

**BUDGET CHANGE FORM**

Type of Change	From		To	
	Account	Amount	Account	Amount
<b>Check one:</b> <input checked="" type="checkbox"/> Budget Appropriation <input type="checkbox"/> Budget Transfer	341-951-3706-15-3899 340-2931	\$41,729 41,729	341-951-3706-7-4800 340-3999	\$41,729 41,729

**Explain the reason for the budget change:**

**Background:** The Minor Storm Drain Projects 2011-12, Project No. 3706, is included in the approved Capital Improvement Program. The work involves clearing debris and sediment that restricts water flows in Wrigley-Ford Creek for the purpose of maintaining flood protection. Work also includes spot replanting of native riparian vegetation, installation of associated irrigation systems, and ongoing monitoring and reporting on the health of the plantings as required by the State as mitigation for work within the creeks. Through the City's professional consultant selection process, Schaaf & Wheeler, Consulting Civil Engineers was selected to provide the construction support and ecological monitoring services required for the project. Staff negotiated a scope and fee for these services not to exceed \$41,729, which is considered reasonable for the work.

**Fiscal Impact:** A budget appropriation in the amount of \$41,729 is required to execute this agreement, and funds are available in the Storm Drain Fund.

**Recommendations:**

Approve a budget appropriation in the amount not to exceed \$41,729 from the Storm Drain Fund into the Minor Storm Drain Projects 2011-12, Project No. 3706.

Check if City Council Approval required. Meeting Date: May 1, 2012

Requested by:	Division Head:	Date:
	Department Head:	Date:
Reviewed by:	Finance Director: <i>[Signature]</i>	Date: 4/25/12
Approved by:	City Manager:	Date:
Date approved by City Council, if required:		Confirmed by:

DRAFT

**CONSULTING SERVICES AGREEMENT BETWEEN  
THE CITY OF MILPITAS AND  
SCHAAF & WHEELER, CONSULTING CIVIL ENGINEERS**

DRAFT

THIS AGREEMENT for consulting services is made by and between the City of Milpitas referred to herein as the ("City"), and Schaaf & Wheeler, Consulting Civil Engineers ("Consultant") as of May 01, 2012.

**AGREEMENT**

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

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

- 1.5 Time.** Consultant shall devote such time to the performance of services pursuant to this Agreement as may be reasonably necessary to meet the standard of performance provided in Section 1.1 above and to complete Consultant's obligations hereunder.

**Section 2. COMPENSATION.** City hereby agrees to pay Consultant an amount not to exceed \$ 41,729.00 based on time and materials for all services to be performed and reimbursable costs incurred under this Agreement. City 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 City to Consultant for services rendered pursuant to this Agreement. Consultant shall submit all invoices to City in the manner specified herein. Except as specifically authorized by City, Consultant shall not bill City for duplicate services performed by more than one person.

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

- 2.1 Invoices.** Consultant shall submit invoices, not more often than once a month during the term of this Agreement, based on the cost for services performed and reimbursable costs incurred during the billing period. Invoices shall contain the following information:

- Serial identification of bills;
- The beginning and ending dates of the billing period;
- A Task Summary containing the original contract amount, the amount of prior billings, the total due this period, the balance available under the Agreement, and the percentage of completion, if applicable;
- At City's option, for each work item in each task, a copy of the applicable time entries or time sheets shall be submitted showing the name of the person doing the work, the hours spent by each person, a brief description of the work, and each reimbursable expense;
- The total number of hours of work performed under the Agreement by Consultant and each employee, agent, and subcontractor of Consultant performing services hereunder, as well as a separate notice when the total number of hours of work by Consultant and any individual employee, agent, or subcontractor of Consultant reaches or exceeds 800 hours,

which shall include an estimate of the time necessary to complete the work described in Exhibit A;

- The Consultant's signature.

**2.2 Monthly Payment.** City shall make monthly payments, based on invoices received, for services satisfactorily performed, and for authorized reimbursable costs incurred. City 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 City to pay Consultant. Ten (10) percent shall be retained by the City from each Agreement billing until the completion of the Agreement unless authorized differently by City. In the event that an invoice is not acceptable to the City, said invoice shall be returned to Consultant within thirty (30) days of the City's receipt of the invoice with a detailed explanation of the deficiency. City'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.** City shall pay for the services to be rendered by Consultant pursuant to this Agreement. City shall not pay any additional sum for any expense or cost whatsoever incurred by Consultant in rendering services pursuant to this Agreement. City 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 City 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 B.

**2.5 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.

**2.6 Reimbursable Expenses.** Reimbursable expenses are included in the total not-to-exceed amount of compensation provided under this Agreement.

**2.7 Payment upon Termination.** In the event that the City or Consultant terminates this Agreement pursuant to Section 8, the City 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

City 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 City.

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

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

**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 City of such insurance that meets the requirements of this section and under forms of insurance satisfactory in all respects to the City. Consultant shall maintain the insurance policies required by this section throughout the term of this Agreement and shall produce said policies to the City 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 City. 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 City 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 City 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 City.

#### **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. City (i.e., both the City of Milpitas and the Milpitas Redevelopment Agency) 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 City 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 City and its officers, officials, employees, contractors, consultants, and volunteers, and that no insurance or self-insurance maintained by the City 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 CITY 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 City.

**4.3 Professional Liability Insurance.** If Consultant shall be performing licensed professional services, Consultant shall maintain for the period covered by this Agreement professional liability insurance for licensed professionals performing work pursuant to this Agreement in an amount not less than TWO MILLION DOLLARS (\$2,000,000) 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 City.
- 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 City.
- 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 City 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 City 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 City 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 City 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 City 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 City, Consultant may increase such deductibles or self-insured retentions with respect to City, its officers,

employees, agents, contractors, consultants, and volunteers. The City 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 City.

**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 City 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 City may have if Consultant fails to provide or maintain any insurance policies or policy endorsements to the extent and within the time herein required, City may, at its sole option exercise any of the following remedies, which are alternatives to other remedies City 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 City 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 City, and hold harmless the City 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 City 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 City 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 City, Consultant shall indemnify, defend, and hold harmless City 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 City.

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

**Section 8. TERMINATION AND MODIFICATION.**

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

- 8.2 **Extension.** City 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 City grants such an extension, City shall have no obligation to provide Consultant with compensation beyond the maximum amount provided for in this Agreement. Similarly, unless authorized by the City, City 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.** City 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 City 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 City. 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 City.
- 8.5 Survival.** All obligations arising prior to the termination of this Agreement and all provisions of this Agreement allocating liability between City 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, City'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 City. Consultant hereby agrees to deliver those documents to the City at any time upon

demand of the City. 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 City and are not necessarily suitable for any future or other use. Failure by Consultant to deliver these documents to the City within the time period specified by the City shall be a material breach of this Agreement. City and Consultant agree that, until final approval by City, all data, plans, specifications, reports and other documents are preliminary drafts not kept by the City 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 City 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 City. 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 City or as part of any audit of the City, 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 City 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 City official in the work performed pursuant to this Agreement. No officer or employee of City 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 City. If Consultant were an employee, agent, appointee, or official of the City 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 City 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 City Engineer who is authorized to act for, and on behalf of, City. All correspondence shall be directed to or through the Contract Administrator or his or her designee.

**10.10 Notices.** Any written notice to Consultant shall be sent to:

Charles Anderson, Principal  
Schaaf & Wheeler  
100 North Winchester Blvd., Suite 200  
Santa Clara, CA 95050

Any written notice to City shall be sent to:  
Greg Armendariz, City Engineer  
455 East Calaveras Boulevard  
Milpitas, California 95035

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

CITY OF MILPITAS

CONSULTANT

\_\_\_\_\_  
Thomas C Williams, City Manager

ATTEST:

\_\_\_\_\_  
Mary Lavelle, City Clerk

\_\_\_\_\_  
Taxpayer Identification Number

APPROVED AS TO FORM:

\_\_\_\_\_  
Michael J. Ogaz, City Attorney

APPROVED AS TO CONTENT:

\_\_\_\_\_  
Greg Armendariz, Public Works Director/City Engineer

APPROVED:

\_\_\_\_\_  
Emma Karlen, Finance Director/Risk Manager

EXHIBIT A

SCOPE OF SERVICES FOR \_\_\_\_\_

**Schaaf & Wheeler**  
CONSULTING CIVIL ENGINEERS

Charles D. Anderson, PE  
Peder C. Jorgensen, PE  
David A. Foote, PE  
James R. Schaaf, PE  
Kirk R. Wheeler, PE  
Daniel J. Schaaf, PE

1171 Homestead Road, Ste 255  
Santa Clara, California 95050  
408-246-4848  
FAX 408-246-5624

Offices  
Santa Clara  
San Francisco  
Salinas

March 30, 2012

Ms. Julie Waldron  
City of Milpitas, Engineering Division  
455 East Calaveras Boulevard  
Milpitas, CA 95035

***Subject: Wrigley-Ford Creek Maintenance Project, Construction Phase Services***

Dear Julie:

Schaaf & Wheeler is pleased to propose the following construction phase services for the *Wrigley-Ford Creek Maintenance Project*. This effort includes the Nesting Bird Survey, Ecological Monitoring and the Habitat Mitigation Biological Record Report as required in the environmental permits. The construction phase is envisioned as ending at the completion of the mitigation planting in the spring, and not including the long-term maintenance period. Our detailed scope of work is attached.

At our request, H. T. Harvey has also included a scope and fee estimate for the Long-Term Monitoring and Reporting associated with the environmental permits. That effort begins at the completion of the mitigation planting (Spring 2012) and consists of annual site visits and evaluations for ten years. We expect that the City would prefer to contract for this service directly, and have therefore not included it in our proposal.

**Fee**

The not-to-exceed fee for the above scope of work is \$41,730. Billing will be on a time and materials basis. A fee breakdown by task is attached.

If you have any questions, please feel free to contact me or Andy Sterbenz at (831) 883-4848. We look forward to working with you on the *Wrigley-Ford Creek Maintenance Project*.

Very truly yours,  
SCHAAF & WHEELER



Charles D. Anderson, P.E.  
President

Attachments

**CITY OF MILPITAS  
WRIGLEY-FORD AND FORD CREEKS MAINTENANCE PROJECT  
CONSTRUCTION PHASE SERVICES**

**Scope of Work**

**1 Construction Phase Services**

Schaaf & Wheeler will provide support to the City Staff during the construction phase, as follows:

1.1 Attend meetings. Schaaf & Wheeler and H. T. Harvey will attend the pre-construction meeting with the Contractor. We will attend progress meetings when requested by City Staff. Eight meetings are assumed.

1.2 Review Contractor submittals and provide response to City project manager.

1.3 Respond to Contractor RFI's and provide written responses. Four RFI's are assumed.

1.4 Site Visits. Schaaf & Wheeler will visit the construction site, when requested by the City, to review the tree removal, sediment removal and channel restoration activities. Eight visits are assumed.

1.5 Prepare Record Drawings. Schaaf & Wheeler will prepare record drawings based on the information provided by the Contractor and the City Inspector. Half-size drawings will be provided for City review. Final full-size drawings will be provided on mylar and electronically (CAD, PDF plot and scanned TIFF).

1.6 Pre-Construction Nesting Bird Survey by H. T. Harvey. See attached scope.

1.7 Ecological Construction Monitoring by H. T. Harvey. See attached scope.

1.8 Habitat Mitigation Biological Record Report and Wetland Tracker Form by H. T. Harvey. See attached scope.

Items not included in the Scope:

- Full-time site inspection
- Compaction testing
- Construction staking and surveying
- Obtaining construction rights-of-entry



## MEMORANDUM

PROPOSAL #6471

**TO:** Andy Sterbenz, P.E.  
Schaaf & Wheeler

**FROM:** Max Busnardo, M.S.  
Associate Restoration Ecologist

**DATE:** 16 June 2011

**CC:** Dan Stephens, Laurel Kelly - HTH

**SUBJECT:** Wrigley-Ford Creek Maintenance Project - Ecological Construction and Long-Term Monitoring Proposal

### INTRODUCTION

Thank you for the opportunity to provide a proposal to assist Schaaf & Wheeler and the City of Milpitas (City) with ecological construction and long-term monitoring for the Wrigley-Ford Creek Maintenance Project. Our scope of work includes ecological construction monitoring work in accordance with requirements of the following Project documents:

- *Biotic Study* (H. T. Harvey & Associates 2010a)—which was incorporated into the City's Initial Study/Mitigated Negative Declaration.
- *Mitigation and Monitoring Plan* (H. T. Harvey & Associates 2010b).
- *Construction Documents—Revegetation/Irrigation Drawings and Specifications* (Schaaf & Wheeler and H. T. Harvey & Associates 2011).

### SCOPE OF WORK

#### PHASE 1: ECOLOGICAL CONSTRUCTION MONITORING

##### Task 1. Bid Support

H. T. Harvey & Associates will support the City during the bid period through attendance at one pre-bid meeting and responding to Contractor questions.

##### Products

- Attendance at up to one (1) pre-bid meeting.
- Bid addenda and clarifications, as required.



## **Task 2. Pre-construction Nesting Bird Surveys**

In compliance with the federal Migratory Bird Treaty Act and California Department of Fish and Game Code, H. T. Harvey & Associates' wildlife ecologist will conduct a pre-construction survey for nesting birds within fifteen (15) days of the start of construction, if construction is scheduled to begin during the bird-nesting season (1 January – 31 August). Our wildlife ecologist will survey the sites for signs of avian nesting or pre-nesting activity including nest starts (i.e., a new nest under construction), birds carrying materials or food, distraction displays, and other physical or behavioral evidence of nesting. We will prepare a 1- to 2-page memorandum summarizing the results of the survey. The memorandum will include a hand-marked map of any active bird nest locations detected during the survey and recommendations for nest avoidance measures.

Our scope assumes up to two (2) separate surveys and memoranda in the event that the Contractor mobilizes to up to two different portions of the site at different times.

### Assumptions

- This scope does not include removal of inactive nests or follow up survey(s) if nesting birds are detected.

### Products

- Pre-construction survey letter reports (2).

## **Task 3. Ecological Construction Monitoring**

**Habitat Impact Monitoring.** H. T. Harvey & Associates will monitor the Contractor's sediment excavation and tree removal/pruning work to help the City ensure that the extent of wetland and riparian habitat impacts is in conformance with permit applications to the U. S. Army Corps of Engineers (USACE), Regional Water Quality Control Board (RWQCB), and California Department of Fish and Game (CDFG). Our scope assumes up to four (4) site visits by H. T. Harvey & Associates to observe one or more of the following activities at each site visit:

- **Upstream Ford Creek:** inspection of the Contractor's field-staked limits of sediment excavation, tree removal/pruning, and Environmentally Sensitive Area (ESA) fencing layout prior to the commencement of work.
- **Upstream Ford Creek:** inspection of excavation and tree removal/pruning work.
- **Downstream Ford Creek:** inspection of the Contractor's field-staked limits of wetland vegetation removal within the creek prior to commencement of work.
- **Wrigley-Ford Creek:** inspection of willow pruning.

**Revegetation Installation Monitoring.** H. T. Harvey & Associates' ecologists and landscape designers will monitor construction of the riparian and wetland habitat mitigation sites. The following scope is focused on assessing the conformance of the Contractor's work with the

Landscape/Revegetation portion of the Project's Construction Documents (Sheets L-1 to L-9 and associated Specifications).

H. T. Harvey & Associates will attend the pre-construction meeting. During construction, we will assist in reviewing Contractor submittals and responding to the Contractor's requests for information (RFIs). This scope assumes review of up to eight (8) submittals (as follows) and responding to up to three (3) RFIs.

#### Submittals

- Herbicides to be used in non-native plant removal and applicator qualifications.
- Irrigation equipment to be used.
- Shop drawings for irrigation assemblies not included in Drawings.
- Operation and maintenance manuals and as-built drawings for irrigation system as installed.
- Mulch.
- Soil amendments.
- Seed lot tags.
- Straw composition.

H. T. Harvey & Associates will coordinate with the City and the Contractor to provide support during the revegetation work. Our scope assumes up to eight (8) site visits by H. T. Harvey & Associates to observe one or more of the following activities at each site visit:

#### Site Visits

- Inspection and acceptance of Contractor's field-marked delineation of non-native noxious and invasive plant removal areas.
- Review of coyote brush pruning areas and plants to be removed.
- Inspection of layout and flagging of wetland planting areas.
- Location and identification of donor plants for willow stake harvesting.
- Observation of willow stake collection and inspection of willow stake installation.
- Inspection and acceptance of riparian plant location flagging.
- Inspection and acceptance of irrigation system layout.
- Observation of irrigation system installation.
- Observation of irrigation system test and acceptance of irrigation system installation.
- Inspection during seeding, including layout of seeding areas and final acceptance of seeding.
- Inspection and acceptance of container plants at the time of delivery (assumes one delivery).
- Inspection and acceptance of container planting.
- Inspection and acceptance of fence staking prior to installation.
- Inspection and acceptance of fencing, gates, and signs.

Following the completion of construction, H. T. Harvey & Associates will prepare record drawings (in AutoCAD) based on the Contractor's as-built mark-ups of the planting and irrigation drawings. Our scope assumes one submittal of up to nine (9) sheets.

Assumptions

- Our review of submittals is intended to check for conformance with the design concept and is not intended to determine the accuracy and completeness of the submittal, which remain the sole responsibility of the Contractor.

Products

- Brief site inspection memoranda, as needed, to convey recommendations to the City.
- Memos and/or clarification drawings in response to RFIs (submitted electronically in PDF format).
- Completed submittal review forms per Project requirements.
- Record drawings (submitted electronically in PDF format).

**Task 4. Habitat Mitigation Biological Record Report and Wetland Tracker Form**

The USACE, RWQCB, and CDFG permits will require submittal of a Habitat Mitigation Biological Record (As-built) Report prepared by the monitoring biologist within two to three months of the completion of installation. H. T. Harvey & Associates will prepare a Habitat Mitigation Biological Record of Construction Report (As-built) to document the post-restoration condition of the site, in accordance with the permit conditions. The report will be prepared with plan view drawings of the riparian and wetland mitigation areas to show biologically significant deviations from the concepts outlined in the Project's *Mitigation and Monitoring Plan* (MMP) and other relevant information such as planting zones, plant palettes and quantities installed, and typical plant spacing. This report will outline observations made during construction inspections relevant to the ecological aspects of the Project, as well as establish permanent photo-documentation points for use as a baseline for the long-term monitoring of the site. The report will also include a completed Wetland Tracker Form as required by the RWQCB for documentation of the installation of wetland mitigation projects.

We will prepare a draft report for Schaaf & Wheeler's and the City's review. We will incorporate review comments, as needed, into a final submittal. We will submit the final report to the regulatory agencies on behalf of the City.

Assumption

- One round of minor revisions to the Draft Habitat Mitigation Biological Record Report based on one (1) set of consolidated comments.

Products

- Draft and Final Habitat Mitigation Biological Record Report.
- Wetland Tracker Form.
- Field location of transect and photo-documentation point locations.

## **GENERAL ASSUMPTIONS**

1. We assume that the regulatory agency permits (when issued) will be consistent with the Project's *Mitigation and Monitoring Plan* and *Construction Documents*.
2. We assume the City will be administering the day-to-day aspects of the construction and inspection work (including reviewing requests for change orders) and that a City inspector will be our primary point of contact during construction.
3. We assume that the final success criteria will be met and that the regulatory agencies will not require additional assessments or monitoring beyond that specified in the Project's MMP. The design of remedial mitigation actions is not included, should the success criteria fail to be met.

## **FEE ESTIMATE**

Our fee estimate is attached. We will invoice our work on a monthly basis, not-to-exceed the total estimated budget.

## **REFERENCES**

- H. T. Harvey & Associates. 2010a. Wrigley, Ford, and Wrigley-Ford Creeks Maintenance Project—Biotic Study. Prepared for Schaaf & Wheeler. Project Number 3159-01.
- H. T. Harvey & Associates. 2010b. Wrigley, Ford, and Wrigley-Ford Creeks Maintenance Project—Mitigation and Monitoring Plan. Prepared for Schaaf & Wheeler. Project Number 3159-01.

EXHIBIT B  
COMPENSATION SCHEDULE

Schaaf & Wheeler  
 Exhibit B (Fee Estimate)  
 City of Milpitas, Wrigley and Ford Creeks Dredging Design and Permitting

NO.	TASK ITEMS DESCRIPTION	SEN ENG \$ 175.00	ASST ENG \$ 138.00	SUBTOTAL M.H.'S	IN-HOUSE LABOR COSTS \$	MATERIALS & SERVICES COSTS \$	@ 1.05 SUBTOTAL M&S	TOTAL COSTS \$
1	Construction Phase Services							
1.1	Meetings (Pre-Construction, Progress)	8	24	32	\$4,712		\$0	\$4,712
1.2	Submittal Review	4	12	16	\$2,356		\$0	\$2,356
1.3	Respond to RFI's	8	16	24	\$3,608		\$0	\$3,608
1.4	Site Visits	8	24	32	\$4,712		\$0	\$4,712
1.5	Prepare Record Drawings	2	16	18	\$2,558	\$2,475	\$2,599	\$5,157
1.6	Pre-Construction Nesting Bird Survey (HTH)			0	\$0	\$2,598	\$2,728	\$2,728
1.7	Ecological Construction Monitoring (HTH)	2		2	\$350	\$10,548	\$11,075	\$11,425
1.8	Habitat Mitigation Biological Record Report and Wetland Tracker Form (HTH)	2		2	\$350	\$6,363	\$6,681	\$7,031
	<b>TOTAL - BASE SCOPE</b>	<b>34</b>	<b>92</b>	<b>126</b>	<b>\$18,646</b>	<b>\$21,984</b>	<b>\$23,083</b>	<b>\$41,729</b>



Project Name: Wrigley-Ford Creek Maintenance Project - Ecological Construction & Long-Term Monitoring Proposal

Proposal Number: 6147

Project Number:

Date: 16 June 2011

Task	Personnel Hours by Task										Base Project Cost	Project Cost with 3% Annual Escalation for Year 2 Onward	
	Dan Stephens Principal, Restoration Ecology	Max Busnardo Associate Restoration Ecologist	Laurel Kelly Landscape Architect	Carrie Jensen Restoration Landscape Designer	Nellie Thorngate Wildlife Ecologist	Matt Parson Restoration Biologist	Catherine Roy Plant Biologist	Graphic/GIS	Support				
<b>Phase 1: Ecological Construction Monitoring</b>													
<b>Task 1: Bid Support</b>													
• Attend Pre-Bid Meeting		1	4	2									\$ 652
Respond to Bid RFIs													\$ 705
<b>Task 2: Pre-Construction Nesting Bird Surveys</b>													
Nesting Bird Survey #1	0.5	0.5	2	2	6								1 \$ 1,299
Nesting Bird Survey #2	0.5	0.5	2	2	6								1 \$ 1,299
<b>Task 3: Ecological Construction Monitoring</b>													
Habitat Impact Monitoring	1	8	4	12									\$ 3,499
Revegetation Installation Monitoring													
• Attend Pre-Construction Meeting			4										\$ 652
• Review Submittals (8)			1	2									\$ 363
• Respond to RFIs			2	2									\$ 526
• Conduct Periodic Site Visits (8)	1	3	12	28									\$ 5,508
• Prepare & Submit Record Drawings	1	2	4	12									\$ 2,425
<b>Task 4: Habitat Mitigation Biological Record Report and Wetland Tracker Form</b>													
Prepare Biological Record Report (draft and final)	1	4	8	24									\$ 4,955
Prepare Wetland Tracker Form		1	1	6									\$ 942
<b>Total Labor Hours</b>	5	20	46	88	12	0	0	0	0	6			
<b>Total Labor Cost</b>	\$ 1,075	\$ 3,580	\$ 7,498	\$ 8,800	\$ 1,392	\$ -	\$ -	\$ -	\$ -	\$ 480	\$ 22,825	\$ 22,825	
<b>Direct Costs (mileage, printing, etc.)</b>											\$ 466	\$ 466	
<b>TOTAL BUDGET PHASE I</b>											\$ 23,291	\$ 23,291	

EXHIBIT C  
INSURANCE DOCUMENTS