

BUDGET CHANGE FORM

Type of Change	From		To	
	Account	Amount	Account	Amount
Check one: <input checked="" type="checkbox"/> Budget Appropriation <input type="checkbox"/> Budget Transfer	900-2940	\$60,000	900-910-4237	\$60,000

Explain the reason for the budget change:

Background: In June 2011 the City Council approved an Agreement with the City to provide Business Retention in Milpitas (BRIM) services. The Chamber program was to focus its outreach to businesses with 49 to 99 employees, survey the needs, challenges and business development and expansion opportunities of the business and report those findings to the City.

The Chamber contacted 127 or the 281 businesses falling within the employee count. The Chamber acknowledges that “gearing up” for the outreach program took longer than anticipated in the coordination, formal training and ongoing resourcing for its BRIM Team members. However, the results and information gleaned from the business retention efforts are very valuable to both the Chamber and the City. For example, the Chamber found that businesses chose the Milpitas location for geographical location, easy freeway access and affordable lease terms and affordable housing for owners and employees. Sixty three percent (63%) of the businesses responding to the survey indicated overall favorable experience with the City. Those that felt otherwise cited dissatisfaction with occupancy permits, limited signage opportunities and regulatory requirements. The Chamber notes that they did not “drill down” for specific details or to discern if it was local, county, or state government regulations creating dissatisfaction.

Eighty five percent (85%) of businesses surveyed indicated that their current facility is sufficient for business needs, but 24% suggested a need for expansion or are considering a move outside the City. The Chamber is compiling a more detailed list on these businesses for the Chamber and City to conduct joint follow-up outreach. The Chamber reports that some of the businesses are very concerned about the impact of BART on them, especially those businesses near the BART Station area but some believe that the BART extension will be good for their business.

Outcomes: The Chamber’s performance measures projected quarterly outreach efforts would yield a total of 250 points (see attachment for Performance Measurements). The Chamber achieved 237 points in the first quarter and attributes this to how long it took to create the survey and actually make contact with the responsible business owner/manager. The Chamber discovered that much of what they were doing was business recruitment, as businesses owners they met with would refer them to other businesses that might be interested in relocating to Milpitas. Finally, the Chamber realized that business retention and outreach efforts require more time than anticipated, as once they were able to reach the appropriate business contact, they were often very engaging and ready to talk more in depth than anticipated.

Staff believes that the Chamber, while not meeting the exact target of 250 points, exceeded the expectations of the contract and recommends that the contract be extended to allow the Chamber to continue its business retention efforts and to expand into business recruitment. Staff will recommend to the City Council Economic Development Subcommittee a new agreement not to exceed \$60,000 through June 30, 2011.

The Economic Development Subcommittee will meet with the Chamber on Monday, October 17th to review the performance of the Chamber and consider staff’s recommendation. The Chamber will continue to report back to the City on a quarterly basis and funds would be distributed to the Chamber on a quarterly basis upon approval of their report to the City Council.

Fiscal Impact: Funds for the proposed contract in the amount of \$60,000 is available in the Economic Development Corporation.

Check if City Council Approval required.

Meeting Date: October 18, 2011

Itemization of funds, if needed:		Amount
Requested by:	Division Head:	Date:
	Department Head:	Date:
Reviewed by:	Finance Director: <i>[Signature]</i>	Date: 10/10/11
Approved by:	City Manager:	Date:
Date approved by City Council, if required:		Confirmed by:

Appendix A

PERFORMANCE MEASUREMENTS

The details within this Appendix will identify both the metrics used to compute/gage actual work accomplished by the Chamber as well as establish quarterly targets with monthly reporting submissions to the City for timely consideration.

The Chamber will deliver upon four different initiatives, weighted accordingly, in order to maximize the effectiveness of each category while taking the length of development time for the more impactful programs into account.

In order to ensure the integrity of our program and create a fair balance of constant economic flow of information from our businesses as well as initiating programs to help retain businesses within the City of Milpitas and to secure funding in order to create jobs we have created a point system and associated minimum thresholds to be reviewed quarterly by the City.

Our four categories and associated points are as follows with quarterly goal(s) and minimum threshold(s) after:

Category One

1 Point: “Deliver the Message”

An important aspect for the City was that a message be delivered to their businesses that the City is not only concerned for their well being, but is proactively doing something about it.

“Deliver the Message” will be the 20 to 30 second conversation made from our BRIM agent to the Key Business Person: 1) Owner, 2) CFO, or 3) recognized City liaison or Business Development Officer. Every KBP will be introduced to our program, that it is an effort by the Chamber and City to help identify ways to strengthen their business or add actual revenue to their bottom line via a 10 to 20 minute Business Review.

This positive, promotional message for the City will be the ancillary to a completed Business Review. Evidence from the similar City of Oakland program, shows that even if the KBP is unwilling or unable to complete the Business Review with our agent, a positive impact is made as they will at least have the knowledge that their City is trying to engage them, to involve them in the process, and better support their ongoing success.

Category Two

2 Points: A Completed Business Review

The goal of our calls and face-to-face meetings is to have a Business Review completed.

This 10 to 20 minute process will cover key topics including the following:

- Why did you decide on having your business in Milpitas?
- How was your experience in working with the City?
- Do you expect any growth in the immediate future that would require more employees or a larger business space?
- Are there any pending issues your business faces that you could use support in?
- Are you familiar with Foreign Trade Zones and how they can be used to lower or eliminate duties on your imported components?*
- If you do expect growth of more than 10 or 20 employees, would you be open to investor injection to help expedite this growth?*

*: These questions would only be asked of businesses that we had information supporting that they would most likely have a specific need/benefit.

Also, we have a set list of questions, but would welcome additional questions submitted by the City and/or Economic Development Manager to improve the City’s acquired data via this medium.

Category Three

5, 10, and 50 points: Foreign Trade Zones

The importance of the FTZ for our businesses is that it can help to lower or complete eliminate duties paid on imports of components that are exported back out of the US or are manufactured/assembled/manipulated into a finished product and resold.

For the City, once a business establishes an FTZ into their physical business location – if the business considers a move in the future they may leave, but they cannot take their FTZ with them as it can only be used for the original, designated physical location.

The approximate time from start to finish is six to eight months. But, this is if the business is diligent and has constant follow up. For those unsupported businesses it takes longer or is never completed.

5 Points: For a qualified business that is referred to the appointed FTZ International Program Manager, currently Mr. Joe Hedges, and a meeting occurs (by definition there is genuine interest from the business and FTZ program information and business information exchanged). This will be tracked and reported by the Chamber and confirmed by email from the FTZ IPM.

10 Points: An FTZ application is started with the FTZ IPM. The initial application completed and submitted to the first round of review will be confirmed by email from the FTZ IPM and tracked in our monthly reporting. This would be an additional 5 points, if 5 points was previously given for a meeting.

50 Points: When an FTZ is completed for a Milpitas business that was referred by a Chamber agent.

Category Four

10, 20, and 100* points: EB5 Visa Funding Project

Our “big ticket” item would be to have a business or project within Milpitas City limits funded via the EB5 program.

The two major reasons why is because of the large dollars that could be acquired and the amount of jobs created.

EB5 funded projects need at least \$500,000 increments and need to produce 10+ “sustainable” jobs (at least two years in duration or perpetual) per every \$500,000 increment funded through EB5.

The approximate time from start to finish is a few months to over a year. This would take the coordination of the Chamber, City and designated Regional Center who would directly facilitate the process. The two Resource Centers identified for use are the Silicon Valley Regional Center and Bay Area Regional Center.

10 Points: For a qualified business that is referred to the appointed Regional Center and a meeting occurs (by definition there is genuine interest from the business/project and EB5 program information and business information exchanged). This will be tracked and reported by the Chamber and confirmed by email from the Regional Center representative.

20 Points: An EB5 application is started with the Regional Center. The initial application completed will be confirmed by email from the Regional Center representative and tracked in our monthly reporting. This would be an additional 10 points, if 10 points was previously given for an initial meeting.

100* Points: When a business or project is completed and funded that was referred by a Chamber agent then we would track *100 points PER \$500,000 funded AND 10+ jobs created. This does create a large pooling of points for a completed funding, but considering what is acquired, it is not overcompensated. We will also ensure other minimums are in place to prevent activity drop off in any one quarter that an EB5 funding occurs.

2* Points: We will also help to address the City request to help expand the TEA designated zones within the bounds of the City of Milpitas. For each total aggregate hour of time allocated and tracked by the Chamber agent(s) we will report 2 points of activity.

Reporting of Categories and associated points:

For “Delivering the Message”, we will report the date, business name, Key Business Person, and any notes taken during the delivery of the message. These will be reported on a monthly basis to the appointed City representative.

For Completed Business Reviews, we will have them reported on a monthly basis to the appointed City representative.

IMPORTANT: To ensure the integrity of these reports there will be no duplication of reporting. No business can accrue an aggregate in excess of two points in any single quarter from “Delivering the Message” or a completed Business Review.

Example: if a KBP is contacted and there’s no interest in completing a Business Review is apparent, then one point is reported. If that business changes their mind and completes the Business Review in that same quarter, then only one additional point is awarded.

Again, we are not striving to get points, but to deliver a positive message and collect data.

For the FTZ and EB5 programs we will track and report only activity that has a confirmation from the FTZ International Program Manager or EB5 Regional Center representative respectively. These, too, will be reported monthly to the appointed City representative.

Total goal and minimum thresholds:

The Chamber seeks to deliver a total aggregate of 250 Points per quarter of productivity based on the detailed point metrics described in this Appendix to the City.

Initially, we expect that the majority of productivity will be from Delivering the Message and completed Business Reviews. Over time we expect that as FTZs and EB5s are being completed the higher point valuations will be predominant.

Again, to ensure a sufficient and ongoing level of new businesses being contacted and engaged in the Business Reviews we will commit to a minimum level of 60 points per quarter that need to be derived from the Delivering the Message and Business Review categories.

We expect that our overall performance and subsequent funding will be reviewed and approved or disapproved on a quarterly basis.

We also would like to have the City consideration that in contracts past this first year be considered to be increased if there is sufficient evidence of the Chamber’s ability to significantly exceed the quarter point thresholds.

This Appendix, its contents and metrics are open to City suggestion and change but need be fixed upon final contract agreement.

We thank you for the opportunity to better serve and strengthen our business community.

**BUSINESS RETENTION AND RECRUITMENT SERVICES AGREEMENT BETWEEN
THE MILPITAS ECONOMIC DEVELOPMENT CORPORATION AND
MILPITAS CHAMBER OF COMMERCE**

THIS AGREEMENT for business retention services is made by and between the Milpitas Economic Development Corporation ("MEDC") and the Milpitas Chamber of Commerce ("Chamber") as of October 18, 2011

AGREEMENT

Section 1. SERVICES. Subject to the terms and conditions set forth in this Agreement, Chamber shall provide to MEDC 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, 2012, the date of completion specified in Exhibit A, and Chamber 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 Chamber to complete the services required by this Agreement shall not affect the MEDC's right to terminate the Agreement, as provided for in Section 8.
- 1.2 **Standard of Performance.** Chamber shall perform all services required pursuant to this Agreement in the manner and according to the standards observed by a competent practitioner of the profession in which Chamber is engaged in the geographical area in which Chamber practices its profession. Chamber shall prepare all work products required by this Agreement in a substantial, first-class manner and shall conform to the standards of quality normally observed by a person practicing in Chamber's profession.
- 1.3 **Assignment of Personnel.** Chamber 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 MEDC, in its sole discretion, at any time during the term of this Agreement, desires the reassignment of any such persons, Chamber shall, immediately upon receiving notice from MEDC of such desire of MEDC, reassign such person or persons.
- 1.4 **Time.** Chamber 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 Chamber's obligations hereunder.

Section 2. COMPENSATION. MEDC hereby agrees to set aside a maximum possible amount of \$60,000 for all services to be performed and reimbursable costs incurred under this Agreement. Upon execution of this Agreement, MEDC shall make an initial payment of \$20,000 to the Chamber. Any

subsequent compensation, not to exceed the remaining \$40,000 in possible funding set aside for Chamber activities, shall be subject to the sole discretion and approval of the MEDC Board of Directors, which may be withheld for any reason. Any subsequent compensation, if granted by the MEDC Board of Directors, shall be disbursed on a quarterly basis in \$20,000 increments pursuant to Section 2.2 below. The Chamber shall present reports to the MEDC Board of Directors or to MEDC representatives, as directed by the MEDC, on a quarterly basis. All payments shall be contingent upon pursuant to this Agreement at the time and in the manner set forth herein. The payments specified below shall be the only payments from MEDC to Chamber for services rendered pursuant to this Agreement. Chamber shall submit all invoices to MEDC in the manner specified herein. Except as specifically authorized by MEDC, Chamber shall not bill MEDC for duplicate services performed by more than one person.

Chamber and MEDC acknowledge and agree that compensation paid by MEDC to Chamber under this Agreement is based upon Chamber's estimated costs of providing the services required hereunder, including salaries and benefits of employees and subcontractors of Chamber. Consequently, the parties further agree that compensation hereunder is intended to include the costs of contributions to any pensions and/or annuities to which Chamber and its employees, agents, and subcontractors may be eligible. MEDC therefore has no responsibility for such contributions beyond compensation required under this Agreement.

2.1 **Invoices.** Chamber shall submit invoices, on a quarterly basis during the term of this Agreement, based on the services performed 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, payments received, the total due this period, the balance available under the Agreement, and the percentage of completion, if applicable;
- At MEDC'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;
- At MEDC's option, the total number of hours of work performed under the Agreement by Chamber and each employee, agent, and subcontractor of Chamber performing services hereunder, as well as a separate notice when the total number of hours of work by Chamber and any individual employee, agent, or subcontractor of Chamber reaches or exceeds 800 hours, which shall include an estimate of the time necessary to complete the work described in Exhibit A;
- The Chamber's signature.

2.2 **Quarterly Payment.** As stated in Section 2.0, an initial \$20,000 payment will be made to the Chamber at the beginning of the contract. Thereafter, the Chamber may be eligible for quarterly payments, based on invoices received, for services satisfactorily performed in accordance with the Performance Measurements identified in Exhibit A, subject to the sole discretion of the MEDC Board of Directors.

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

In no event shall Chamber 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 Chamber identifies additional work outside the scope of services specified in Exhibit A that may be required to complete the work required under this Agreement, Chamber shall immediately notify the MEDC and shall provide a written not-to-exceed price for performing this additional work.

2.4 **Hourly Fees.** Intentionally left blank.

2.5 **Reimbursable Expenses.** Intentionally left blank.

2.6 **Payment of Taxes.** Chamber is solely responsible for the payment of employment taxes incurred under this Agreement and any other applicable federal or state taxes.

2.7 **Payment upon Termination.** In the event that the MEDC or Chamber terminates this Agreement pursuant to Section 8, the MEDC shall compensate the Chamber for all outstanding costs and reimbursable expenses incurred for work satisfactorily completed as of the date of written notice of termination. Chamber shall maintain adequate logs and timesheets in order to verify costs incurred to that date. The MEDC shall have no obligation to compensate Chamber for work not verified by logs or timesheets.

2.8 **Authorization to Perform Services.** The Chamber 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 MEDC.

Section 3. FACILITIES AND EQUIPMENT. Except as set forth herein, Chamber shall, at its sole cost and expense, provide all facilities and equipment that may be necessary to perform the services required by this Agreement.

MEDC shall furnish physical facilities such as desks, filing cabinets, and conference space, as may be reasonably necessary for Chamber's use while consulting with MEDC employees and reviewing records and the information in possession of the MEDC. The location, quantity, and time of furnishing those facilities shall be in the sole discretion of MEDC. In no event shall MEDC 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.

Section 4. INSURANCE REQUIREMENTS. Before beginning any work under this Agreement, Chamber 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 Chamber and its agents, representatives, employees, and subcontractors. Chamber shall provide proof satisfactory to MEDC of such insurance that meets the requirements of this section and under forms of insurance satisfactory in all respects to the MEDC. Chamber shall maintain the insurance policies required by this section throughout the term of this Agreement and shall produce said policies to the MEDC upon demand. The cost of such insurance shall be included in the Chamber's price. Chamber shall not allow any subcontractor to commence work on any subcontract until Chamber has obtained all insurance required herein for the subcontractor(s) and provided evidence thereof to MEDC. Verification of the required insurance shall be submitted and made part of this Agreement prior to execution.

- 4.1 **Workers' Compensation.** Chamber 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 Chamber. 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, Chamber 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 MEDC Counsel. The insurer, if insurance is provided, or the Chamber, if a program of self-insurance is provided, shall waive all rights of subrogation against the MEDC 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 MEDC.

4.2 **Commercial General and Automobile Liability Insurance.**

- 4.2.1 **General requirements.** Chamber, 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. MEDC and its officers, employees, agents, contractors, Chambers, 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 Chamber, including the insured's general supervision of Chamber; products and completed operations of Chamber; premises owned, occupied, or used by Chamber; and automobiles owned, leased, or used by the Chamber. The coverage shall contain no special limitations on the scope of protection afforded to MEDC or its officers, employees, agents, contractors, Chambers, 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 MEDC and its officers, officials, employees, contractors, Chambers, and volunteers, and that no insurance or self-insurance maintained by the MEDC shall be called upon to contribute to a loss under the coverage.
- d. Any failure of CHAMBER to comply with reporting provisions of the policy shall not affect coverage provided to MEDC 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 MEDC.

4.3 **Professional Liability Insurance.** If Chamber shall be performing licensed professional services, Chamber 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 ONE MILLION DOLLARS (\$1,000,000) 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 MEDC.
- 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 MEDC.
 - 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, Chamber must provide extended reporting coverage for a minimum of five years after completion of the Agreement or the work. The MEDC shall have the right to exercise, at the Chamber's sole cost and expense, any extended reporting provisions of the policy, if the Chamber cancels or does not renew the coverage.
 - d. A copy of the claim reporting requirements must be submitted to the MEDC 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, Chamber shall furnish MEDC 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 MEDC reserves the right to require complete, certified copies of all required insurance policies at any time.

4.4.3 **Subcontractors.** Chamber 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.** Chamber shall disclose to and obtain the approval of MEDC 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 MEDC, Chamber may increase such deductibles or self-insured retentions with respect to MEDC, its officers, employees, agents, contractors, Chambers, and volunteers. The MEDC may condition approval of an increase in deductible or self-insured retention levels with a requirement that Chamber procure a bond, guaranteeing payment of losses and related investigations, claim administration, and defense expenses that is satisfactory in all respects to the MEDC.

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, Chamber shall provide written notice to MEDC at Chamber's earliest possible opportunity and in no case later than five days after Chamber is notified of the change in coverage.

4.5 **Remedies.** In addition to any other remedies MEDC may have if Chamber fails to provide or maintain any insurance policies or policy endorsements to the extent and within the time herein required, MEDC may, at its sole option exercise any of the following remedies, which are alternatives to other remedies MEDC may have and are not the exclusive remedy for Chamber'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 Chamber to stop work under this Agreement or withhold any payment that becomes due to Chamber hereunder, or both stop work and withhold any payment, until Chamber demonstrates compliance with the requirements hereof; and/or
- Declare Chamber in material breach of the Agreement and terminate the Agreement.

4.6 **Waiver.** The Risk Manager of the MEDC 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 CHAMBER'S RESPONSIBILITIES. Chamber shall indemnify, defend with counsel reasonably acceptable to the MEDC, and hold harmless the MEDC and its officials, officers, employees, agents, contractors, Chambers, and volunteers 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 Chamber 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 Chamber 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 MEDC or its officers, employees, agents, contractors, consultants or volunteers and (2) the actions of Chamber 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 Chamber to indemnify and hold harmless includes the duty to defend as set forth in Section 2778 of the California Civil Code. Acceptance by MEDC of insurance certificates and endorsements required under this Agreement does not relieve Chamber 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, Chamber acknowledges and agrees to the provisions of this Section and that it is a material element of consideration.

In the event that Chamber or any employee, agent, or subcontractor of Chamber 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 MEDC, Chamber shall indemnify, defend, and hold harmless MEDC for the payment of any employee and/or employer contributions for PERS benefits on behalf of Chamber 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 MEDC.

Section 6. STATUS OF CHAMBER.

- 6.1 **Independent Contractor.** At all times during the term of this Agreement, Chamber shall be an independent contractor and shall not be an employee of MEDC. MEDC shall have the right to control Chamber only insofar as the results of Chamber's services rendered pursuant to this Agreement and assignment of personnel pursuant to Subparagraph 1.3. Otherwise, MEDC shall not have the right to control the means by which Chamber accomplishes services rendered pursuant to this Agreement. Notwithstanding any other MEDC, state, or federal policy, rule, regulation, law, or ordinance to the contrary, Chamber 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 MEDC, including but not limited to eligibility to enroll in the California Public Employees Retirement System (PERS) as an employee of MEDC and entitlement to any contribution to be paid by MEDC for employer contributions and/or employee contributions for PERS benefits.

- 6.2 **Consultant No Agent.** Except as MEDC may specify in writing, Chamber shall have no authority, express or implied, to act on behalf of MEDC in any capacity whatsoever as an agent. Chamber shall have no authority, express or implied, pursuant to this Agreement to bind MEDC 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.** Chamber 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, Chamber and any subcontractors shall comply with all applicable rules and regulations to which MEDC is bound by the terms of such fiscal assistance program.
- 7.4 **Licenses and Permits.** Chamber represents and warrants to MEDC that Chamber 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. Chamber represents and warrants to MEDC that Chamber 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, Chamber and any subcontractors shall obtain and maintain during the term of this Agreement valid business license from MEDC.
- 7.5 **Nondiscrimination and Equal Opportunity.** Chamber 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 Chamber under this Agreement. Chamber 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 Chamber thereby.

Chamber shall include the provisions of this Subsection in any subcontract approved by the MEDC or this Agreement.

Section 8. TERMINATION AND MODIFICATION.

- 8.1 **Termination.** MEDC may terminate this Agreement at any time and without cause upon written notification to Chamber.
- 8.2 **Extension.** MEDC 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. Chamber understands and agrees that, if MEDC grants such an extension, MEDC shall have no obligation to provide Chamber with compensation beyond the maximum amount provided for in this Agreement. Similarly, unless authorized by the MEDC, MEDC shall have no obligation to reimburse Chamber 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.** MEDC and Chamber recognize and agree that this Agreement contemplates personal performance by Chamber and is based upon a determination of Chamber's unique personal competence, experience, and specialized personal knowledge. Moreover, a substantial inducement to MEDC for entering into this Agreement was and is the professional reputation and competence of Chamber. Chamber may not assign this Agreement or any interest therein without the prior written approval of the MEDC. Chamber shall not subcontract any portion of the performance contemplated and provided for herein, other than to the subcontractors listed in the Chamber's proposal, without prior written approval of the MEDC.
- 8.5 **Survival.** All obligations arising prior to the termination of this Agreement and all provisions of this Agreement allocating liability between MEDC and Chamber shall survive the termination of this Agreement.
- 8.6 **Options upon Breach by Chamber.** If Chamber materially breaches any of the terms of this Agreement, MEDC'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 Chamber pursuant to this Agreement prior to cancellation; and
 - 8.6.3 Retention of a different Chamber at Chamber's cost to complete the work described in Exhibit A not finished by Chamber.

Section 9. KEEPING AND STATUS OF RECORDS.

- 9.1 **Records Created as Part of Chamber'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 Chamber prepares or obtains pursuant to this Agreement and that relate to the matters covered hereunder shall be the property of the MEDC. Chamber hereby agrees to deliver those documents to the MEDC at any time upon demand of the MEDC. 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 MEDC and are not necessarily suitable for any future or other use. Failure by Chamber to deliver these documents to the MEDC within the time period specified by the MEDC shall be a material breach of this Agreement. MEDC and Chamber agree that, until final approval by MEDC, all data, plans, specifications, reports and other documents are preliminary drafts not kept by the MEDC in the ordinary course of business and will not be disclosed to third parties without prior written consent of both parties.
- 9.2 **Chamber's Books and Records.** Chamber 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 MEDC 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 Chamber to this Agreement.
- 9.3 **Inspection and Audit of Records.** Any records or documents that Section 9.2 of this Agreement requires Chamber 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 MEDC. 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 MEDC or as part of any audit of the MEDC, 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.** Chamber 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 Intentionally left blank_.
- 10.8 **Solicitation.** Chamber 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 MEDC's Economic Development Manager who is authorized to act for, and on behalf of, MEDC. All correspondence shall be directed to or through the Contract Administrator or his or her designee.
- 10.10 **Notices.** Any written notice to Chamber shall be sent to:
Carol Kassab, CEO
Milpitas Chamber of Commerce
828 North Hillview Drive
Milpitas, CA 95035
- Any written notice to MEDC shall be sent to:
Diana Barnhart
Milpitas Economic Development Corporation
455 East Calaveras Boulevard
Milpitas, California 95035
- 10.11 **Professional Seal.** Where applicable in the determination of the MEDC, 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 MEDC and Chamber 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.

MEDC OF MILPITAS

MILPITAS CHAMBER OF COMMERCE

Thomas C. Williams, Chief Executive Officer

Carol Kassab, CEO

Taxpayer Identification Number

Milpitas Business License Number

APPROVED AS TO FORM:

Michael J. Ogaz, Corporate Counsel

EXHIBIT A

SCOPE OF SERVICES

DESCRIPTION OF PROGRAM/S

The Chamber will create and implement the Business Retention in Milpitas (BRIM) Program for business outreach services to business employing from 49 to 99 employees.

TASK/S

Task 1. “Deliver the Message” (1 point)

An important aspect for the City was that a message be delivered to their businesses that the City is not only concerned for their well being, but is proactively doing something about it.

“Deliver the Message” will be the 20 to 30 second conversation made from our BRIM Chamber representative to the Key Business Person (KBP): 1) Owner, 2) CFO, or 3) recognized MEDC liaison or Business Development Officer. Every KBP will be introduced to our program, that it is an effort by the Chamber and MEDC to help identify ways to strengthen their business or add actual revenue to their bottom line via a 10 to 20 minute Business Review.

This positive, promotional message for the City will be the ancillary to a completed Business Review. Similar programs in other cities show that even if the KBP is unwilling or unable to complete the Business Review with the Chamber, a positive impact is made as they will at least have the knowledge that the MEDC, on behalf of the City, is trying to engage them, to involve them in the process, and better support their ongoing success.

Task 2: Completed Business Review (2 points)

The goal of BRIM calls and face-to-face meetings is to have a Business Review completed. The MEDC will participate in the creation of the Business Review survey.

This 10 to 20 minute process will cover key topics including the following:

- a. Why did you decide on having your business in Milpitas?
- b. How was your experience in working with the City?
- c. Do you expect any growth in the immediate future that would require more employees or a larger business space?
- d. Are there any pending issues your business faces that you could use support in?
- e. Are you familiar with Foreign Trade Zones and how they can be used to lower or eliminate duties on your imported components?*
- f. If you do expect growth of more than 10 or 20 employees, would you be open to investor injection to help expedite this growth?*

*: These questions would only be asked of businesses that we had information supporting that they would most likely have a specific need/benefit.

Also, we have a set list of questions, but would welcome additional questions submitted by the MEDC and/or Economic Development Manager to improve the MEDC's acquired data via this medium.

Task 3: Foreign Trade Zones (5, 10, and 50 points)

The importance of the Foreign Trade Zone (FTZ) for local businesses is that it can help to lower or completely eliminate duties paid on imports of components that are exported back out of the US or are manufactured/assembled/manipulated into a finished product and resold.

For the City, once a business establishes an FTZ into their physical business location, it can only be used for the original, designated physical location. If the business considers a move in the future they may leave the building or the City, but they cannot take their FTZ with them. It then becomes an asset for marketing the vacant space.

The approximate time for creating a FTZ, from start to finish, is six to eight months if the business is diligent and has constant follow up. For those unsupported businesses it takes longer or is never completed.

5 Points: For a qualified business that is referred to the appointed FTZ International Program Manager, currently Mr. Joe Hedges, and a meeting occurs (by definition there is genuine interest from the business and FTZ program information and business information exchanged). This will be tracked and reported by the Chamber and confirmed by email from the FTZ IPM.

10 Points: An FTZ application is started with the FTZ IPM. The initial application completed and submitted to the first round of review will be confirmed by email from the FTZ IPM and tracked in our monthly reporting. This would be an additional 5 points, if 5 points was previously given for a meeting.

50 Points: When an FTZ is completed for a Milpitas business that was referred by a Chamber agent.

Task Four: EB5 Visa Funding Project (10, 20, and 100* points)

The Chamber's "big ticket" item would be to have a business or project within Milpitas City limits funded via the EB5 program as the program provides large investments and jobs created.

EB5 funded projects need at least \$500,000 increments and need to produce 10+ "sustainable" jobs (at least two years in duration or perpetual) per every \$500,000 increment funded through EB5.

The approximate time from start to finish is a few months to over a year. This would take the coordination of the Chamber, City and designated Regional Center who would directly facilitate the process. The two Resource Centers identified for use are the Silicon Valley Regional Center and Bay Area Regional Center.

10 Points: For a qualified business that is referred to the appointed Regional Center and a meeting occurs (by definition there is genuine interest from the business/project and EB5 program information and business information exchanged). This will be tracked and reported by the Chamber and confirmed by email from the Regional Center representative.

20 Points: An EB5 application is started with the Regional Center. The initial application completed will be confirmed by email from the Regional Center representative and tracked in our monthly reporting. This would be an additional 10 points, if 10 points was previously given for an initial meeting.

100* Points: When a business or project is completed and funded that was referred by a Chamber agent then we would track *100 points PER \$500,000 funded AND 10+ jobs created. This does create a large pooling of points for a completed funding, but considering what is acquired, it is not overcompensated. We will also ensure other minimums are in place to prevent activity drop off in any one quarter that an EB5 funding occurs.

2* Points: We will also help to address the City and MEDC request to help expand the Targeted Employment Areas (TEA) within the City limits. For each total aggregate hour of time allocated and tracked by the Chamber 2 points of activity will be reported.

Reporting Tasks and associated points:

Task 1: Delivering the Message: the Chamber will report the date, business name, Key Business Person, and any notes taken during the delivery of the message. These will be reported on a monthly basis to the appointed MEDC representative.

Task 2: For Completed Business Reviews: the Chamber will have results of the surveys reported on a monthly basis to the appointed MEDC representative. Any critical information will be reported immediately to the MEDC.

IMPORTANT: To ensure the integrity of these reports, the Chamber insures there will be no duplication of reporting. No business can accrue an aggregate in excess of two points in any single quarter from "Delivering the Message" or a completed Business Review.

Example: if a KBP is contacted and there's no interest in completing a Business Review is apparent, then one point is reported. If that business changes their mind and completes the Business Review in that same quarter, then only one additional point is awarded.

The Chamber is striving to deliver a positive message and collect data, not to collect points.

Tasks 3 & 4: For the FTZ and EB5 programs we will track and report only activity that has a confirmation from the FTZ International Program Manager or EB5 Regional Center representative respectively. These, too, will be reported monthly to the appointed MEDC representative.

Total goal and minimum thresholds:

The Chamber seeks to deliver a total aggregate of 250 Points per quarter of productivity based on the detailed point metrics described in this Exhibit.

Initially, we expect that the majority of productivity will be from Delivering the Message and completed Business Reviews. Over time we expect that as FTZs and EB5s are being completed the higher point valuations will be predominant.

Again, to ensure a sufficient and ongoing level of new businesses being contacted and engaged in the Business Reviews we will commit to a minimum level of 60 points per quarter that need to be derived from the Delivering the Message and Business Review categories.

We expect that our overall performance and subsequent funding will be reviewed and approved or disapproved on a quarterly basis.