz, Public Works Director/City Engineer

APPROVED:

Emma Karlen, Chief Financial Officer

EXHIBIT A
SCOPE OF SERVICES
FOR
CITY HALL AUDIO VISUAL REPLACEMENT
PROJECT NO. 9001

Project Description

This proposal assumes the project to include renovations and upgrades to the existing AV systems at City Hall as described below. The project will be administered as a city-funded, design-bid-build project and under the jurisdiction of the local authorities. The project will involve existing construction and new and existing technical systems.

Scope of Work

Field of Responsibility

The SC's work will be in two basic areas of consultation: architectural and engineering aspects that affect the facility's AV functions, and AV systems design. Typical architectural and engineering guidance includes structural, mechanical and electrical criteria for AV systems accommodations.

AV Systems Documentation

This proposal includes planning, criteria, design and oversight, culminating in bid-ready documents, for the following AV Systems:

- Council Chambers (maximum budget assumed: \$700,000)
 - Video Projection
 - Dias & Presenter System with touch panels and all current functions
 - Audio reinforcement & playback
 - Broadcast/Webcast video production & switching
 - CATV headend upgrade
 - General upgrade to digital & high-definition video systems
 - Control System w/ addition of power sequencing

- Video Conference Room (maximum budget assumed: \$85,000)
 - Dual Video Displays
 - Video Conference Codec with cameras & audio
 - Control System
 - Power Sequencing & Equipment Cooling

- Eight Standard Conference Rooms (maximum budget assumed: \$35,000 each)
 - Video display (projector, smart board, flat screen)
 - Audio playback
 - Control System

- Power Sequencing & Equipment Cooling
- Ancillary Spaces & Systems (maximum budget assumed: \$25,000)
 - Lobby audio system
 - Pre-function spaces with audio & video systems
 - Digital Signage
- Related Electrical (provided by O'Mahoney & Myer)
 - Relocation of outlets at conference rooms to support flat-panel displays
 - Upgraded grounding system at council chambers
 - Addition of hard-wired power sequencing system at council chambers
- Demolition
 - Preparation of demolition drawings

Maximum budgets assumed: This proposal assumes a level of sophistication of the AV systems within the maximum budgets based on the complete replacement and duplication of existing functions. Should the systems increase in scope, our fees will be equitably adjusted.

Related Services Limits

The AV equipment will be specified in Division 11 of the specifications. All related electrical design, components and services that control or fall under Division 16 shall be the responsibility of the Electrical Engineer. For low voltage AV systems, this proposal includes specification of wiring devices, point to point diagrams, infrastructure criteria, wire types, and conduit sizing. Line-voltage design and documentation, including conduit size and route, power wire, back boxes, and any power systems would be handled by the electrical engineer.

This proposal assumes that all building-integrated systems are designed, coordinated, documented and bid within the base building design and construction process. Coordination of design, bidding and construction of integrated systems outside of the base contract for construction will be considered an additional service.

The SC will not be providing services in acoustics or noise isolation in this scope of work. Professional stamping and representation to building agencies is not included in this scope of work. In our experience, professional stamping of AV systems documents is not normally required by building agencies. AV system specifications will require the specialty sub-contractor's shop drawings to bear a CA Professional Engineer's stamp for any required items.

Programming

Within our field of responsibility, we will determine the program for the project. Work will be delivered primarily in meetings as outlined below, and be issued in the form of written memoranda, document review and comment, and sketches.

Meetings: Meetings and related travel during the Programming phase of the project within this proposal are limited to:

- Two partial days of meetings in Milpitas, CA.

Schematic Design Phase (SD)

We will provide the following services during the Schematic Design phase of the project:
Design: Within our field of responsibility, we will develop a Schematic design in the areas for which we are responsible. We will work within the context of the project to determine the best use of available resources with the intent of maximizing aesthetic impact, and system functionality. Review and advice will take place in meetings as outlined below, and be issued in the form of written memoranda and sketches as required.

Engineering Accommodations: We will provide guidance on any related architectural and engineering accommodations that will be required. Review and advice will take place in meetings as outlined below, and be issued in the form of sketches and written reports and memoranda.
Executive Summary: We will provide a narrative that outlines the approach to be taken for AV systems. This narrative should be used as a part of the final Schematic Design documents submitted to the board for approval.

AV Systems Budget Recommendations: We will provide budget recommendations for the systems as outlined in the executive summary.

Meetings: Meetings and related travel during the Schematic Design phase of the project within this proposal are limited to:

- Two partial days of meetings in Milpitas, CA.

Design Development Phase (DD)

We will provide the following services during the Design Development phase of the project:
Design Development: We will continue to develop the project within our field of responsibility. Solutions will be developed in meetings and in the form of sketches and written memoranda.
AV Systems Documentation: We will provide one preliminary and one final set of drawings for the systems determined in the Schematic Design Phase as listed above. Deliverables will include design development-level drawings that shall fix and describe the systems within our field of responsibility, sufficient to reach design consensus.

Drawings will be developed in the current release of AutoCAD (saved backward as required) and we will provide revised narratives, if necessary. Documents will be provided electronically only. Building background AutoCAD compatible files and all updates and revisions thereto shall be provided by the owner. Changes in format or drawing organization after the initial format is agreed upon shall be considered an additional service.

AV Systems Budget Recommendations: We will provide revised budget recommendations if necessary for the systems as shown in our documents.

Meetings: Meetings and related travel during the Design Development phase of the project within this proposal are limited to:

- Two partial days of meetings in Milpitas, CA.

Contract Documents Phase (CD)

We will provide the following services during the Contract Documents phase of the project:

Detail Development: We will continue to develop details for the project within our field of responsibility. Solutions will be developed in meetings and in the form of sketches and written memoranda.

AV Systems Documentation: We will provide one preliminary and one final set of drawings and specifications for the systems listed above. Deliverables will include contract document -level documents that shall set forth in detail the systems within our field of responsibility, sufficient to bid and construct the systems.

Drawings will be developed in the current release of AutoCAD (saved backward as required) and specifications, if necessary, will be in standard CSI format. Documents will be provided electronically only. Building background AutoCAD compatible files and all updates and revisions thereto shall be provided by the Owner. Changes in format or drawing organization after the initial format is agreed upon shall be considered an additional service.

AV Systems Budget Recommendations: We will provide revised budget recommendations if necessary for the systems as shown in our documents.

Meetings: Meetings and related travel during the Contract Documents phase of the project within this proposal are limited to:

- Two partial days of meetings in Milpitas, CA.

Agency Review/Bidding

Bidding: We will answer bid questions, review bids and advise the Client as to their completeness relative to the bid documents.

Redesign: Should it be necessary to invoke substantial redesign of the systems for which we are responsible due to the receipt of bids over the Client's approved budget and contingency for those systems, we will provide revised documents at no additional cost. Any redesign efforts due to overages outside of our systems responsibility, or revisions in their criteria or scope of work will be considered an additional service.

Meetings: Meetings and related travel during the Agency Review & Bidding phase of the project within this proposal are limited to:

- Two partial days of meetings in Milpitas, CA.

Construction Administration (CA)

Based upon the successful award of the contract for construction and authorization to proceed, we will provide construction administration services as outlined herein within our field of responsibility.

RFI's, bulletins and change orders: We will respond to issues that arise within our field of responsibility.

Shop Drawings: We will review and stamp two submissions of shop drawings for each specification section we author.

Construction Phase Additional Services: The following tasks are *not* included in this scope of work and would be considered an additional service:

- Work required due to errors outside of our field.
- Responses to RFI's where the information is within the document set.
- Incorporation of addenda into the Construction Documents.
- Further review of resubmitted sections.
- Review of submissions outside of the Contractor's Submittal Schedule.
- Review of Change Order Proposals requiring research, evaluation or preparation or revision of bid documents.
- Evaluation of extensive number claims submitted by the Contractor or others in connection with the Work.
- Evaluation of Substitutions after Award of Construction Contract unless due to unavailability or unsuitability of specified product or system.
- Preparation of design and documentation for complex Bid Alternates or an unusual quantity of Bid Alternates.
- Preparation of design and documentation for Owner initiated Proposal Requests after Construction Contract Award.
- More than 1 inspection to determine whether Work is Substantially Complete in accordance with Contract Documents.
- More than 1 inspection to determine Final Completion of the Work in accordance with Contract Documents.
- Providing Contract Administration Services more than 60 days after the date of project completion.

Intermediate Site Visits: We will visit the site during construction at times appropriate to observe the work in progress in conformance with the design intent of the bid documents and to discuss and assist in coordinating solutions. We will provide a written report after each visit. Intermediate site visits and related travel within this scope of work will be limited to:

- Four partial man-day visits

We would highly recommend further intermediate visits, which are available as an additional service.

Final Checkouts: Based upon written notice from the Contractor that the work within our field is complete, we will provide a final checkout of all AV systems we have specified. A written punchlist will be provided. Further backcheck of systems will be considered an additional service. We will include in our specifications a clause stating that if we are requested to review systems that are incomplete in actuality, the Contractor will be back-charged for a repeat checkout. Checkout time will be limited to:

- Four man-days of checkout sessions

Project Schedule

This proposal assumes the following schedule:

- | | |
|---------------------|-----------------------------------|
| ▪ Programming | May-June, 2011 |
| ▪ SD | July, 2011 |
| ▪ DD | August – September, 2011 |
| ▪ CD | October – November, 2011 |
| ▪ Agency Review/Bid | December, 2011 |
| ▪ CA | January – July, 2012 ¹ |

¹ *Extended CA schedule based on potential phasing requirements.*

Should this schedule be extended due to causes other than our own, our fees will be equitably adjusted.

EXHIBIT B

COMPENSATION SCHEDULE

Compensation for the services outlined herein will be billed on a fixed fee plus reimbursable expenses basis. Fees will be as follows. Expenses *are not* included in these fees.

Phase	Base ²
▪ Programming	\$4,000
▪ SD	\$8,000
▪ DD	\$18,000
▪ CD	\$29,500
▪ Agency Review/Bid	\$3,500
▪ CA	\$16,000
▪ Reimbursables	\$3,000
<hr/>	
▪ Total Fee	\$8200

² Includes Electrical design fees, as provided by O'Mahoney & Myer, under direct contract to The SC.

For any additional services based on a time & materials agreement, the Shalleck Collaborative's hourly rates are as follows. These rates would be fixed for the entirety of the project base scope schedule.

Employee	Rate
• Project Lead	\$175
• Systems Designer & Project Mgr.	\$120
• Draftsperson	\$95

Reimbursable Expenses

Reimbursable expenses are included in the fee limits quoted above. Expenses typically include:

- Printing and plotting costs
- Communications including telephone, fax and delivery charges
- Additional insurance coverage fees

EXHIBIT C
INSURANCE DOCUMENTS