

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	900-2921	\$30,000	900-910-4237	\$30,000

Explain the reason for the budget change:

Background:

Economic Development Corporation (EDC) Staff is in the process of evaluating the use of economic development funds and the potential for future redevelopment tax increment funds for the implementation of the City's Five Year Capital Improvement Program (CIP) and other economic development and stimulation project and programs the EDC may wish to undertake.

Professional assistance is necessary to prepare the fiscal analysis. Fraser and Associates has performed similar functions for the City as part of previous bond issues. Don Fraser, the principal of the firm, has a strong working knowledge of the City's financials and would be able to begin immediately working with staff on this project and to identify possible EDC actions to spur future economic growth.

Fiscal Impact: Funds are available in the Milpitas Economic Development Corporation for this proposed contract.

Recommendation: Authorize the President to execute a contract with Fraser & Associates for an amount not to exceed \$30,000 and approve budget appropriation from the Economic Development Corporation Fund.

Check if City Council Approval required.

Meeting Date: November 15, 2011

Requested by:	Division Head:	Date:
	Department Head:	Date:
Reviewed by:	Finance Director: <i>Don C. Karl</i>	Date: <i>11/8/11</i>
Approved by:	City Manager:	Date:
Date approved by City Council, if required:		Confirmed by:

DATE: _____

**CONSULTING SERVICES AGREEMENT BETWEEN
MILPITAS ECONOMIC DEVELOPMENT CORPORATION AND
FRASER & ASSOCIATES**

THIS AGREEMENT for consulting services is made by and between the Milpitas Economic Development Corporation ("EDC") and _____ ("Consultant") as of _____, 201_.

AGREEMENT

Section 1. SERVICES. Subject to the terms and conditions set forth in this Agreement, Consultant shall provide to EDC 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, 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 EDC'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 standards observed by a competent 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, first-class manner and shall conform to the standards of quality normally observed by a person practicing in Consultant's profession.
- 1.3 **Assignment of Personnel.** Consultant shall assign only competent personnel to perform services pursuant to this Agreement. In the event that EDC, 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 EDC of such desire of EDC, reassign such person or persons.
- 1.4 **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. EDC hereby agrees to pay Consultant a guaranteed maximum price not to exceed \$25,500.00 for all services to be performed and reimbursable costs incurred under this Agreement. EDC 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 EDC to Consultant for services rendered pursuant to this Agreement. Consultant shall submit all invoices to EDC

in the manner specified herein. Except as specifically authorized by EDC, Consultant shall not bill EDC for duplicate services performed by more than one person.

Consultant and EDC acknowledge and agree that compensation paid by EDC 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 A. 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. EDC 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;
- The Consultant's signature.

2.2 Monthly Payment. EDC shall make monthly payments, based on invoices received, for services satisfactorily performed, and for authorized reimbursable costs incurred. EDC 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 EDC to pay Consultant. In the event that an invoice is not acceptable to the EDC, said invoice shall be returned to Consultant within thirty (30) days of the EDC's receipt of the invoice with a detailed explanation of the deficiency. EDC'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. EDC shall pay for the services to be rendered by Consultant pursuant to this Agreement. EDC shall not pay any additional sum for any expense or cost whatsoever incurred by Consultant in rendering services pursuant to this Agreement. EDC 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 EDC and shall provide a written not-to-exceed price for performing this additional work.

- 2.4 **Hourly Fees.** Fees for work performed by Consultant on an hourly basis shall not exceed the amounts shown on Exhibit A.
- 2.5 **Reimbursable Expenses.** Reimbursable expenses are shown on Exhibit A, and shall not exceed six thousand dollars (\$6,000.00). Expenses not listed in Exhibit A are not chargeable to EDC. Reimbursable expenses are included in the total not-to-exceed amount of compensation provided under this Agreement.
- 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 **Payment upon Termination.** In the event that the EDC or Consultant terminates this Agreement pursuant to Section 8, the EDC 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 EDC 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 EDC.

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. EDC shall make available to Consultant only the facilities and equipment listed in this section, and only under the terms and conditions set forth herein.

EDC shall furnish physical facilities such as desks, filing cabinets, and conference space, as may be reasonably necessary for Consultant's use while consulting with EDC employees and reviewing records and the information in possession of the EDC. The location, quantity, and time of furnishing those facilities shall be in the sole discretion of EDC. In no event shall EDC 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 EDC's public right-of-way, Consultant, or Consultant's subconsultant, shall obtain an encroachment permit from the EDC.

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 EDC of such insurance that meets the requirements of this section and under forms of

insurance satisfactory in all respects to the EDC. Consultant shall maintain the insurance policies required by this section throughout the term of this Agreement and shall produce said policies to the EDC 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 EDC. 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 EDC 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 EDC 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 EDC.

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. EDC 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 EDC 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 EDC and its officers, officials, employees, contractors, consultants, and volunteers, and that no insurance or self-insurance maintained by the EDC 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 EDC 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 EDC.

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 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 EDC.
- 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 EDC.
 - 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 EDC 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 EDC 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 EDC 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 EDC 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 EDC 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 EDC, Consultant may increase such deductibles or self-insured retentions with respect to EDC, its officers, employees, agents, contractors, consultants, and volunteers. The EDC 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 EDC.

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 EDC 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 EDC may have if Consultant fails to provide or maintain any insurance policies or policy endorsements to the extent and within the time herein required, EDC may, at its sole option exercise any of the following remedies, which are alternatives to other remedies EDC 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 EDC 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 EDC, and hold harmless the EDC and its officials, officers, employees, agents, contractors, consultants, 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 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 EDC or its officers, employees, agents, contractors, consultants, or volunteers 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 of the California Civil Code. Acceptance by EDC 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 EDC, Consultant shall indemnify, defend, and hold harmless EDC 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 EDC.

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 EDC. EDC 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, EDC shall not have the right to control the means by which Consultant accomplishes services rendered pursuant to this Agreement. Notwithstanding any other EDC, 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 EDC, including but not limited to eligibility to enroll in the California Public Employees Retirement System (PERS) as an employee of EDC and entitlement to any contribution to be paid by EDC for employer contributions and/or employee contributions for PERS benefits.
- 6.2 **Consultant No Agent.** Except as EDC may specify in writing, Consultant shall have no authority, express or implied, to act on behalf of EDC in any capacity whatsoever as an agent. Consultant shall have no authority, express or implied, pursuant to this Agreement to bind EDC 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 EDC is bound by the terms of such fiscal assistance program.
- 7.4 **Licenses and Permits.** Consultant represents and warrants to EDC 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 EDC 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 EDC.
- 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 EDC or this Agreement.

Section 8. TERMINATION AND MODIFICATION.

- 8.1 **Termination.** EDC 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. EDC, however, may condition payment of such compensation upon Consultant delivering to EDC 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 EDC in connection with this Agreement.

- 8.2 Extension.** EDC 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 EDC grants such an extension, EDC shall have no obligation to provide Consultant with compensation beyond the maximum amount provided for in this Agreement. Similarly, unless authorized by the EDC, EDC 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.** EDC 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 EDC 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 EDC. 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 EDC.
- 8.5 Survival.** All obligations arising prior to the termination of this Agreement and all provisions of this Agreement allocating liability between EDC 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, EDC'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 EDC. Consultant hereby agrees to deliver those documents to the EDC at any time upon demand of the EDC. 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 EDC and are not necessarily suitable for any future or other use. Failure by Consultant to deliver these documents to the EDC within the time period specified by the EDC shall be a material breach of this Agreement. EDC and Consultant agree that, until final approval by EDC, all data, plans, specifications, reports and other documents are preliminary drafts not kept by the EDC 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 EDC 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 EDC. 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 EDC or as part of any audit of the EDC, 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 EDC 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 EDC official in the work performed pursuant to this Agreement. No officer or employee of EDC 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 EDC. If Consultant were an employee, agent, appointee, or official of the EDC 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 EDC 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 Emma Karlen, Chief Financial Officer who is authorized to act for, and on behalf of, EDC. All correspondence shall be directed to or through the Contract Administrator or her designee.
- 10.10 **Notices.** Any written notice to Consultant shall be sent to:

Any written notice to EDC shall be sent to:
Emma Karlen, Chief Financial Officer
455 East Calaveras Boulevard
Milpitas, California 95035

- 10.11 **Professional Seal.** Where applicable in the determination of the EDC, 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 EDC 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

CONSULTANT

Thomas C. Williams, EDC President

Fraser & Associates

Taxpayer Identification Number

APPROVED AS TO FORM:

Michael J. Ogaz, EDC Attorney

EXHIBIT A

Scope of Work and Compensation Schedule

FA FRASER & ASSOCIATES

Redevelopment and Financial Consulting

225 Holmfirth Court
Roseville CA 95661

Phone: (916) 791-8958
FAX: (916) 791-9234

November 7, 2011

Ms. Emma Karlen
Finance Director
Milpitas Redevelopment Agency
455 East Calaveras Blvd.
Milpitas, California 95035

Dear Ms. Karlen:

Per our recent discussions, the Milpitas Redevelopment Agency is attempting to assess its financial position and whether it can issue bonds. Fraser & Associates is prepared to assist with the analysis based on the scope of services contained in this proposal.

Scope of Work

The ability of the Agency to issue new bonds will be affected by two separate issues. One is the outcome of AB 26 and AB 27, which are currently being reviewed by the California Supreme Court. The second is the Agency's 2010 Plan Amendment, which is being challenged by Santa Clara County. The 2010 Amendment added territory and also extended certain time and financial limits. While the territory amendment will not affect our analysis, since there is currently no tax increment from the new area, the financial limits amendment will. Given this, we will prepare four separate tax increment / cash flow projections to include:

1. Both AB 26 / 27 and the 2010 Amendment are found valid;
2. Both AB 26 / 27 and the 2010 Amendment are found invalid;
3. AB 26 / 27 are found valid, but the 2010 Amendment is invalid;
4. AB 26 / 27 are found invalid, but the 2010 Amendment are found valid.

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We are suggesting a phased approach within the above parameters. Phase I would include:

1. Tax Increment Projections: Four projections showing the tax increment revenues estimated to be annually allocated to the Agency for the Project Area will be prepared. The projections will include estimates of taxable value of developments identified by the Agency as completed or under construction but not yet on the assessment rolls. The tax increment projections will show the amount of the low and moderate income housing set-aside for the Project Area. We will also include other liens on the tax increment revenue, including tax sharing payments. We will incorporate information already available on the potential impact of assessment appeals.
2. Cash Flow Analysis: Four cash flow analysis will be prepared that compares the estimated revenues of the Project Area to the estimated expenditures over the remaining term of the Project Area. Expenditures will include the ongoing operating costs for the Project Area along with the repayment of existing and new debt. The cash flow analysis will be used to determine the current financial status of the Project Area and the amount of new debt the Agency can repay from that fund.
3. Bond Capacity Analysis: Based on the four cash flow projections, the amount of new bonds and the resulting debt service will be estimated. We will work with your bond underwriter on the bonding capacity analysis.
4. Memo with findings: A memo will be provided along with the projections that show the assumptions used to project tax increment revenues and the Project Area's cash flow position. The memo will show the potential amount of new debt that can be incurred for the Project Area.

Phase I services include attendance at one meeting to review the results of our analysis.

If the Agency finds that bonds can sold, the following additional Phase II services will be provided, which will result in completion of a Fiscal Consultant Report. These services will only be provided once the validity of AB 26 / 27 have been determined and if the Agency has the capacity to issue bonds.

- 1) Review of Historical Assessed Value Revenues: Fraser & Associates will review the growth in taxable values over the past five years and disclose any major reasons for changes in values. In addition, an analysis will be prepared of the actual tax increment receipts to the initial County levy in order to determine collection trends.
- 3) Analysis of County Allocation Procedures: A review of County procedures used for the calculation of tax increment, including tax increment from the

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application of tax rates to incremental value will be prepared for current year and prior year revenues.

- 4) Assessment Appeals: An analysis of recently resolved and open appeals will be prepared. The analysis of appeals will be reflected in the tax increment projections.
- 5) Housing Market Impact Analysis: Recent volatility in the housing market has caused rating agencies to require additional information concerning housing prices and property transfers. As a result, the impact that housing price declines, if any, have had on the Project Area will be reviewed. This information provides a general indication as to how sensitive the Project Area may be to future real estate valuation declines.
- 6) Fiscal Consultants Report: A Fiscal Consultants Report (FCR) will be prepared summarizing the analysis of historical, current and projected tax increment revenues. The FCR will include our methodology in preparing the tax increment study. The FCR is typically included as an appendix to the Official Statement for the bond issue.
- 7) Official Statement Tables: Fraser & Associates will provide tables on the revenues in the Project Area for inclusion in the offering document based on the data utilized in the services described above.
- 8) Document Review: Other documents (Official Statement; Indenture of Trust; etc.) will be reviewed and commented on by Fraser & Associates.
- 9) Bond Rating Agency and Other Meetings: Fraser & Associates will represent the Agency in meetings and presentations to the bond rating agencies (Moody's and Standard and Poor's).

Services shall be compensated on the basis of a combination of fixed fees and hourly rates. Fees for Phase II services (including preparation of the Fiscal Consultant Report) will only be incurred if the Agency authorizes us to move forward with a tax allocation bond sale, although such fees are not contingent on the successful sale of bonds. Our fee proposal is shown below.

	Fixed Fee	Hourly Rate / Expense Estimate	Total
Phase I - Financial Analysis	\$9,500	\$1,000	\$10,500
Phase II - Fiscal Consultant Report /Other Bond Services	\$10,000	\$3,000	\$13,000
Expenses		\$2,000	\$2,000
Grand Total	\$19,500	\$6,000	\$25,500

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Our hourly rates are as follows:

President	\$200 per hour
Associate	140 per hour
Secretarial/Administrative	70 per hour

Fraser & Associates appreciates the opportunity to submit this proposal. Please let me know if you have any questions.

Sincerely,



Donald J. Fraser