

**CONSULTING SERVICES AGREEMENT BETWEEN  
THE CITY OF MILPITAS AND  
SCS ENGINEERS, INC.**

THIS AGREEMENT for consulting services is made by and between the City of Milpitas, a municipal corporation of the State of California referred to herein as the ("City"), and SCS Engineers, Inc., a California Corporation ("Consultant") as of October 7, 2014.

**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 October 31, 2017, 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 two hundred fifty thousand dollars (\$250,000.00) 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. Rates for Principals on the firm may be negotiated on a project-specific basis. Scheduled labor rates include overhead, administration, and profit.

**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. Job related reimbursable including reproduction, telephone, equipment, and supplies will be billed at an actual cost plus a fifteen percent (15%) administration fee. Additional fees for travel time, mileage, and meals will not be included. Charges for field equipment and instruments will be in accordance with SCS' Field Equipment

Rental Rates Schedule in effect at the time the work is performed. Vehicle charges for long-term and/or high mileage projects may be negotiated on a case-by-case basis.

**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 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 Michael Boitnott 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:

SCS Engineers  
James Richie, Project Director  
6601 Knoll Center Parkway, Suite 140  
Pleasanton, CA 94566

Any written notice to City shall be sent to:  
Jeff Moneda, Public Works Director/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 and attachments to exhibits referenced in this Agreement are incorporated by reference herein.

CITY OF MILPITAS

CONSULTANT  
SCS Engineers

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Thomas C Williams, City Manager

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Name & Title

Taxpayer Identification Number

54-0913440

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APPROVED AS TO FORM:

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Michael J. Ogaz, City Attorney

Corporate Entity Number

200708710188

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APPROVED AS TO CONTENT:

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Jeff Moneda, Public Works Director/City Engineer

## **EXHIBIT A**

### **SCOPE OF SERVICES FOR ON-CALL ENVIRONMENTAL ENGINEERING & TESTING SERVICES FOR VARIOUS CAPITAL IMPROVEMENT PROJECTS**

CONSULTANT shall provide to the CITY's Department of Public Works on-call environmental engineering and testing consulting services for various CITY capital improvement projects, on an as needed basis. CONSULTANT'S services shall be provided as requested by the CITY's Director on an as needed basis, as set forth in a specific project Service Order in the form attached as **Exhibit D** to this Agreement.

#### **SECTION 1. GENERAL PROVISIONS**

- A. CONSULTANT shall perform all services to the satisfaction of the CITY'S Director.
- B. All of the services furnished by the CONSULTANT under this AGREEMENT shall be of the currently prevailing professional standards and quality which prevail among environmental CONSULTANT professionals of similar knowledge and skill engaged in related work throughout California under the same or similar circumstances. All documentation prepared by CONSULTANT shall provide for a completed project that conforms to all applicable codes, rules, regulations and guidelines which are in effect at the time such documentation is prepared.
- C. All work performed under this AGREEMENT shall be authorized by a specific Service Order. Each Service Order given by CITY shall detail the nature of the specific services to be performed by the CONSULTANT, the time limit within which such services must be completed and the compensation for such services. Such details shall include a description of the project for which CONSULTANT shall perform the services, the geographic limits of the project, the type and scope of services to be performed, the format and schedule for deliverables, the schedule of performance, and the schedule of compensation. CONSULTANT shall not perform any services unless authorized by a fully executed Service Order. Any unauthorized services performed by CONSULTANT shall be at no cost to the CITY.
- D. CONSULTANT shall begin work under the service order only after receipt of the service order bearing the approval signature of the Director and the signature of the CITY Attorney approving the service order as to form. Each authorized Service Order issued under this AGREEMENT by CITY shall be incorporated into the terms and conditions of this AGREEMENT.

- E. CITY will assign a Project Manager to facilitate each Service Order authorized under this AGREEMENT. CONSULTANT shall coordinate with the designated Project Manager on the performance of each Service Order.
- F. CONSULTANT shall be responsible for the coordination with CITY and federal, state and local agencies that are necessary for all services authorized under this AGREEMENT.
- G. **Assignment of Personnel.** CONSULTANT shall assign only competent personnel to perform services pursuant to this Agreement. The Service Order may 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.

## **SECTION 2. BASIC SERVICES.**

- A. CONSULTANT shall provide environmental engineering and testing consulting services for various CITY capitol improvement projects, as more particularly described in the authorized Service Order. The authorized Service Order may include any of the specific environmental engineering and testing tasks set forth below in Section 3. The authorized Service Order may also include any other environmental engineering and testing services described and agreed to be performed by the CONSULTANT.

- B. **Service Initiation**

**Prepare Service Order** - Upon request of CITY's Project Manager, CONSULTANT shall meet with the Project Manager to discuss the Project. CONSULTANT shall become familiar with the Project description, scope and goals and develop proposed scope of services.

CONSULTANT shall prepare a proposed scope of work for Project services consistent with CITY'S standard form of Service Order (attached hereto as **Exhibit D**). The proposed scope of services shall, at a minimum, include the following: Project Description, Scope of Services including deliverables, and Schedule of Performance and Schedule of Compensation. CONSULTANT shall submit the proposed scope of services to the Project Manager in both paper and electronic format.

The Project Manager will review and comment on proposed scope of work, and the parties shall agree on the terms of the final Service Order. CONSULTANT shall not be compensated for work performed in preparing a draft scope of services for a Service Order.

### C. Service Implementation

Upon receipt of an authorized Service Order, CONSULTANT shall begin Project services described in the Service Order in accordance with the Schedule of Performance in the Service Order. For each Project, in addition to the specified services, products and deliverables detailed in the Service Order, CONSULTANT shall perform the following tasks:

**Initial Meeting** - Prior to beginning substantive work on a project, CONSULTANT shall meet with CITY to establish procedures and notifications for any necessary meetings and communications with CITY staff; collect available data from the CITY and establish additional data needs and availability; confirm the format for all project products and deliverables; and address any preliminary project concerns. The meeting will be the primary opportunity to discuss the CITY'S intent, schedule and budget for the project.

The CONSULTANT shall prepare minutes of the meeting and distribute minutes to meeting participants.

**Project Coordination Meetings** - CONSULTANT shall attend and/or conduct project coordination meetings as required to perform authorized services and as required by Project Manager. CONSULTANT shall prepare minutes of each meeting and distribute minutes to participants.

**Project Schedule** - CONSULTANT shall prepare and submit a detailed schedule of performance consistent with the schedule contained in the Service Order to the Project manager for review and approval. CONSULTANT shall confirm or update the schedule monthly at a minimum. Any changes to the schedule shall only be permitted with the written approval of CITY's Project Manager.

**Project Progress Report** - CONSULTANT shall submit a monthly report to the Project Manager detailing progress on the Project services.

**Request for Payment / Invoice** - CONSULTANT shall submit progress payment invoices to the Project Manager monthly, as specified in **Exhibit C**. The updated Project schedule and progress report may be submitted as attachments to the invoice.

**Project Record** - CONSULTANT shall develop and maintain a detailed record of the chronology of the project tasks and milestones completed that are decisive, conclusive or relevant to the outcome of the Project. CONSULTANT shall submit a copy of the Project Record to the Project Manager prior to final payment for services performed on the Project. The Record shall be submitted in both paper and electronic format.

**Project Documents** - Aside from deliverables specified in the Service Order, and before the conclusion of the Project and final payment for services performed on the Project, CONSULTANT shall submit to the Project Manager a copy of all project documents that

are decisive, conclusive or relevant to the outcome of the Project. Such documents may include, without limitation, topographical surveys and mapping, utility mapping, site inventories, base plans, reports and studies, permit applications and permits, environmental documentation, records of meetings, and communication documents. Documents shall be submitted in both paper and electronic format, as available.

### **SECTION 3. SPECIFIC ENVIRONMENTAL ENGINEERING SERVICES.**

A. In addition to any other environmental engineering and testing services contained in the authorized Service Order, the Service Order may incorporate any of the services set forth below in this Section 3 by simply identifying the particular Task, in which case the Task is considered to have been incorporated into the authorized Service Order and CONSULTANT shall perform the Task as set forth herein.

B. Tasks: Listed below are the Tasks which may be included in the Service Order depending on the scope of the project.

**Task 1:** Review the project scope.

**Task 2:** Visit the project site, as necessary.

**Task 3:** Determine the type of testing/evaluation needed, as discussed with City staff. Prepare a work plan.

**Task 4:** Obtain necessary permits and approval from applicable agencies with jurisdiction over the project.

**Task 5:** Perform sampling and testing. Testing shall be performed within 24 hours notice by the City if required.

**Task 6:** Prepare a report of the testing results and conclusions/recommendations. Upon receipt of the analytical results, Consultant shall prepare a summary letter comparing the analytical data to the governing allowable limits. The Summary Report will include copies of the laboratory reports and a sample location map. The Summary Report will provide conclusions and recommendations for reuse or disposal of contaminated soil and or groundwater, remediation of hazardous materials found in excess of acceptable levels. Summary report shall be provided to City staff within in one week of receipt of the analytical results.

**Task 7:** Review and make recommendations on hazardous material removal plans prepared by third parties.

**Task 8:** Develop specifications and work plan for removal of hazardous material by third parties.

**Task 8 Deliverable:**

- Specifications for removal of Hazardous Materials

**Task 9:** On site observation of hazardous material remediation and/or removal by third parties.

**Task 10:** Assist City in obtaining approvals and/o permits from County, State, and Federal agencies for remediation and disposal of hazardous materials.

**Task 11:** Prepare Phase I and Phase II Environmental Assessments as required for projects.

**Task 11 Deliverables:**

- Phase I and Phase II Environmental Assessments.

**Task 12:** Prepare closeout documentation as required by the City and other agencies.

**Task 12 Deliverables:**

- Closeout documentation.

**EXHIBIT B**  
**COMPENSATION SCHEDULE**

**Section 1. Maximum Compensation for Master Agreement.**

**1.1 Maximum Amount:** The maximum amount of compensation the CITY will pay to the CONSULTANT under this Master Agreement, including both payment for professional services and reimbursable expenses, shall not exceed Two Hundred and Fifty Thousand Dollars (\$250,000). Any hours worked for which payment would result in a total exceeding this maximum amount shall be at no cost to the CITY.

**1.2 Manner of Payment:** Each Service Order will set forth whether the CITY will pay the CONSULTANT for work performed under such Service Order on a lump sum basis or on a time and material basis. Section 2 of this Exhibit applies to each Service Order where the CITY will pay the CONSULTANT a lump sum for the work performed. Section 3 of this Exhibit applies to all Service Orders where the CITY will pay the CONSULTANT on a time and material basis for the work performed.

**1.3 Schedule of Charges:** Exhibit B-1 of this AGREEMENT, entitled "Schedule of Charges," set forth the CONSULTANT'S charge rates for various personnel as well as the amounts it charges for various special inspections and material tests. Regardless of whether the manner of payment contained in a Service Order is on a lump sum basis or on a time and material basis, compensation shall be determined and based upon the charge rates and charge amounts set forth in the Schedule of Charges.

**Section 2. Lump Sum Payment.**

**2.1 Lump Sum Amount:** The Service Order shall specify the lump sum amount the CITY will pay the CONSULTANT for performing the required work. The lump sum amount compensates the CONSULTANT for all its costs necessary to complete the work, including professional services and reimbursable expenses. CONSULTANT shall complete all work set forth in the Service Order for the lump sum amount.

**2.2 Progress Payments:** The Service Order may provide for the CITY to pay the lump sum amount by making progress payments. Under such circumstances, the Service Order shall specify appropriate milestones and the amount payable upon successful completion of each milestone. Upon completion of a milestone to the Director's satisfaction, the CONSULTANT shall invoice the CITY for the appropriate progress payment. The CITY will make the appropriate progress payment to the CONSULTANT within thirty (30) days of the Director's approval of the CONSULTANT's invoice.

**2.3 Lump-Sum Payment:** If the Service Order does not provide for the CITY to make progress payments, then the CITY shall make a single, lump-sum payment to the CONSULTANT upon completion of all the work to the Director's satisfaction. Upon

completion of the work to the Director's satisfaction, the CONSULTANT shall invoice the CITY for the lump-sum amount. The CITY shall pay the lump-sum amount within thirty (30) days of the Director's approval of the CONSULTANT'S invoice.

### **Section 3. Payment on a Time and Materials Basis.**

**3.1 Maximum Compensation:** The Service Order shall specify the maximum amount of compensation for the work, including both payment for professional and special inspection services, material tests and reimbursable expenses. The CONSULTANT shall complete all work it is required to perform under the Service Order for no more than the specified maximum amount. Any hours worked for which payment would result in a total exceeding this maximum amount shall be at no cost to the CITY.

**3.2 Budget:** If the Service Order itemizes budget amounts for any phase or category of work, then CONSULTANT shall not exceed such itemized amount without the Director's prior written authorization. The Director may approve, in writing, transfers of budget amounts between any of the phases or categories of work listed in the Service Order, provided the aggregate total compensation does not exceed the maximum compensation.

**3.3 Rates:** CITY will compensate CONSULTANT at the rates set forth in **Exhibit B-1** of this Master Agreement, entitled "Schedule of Charges." Wage rates subject to Prevailing Wage Requirements are subject to revision at the time of issuance of a new Determination and subsequent Determinations for the duration of the AGREEMENT consistent with the provisions of Exhibit "B-1." Rates not subject to Prevailing Wage Requirements are subject to review annually upon request of the CONSULTANT in accordance with the provisions of Exhibit "B-1." The parties must enter into a written amendment to this AGREEMENT to reflect any new rates before such rates become effective.

**3.4 Reimbursable Expenses:** The CITY will reimburse for expenses subject to the following:

Each Service Order will specify the maximum amount of expenses for which the CITY will reimburse the CONSULTANT. The CITY will reimburse expenses and the costs of subCONSULTANTS, at actual cost plus an eight percent (8%) markup, unless a lower markup is provided for in the Exhibit B-1 of this Master Agreement. Any expense the CONSULTANT incurs beyond the specified amount is at no cost to the CITY.

The following expenses are reimbursable to the extent the CONSULTANT documents to the Director's satisfaction that they were incurred in performing the work required by the Service Order: (a) the cost of mailing, shipping and/or delivery of documents or products to the CITY, (b) the cost of photographing, reproducing and/or copying, (c) the cost of the subCONSULTANT, provided the Director has preapproved, in writing, the use and cost of the subCONSULTANT, (d) telephone and fax charges, (e) the rental of any specialized equipment to the extent the Director has preapproved, in writing, the cost of such rental, and (f) any other expenses expressly identified in the service order as

reimbursable. No other expenses are reimbursable unless the Director has preapproved, in writing, such expense.

**3.5 Travel Time:** For Service Orders on a time and materials basis, CITY will not pay time for travel to and from the site. CONSULTANT shall commence billing at its hourly rates only upon CONSULTANT's arrival at the CONSULTANT's work site and CONSULTANT will stop billing at its hourly rates upon CONSULTANT's departure of the CONSULTANT from the CONSULTANT's work site. CITY will provide the CONSULTANT a place to store CONSULTANT's equipment at the project site.

**3.6 Invoice:** Every month the CONSULTANT shall invoice the CITY for work performed during the immediately previous month. The monthly invoice shall set forth for the relevant invoice period, a detailed description of the work completed, the number of hours worked and the applicable hourly rates, a detailed description of the reimbursable expenses incurred and the amount of such expenses, and documents supporting the reimbursable expenses. The invoice shall also show the total to be paid for the invoice period, the aggregate amounts of payments received to date under the Service Order and the balance of maximum compensation for remaining work on the Service Order.

#### **Section 4. Others.**

**4.1 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.

# SCS ENGINEERS

## Exhibit B-1 Schedule of Charges

### City of Milpitas On-Call Environmental Engineering & Testing Services (Effective September 1, 2014 through September 30, 2017)

	<u>Rate/\$Hour</u>
Project Director (Joe Miller, Gary Pons, James Ritchie, Bob Pilzer) .....	215
Senior Project/Technical Manager (James Ritchie – Field Assignment) .....	180
Project Manager (Ted Sison) .....	150
Certified Industrial Hygienist/Lead Inspector (Gary Pons, Bob Pilzer) .....	195
Senior Project Professional (Ted Sison, Alex Tuveson – Field Assignments) .....	130
Project Professional (Jonathan Meronek, Michael Sperber).....	110
Construction Superintendent .....	105
Staff Professional.....	100
Equipment Operator.....	80
Project Administrator (Melissa Grisham) .....	80
Senior Engineering Technician .....	80
Designer/Drafter.....	75
Laborer.....	60
Administrative/Secretarial .....	65
Technician.....	65



**EXHIBIT C**  
**INSURANCE DOCUMENTS**

**EXHIBIT D: SERVICE ORDER**

**1 CONSULTANT MASTER AGREEMENT**

This Service Order is made and entered into by and between the CITY OF MILPITAS, a municipal corporation of the State of California and SCS Engineers, a California corporation. CITY and CONSULTANT have entered into a Master Service Agreement dated October 7, 2014 which authorizes the proposed services and compensation as outlined below.

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**2 SERVICE ORDER**

Service Order No: \_\_\_\_\_ Date: \_\_\_\_\_

Service Order Compensation Amount: \$\_\_\_\_\_

CONSULTANT Firm Name: \_\_\_\_\_

Address: \_\_\_\_\_

Contact: \_\_\_\_\_

Phone/Email: \_\_\_\_\_

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**3 PROJECT DESCRIPTION**

Project Name: \_\_\_\_\_

Brief Description of Services: \_\_\_\_\_

Exhibit A: *Include Full Scope of Services, Schedule of Performance and Compensation*

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**4 APPROVALS**

CONSULTANT: \_\_\_\_\_ Date: \_\_\_\_\_

Assistant CITY Attorney: \_\_\_\_\_ Date: \_\_\_\_\_

Director of Public Works: \_\_\_\_\_ Date: \_\_\_\_\_

Appropriation Certification: I hereby certify that an unexpended appropriation is available in the above fund for the above contract as estimated, and that funds are available as of this date of signature.

Authorized Signature: \_\_\_\_\_ Date: \_\_\_\_\_

**EXHIBIT E**  
**SPECIAL PROVISIONS**

**In the performance of this AGREEMENT:**

**1. Prohibition on Discrimination and Preferential Treatment**

CONSULTANT shall not discriminate against or grant preferential treatment to any person on the basis of race, sex, color, age, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity or national origin.

This provision is applicable to recruiting, hiring, demotion, layoff, termination, compensation, fringe benefits, advancement, training, apprenticeship and other terms, conditions, or privileges of employment, subcontracting and purchasing.

Nothing herein shall be interpreted as precluding any reasonable accommodation provided to any person with a disability.

**2. Compliance Reports.**

If directed by CITY, CONSULTANT shall file, and cause any subcontractor to file, compliance reports with the CITY. Compliance reports shall be in the form and filed at such times as may be designated by the CITY. Compliance reports shall contain such information and be supported by such data or records as may be requested by the CITY to determine whether CONSULTANT or its subcontractor is complying with the nondiscrimination and non-preference provisions of this Agreement.

**3. Failure to Comply With Nondiscrimination Provisions.**

If the CITY determines that the CONSULTANT has not complied with the nondiscrimination or non-preference provisions of this AGREEMENT, the CITY may terminate or suspend this AGREEMENT, in whole or in part.

**4. Subcontracts.**

CONSULTANT shall include provisions of this Agreement in each subcontract entered into in furtherance of this Agreement so that such provisions are binding upon each of its subcontractors.

**5. Prevailing Wage.** CONSULTANT acknowledges that portions of this contract are a Public Work, subject to the provisions of Section 1771 of the California Labor Code. CONSULTANT shall pay, or cause to be paid, prevailing wages, as set forth in the California Labor Code Section 1770 *et. seq.*, for all labor performed on the Project sites to facilitate the professional services provided

under this AGREEMENT, including, but not limited to inspection, surveying, drilling, trenching, and excavation. CONSULTANT shall include in all agreements for such labor, a requirement that the employer provide all workers with written notice that prevailing wages apply.

CONSULTANT shall maintain, or cause to be maintained, all records documenting the payment of prevailing wages as required by the State prevailing wage law. CONSULTANT shall provide to the CITY, at no cost to the CITY, a copy of all such records within ten (10) working days of a request for such records by CITY.

CONSULTANT expressly agrees that the compensation agreed to between the parties includes all payment necessary to meet State prevailing wage law requirements. CONSULTANT shall indemnify the CITY for any claims, costs or expenses which the CITY incurs as a result of CONSULTANT'S failure to pay, or cause to be paid, prevailing wages.

6. **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. **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.