

**CONSULTING SERVICES AGREEMENT BETWEEN
THE CITY OF MILPITAS AND
HMH INCORPORATED**

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 HMH Incorporated, a California Corporation ("Consultant") as of August 16, 2016.

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 August 17, 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 Three Hundred Twenty Five Thousand One Hundred Dollars and no cents (\$325,100.00) 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 shown on Exhibit B, and shall not exceed Fifteen Thousand Three Hundred and Seventy-eight dollars (\$15,378.00). Expenses not listed in Exhibit B are not chargeable to City. 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 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 Steve Erickson, CIP Manager 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:
- Bill Wagner, PE, Principal In Charge
HMH Incorporated
1570 Oakland Road
San Jose, CA 95131
- Steve Machida, Director of Engineering
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
HMH Incorporated

Thomas C Williams, City Manager

Name & Title

Taxpayer Identification Number

942320927

APPROVED AS TO FORM:

Christopher, J Diaz, City Attorney

Corporate Entity Number

APPROVED AS TO CONTENT:

Steven Machida, Director of Engineering

Exhibit A

Scope of Services for South Main Street Decorative Street Lighting

General:

CONSULTANT shall provide conceptual design, final design services and construction support services for decorative street lighting and utility undergrounding on a portion of South Main Street. The project will provide for the replacement of the existing lighting on South Main Street from Carlo Street to Great Mall Parkway with decorative lighting. The work includes the installation of decorative streets lights with LED fixtures to match existing decorative street lights, new conduit within the sidewalk area, the removal and replacement of sidewalk and driveways required for installation of the new street lights, and the replacement of the traffic signal poles with at the intersection of Serra Avenue and South Main Street with decorative type poles. The project also includes undergrounding of existing overhead power and communication lines and removal of poles through a Rule 20a District generally from Corning Ave to Curtis Avenue. The services vary for three segments: Segment 1 from Carlo Street to Corning Avenue, Segment 2 from Corning Avenue to Curtis Avenue (including utility undergrounding) and Segment 3 from Curtis Avenue to Great America Parkway.

Consultant will engage a traffic engineering subconsultant, Fehr and Peers, to design the street lighting from Carlo Street to Great Mall Parkway and the traffic signal modifications at Serra Avenue and South Main Street and a utility undergrounding subconsultant, Giacalone Design, to assist with the Rule 20a District. Design shall conform to City standard and requirements.

Project Management

CONSULTANT will be responsible for project organization and monitoring. This involves planning the work program, organizing the team personnel to implement the program, monitoring the team progress, and controlling the quality of the work products to complete the project on time and within budget.

Topographic Field Survey and Utility Mapping

Perform field topographic surveys to update selected locations of the as-built condition of the recently completed Main Street Pavement Reconstruction within the limits of this project.

Conceptual Design

Develop a Conceptual Design to establish fundamental elements of the design as a single package for all three segments. The Conceptual Design is intended to allow the City and other involved agencies to review and comment on the street lighting design and other improvement concepts early in the process. Street improvements will include replacement of sidewalk or driveways, where needed to facilitate street lighting and utility construction on South Main Street.

A field review, which includes City staff, will be conducted during this task to identify areas of sidewalk or driveways that are damaged or deteriorated and to identify other minor items to be included in the project scope.

Review the existing utility record drawings and delineate and update the utility information in the areas of the existing sidewalk. Submit the plans to and begin coordination with the utility companies.

Fehr & Peers will prepare a lighting photometric exhibit using AG132, and street light spacing will be designed to achieve standard illumination levels per IESNA RP-8-00 Recommended Practice for Roadway Lighting.

The proposed plans for the Conceptual Design submittal are as follows:

- Preliminary Street Improvement Plans (showing street light locations and sidewalk repairs)

- Photometric Exhibit

Prepare a Preliminary Estimate of Probable Construction Cost for the items and quantities of work shown on the Conceptual Design.

50% PS+E Submittal (Segment 1)

The proposed plans for a separate 50% PS+E Submittal are as follows:

- Title/Index Sheet
- Street Improvement Plans (20 scale)
- Construction Details
- Street Lighting Plans (20 scale)
- Traffic Signal Modification Plan (showing pole/head locations and phasing)

Street Improvement Plans will show sidewalk and driveway repair or replacement, signing modifications caused by street light modification, but no striping, drainage, sewer or water improvements.

Coordinate with PG&E to determine existing service point(s) and loads and determine if new service points are needed. Fehr & Peers will complete electrical load calculations, coordinate with PG&E to confirm the points of connection, prepare and submit service point application if needed. The signal at Serra Avenue and South Main Street will maintain the existing PG&E service connection.

A draft of the technical specifications sections will be included with the submittal. The technical specifications will reference City and/or Caltrans standard specifications sections for the various items of work, with specific consideration of measurement and payment provisions.

Prepare a Preliminary Estimate of Probable Construction Cost based on items and quantities of work shown on the 50% Plans. Prices will be based on the magnitude of the quantities, our experience with similar local projects and engineer's judgment.

Prepare a Baseline Construction Schedule that includes all design tasks and coordination efforts as well as the number of working days to construct the project.

DELIVERABLES:

- Attend meetings to present 50%, Plans, Specifications and estimates, and discuss City design comments. Prepare meeting agendas and summary memoranda (.pdf format via email).
- 50% Construction Plans (two full size copies on bond paper, and one .pdf format via email), Specifications, and Estimates for City review and comment.
- Baseline Construction Schedule

95% PS&E Submittal (Segment 1)

Based on comments received from the 50% Submittal, advance the design to substantial completion and a 95% PS&E Submittal for comprehensive review.

Coordinate with the City and potential suppliers to pre-purchase the street lights in advance of the construction bids, such that the City can provide them to the Contractor as "City-Furnished Materials".

Foundations for decorative poles will be based on Caltrans or City of Milpitas standard details where possible. If special foundations are required, see "Allowance for Structural Engineering" below.

The following plan types will be prepared based on a format similar to the Main Street Pavement Reconstruction project:

- Title Sheet, Legend and Notes
- Street Improvement Plans (20 scale)
- Construction Details
- Erosion Control Plans (20 scale)
- Construction Area Sign Plan
- Street Lighting Plans (20 scale)
- Traffic Signal Modification Plans (20 scale)

The technical specifications sections will be updated to reflect the refinements from the 50% PS&E Submittal to the 95% PS&E Submittal.

The Preliminary Estimate of Probable Construction Cost will be updated to reflect the refinements from the 50% PS&E Submittal to the 95% PS&E Submittal.

The Baseline Construction Schedule will be updated to reflect the refinements from the 50% PS&E Submittal to the 95% PS&E Submittal.

Prepare and submit PS&E to the City, utility companies and other agencies for review and comments. Respond to comments; work with the City and other agencies to resolve any conflicts between the comments of different reviewers.

Conduct an internal quality assurance review of the plans and specifications, concurrent with review of the 95% Submittal by the CITY and other agencies. CONSULTANT quality assurance program provides for the independent checking of individuals tasks as well as an independent review by experienced senior staff. The purpose of this review is to provide oversight to specific project details by professional who are not closely involved in the design, and to review the constructability, cost-effectiveness and completeness of design features relative to the normal standard of professional care.

DELIVERABLES:

- Attend meetings to present 95%, Plans, Specifications and estimates, and discuss City design comments. Prepare meeting agendas and summary memoranda (.pdf format via email).
- Ninety-Five percent (95%) Construction Plans (two full size copies on bond paper, and one .pdf format via email), Specifications, and Estimates for City review and comment.
- Baseline Project Schedule

Allowance for Structural Engineering (Segment 1)

Engage a structural engineer to assist in the review and design of foundation details, where standard details cannot be used, to avoid utility conflicts or where custom plate and connection details are needed to use existing foundations.

100%/Final PS&E Submittal (Segment 1)

After agency review of the 95% PS&E, prepare separate final Bid Documents (100% PS&E) in accordance with the CITY's instructions.

The 95% Estimate of Probable Construction Cost will be updated to reflect the refinements from the 95% PS&E Submittal to the 100%/Final PS&E Submittal.

Provide the City the opportunity to review the completed Bid Documents and direct minor revisions. Submit final documents for signature.

DELIVERABLES:

- Attend meetings in person to present 100%, Plans, Specifications and estimates, and discuss City design comments. Prepare meeting agendas and summary memoranda (.pdf format via email).
- The 100% submittal shall include two (2) hard copy sets of plans, specifications, and calculations stamped by a California licensed professional engineer. Submittals shall also be submitted on CD or DVD in AutoCAD 2013 or later version and PDF formats. Specifications shall be in MS Word 2007 format, and cost estimate shall be in MS Excel 2007.

Post Design Services (Segment 1)

CITY will be responsible for advertisement for bid of the project. CONSULTANT will assist CITY during the bidding process. CONSULTANT will provide bid phase services, as requested by the CITY through award of the construction contract including the following; response to bidders' inquiries, preparation of addenda, attend and assist at one (1) pre-bid meeting, review and evaluation of bids.

DELIVERABLES:

- Answer bidder questions as requested by the CITY during the bid process.
- Attend one (1) Pre-bid meeting in person.
- Assist and draft addenda/response to bidder inquiries, if needed.
- Assist in bid evaluation as requested by CITY

Conformed Drawings and Specifications (Segment 1)

After bid-opening, prepare Conformed Drawings and Specifications that incorporate all changes to the Bid package made by addenda during the bid process.

DELIVERABLES:

- Conformed Drawings and Specifications (two full size copies on bond paper and one .pdf format set via e-mail)

Services During Construction (Segment 1)

Provide services during construction, including attending the pre-construction conference with the City and Contractor, reviewing and responding to shop drawings, Requests for Information (RFI's) and submittals, preparing Contract Change Orders, making occasional field reviews.

DELIVERABLES:

- Attend pre-construction meeting in person (one meeting).
- Attend other meetings as specified in the project specifications in person.
- Submit reports of observations (.pdf format via email).
- Review submittal/shop drawings and provide comments.
- Review and response to RFI's.

Record Drawings (Segment 1)

Prior to acceptance of the Project by the City, CONSULTANT will review for accuracy and completeness the Contractor's as-built drawings and specifications, and will return them for Contractor revision if they are not accurate and complete. CONSULTANT will incorporate all changes shown on the Contractor's As-Built Drawings, executed RFI's, submittals, and Contract Change Orders from the Conformed set into a final Record Drawing set. CONSULTANT will also draft and initial the office Record Drawings and submit both a hard copy on Mylar and an electronic copy in AutoCAD 2013 and GIS shape file format, PDF and TIF on digital video disc (DVD) to the CITY within 25 days of receipt of completed Contractor red line drawings. CONSULTANT to provide the CITY a hardcopy check set of the As-built Drawings for review prior to printing the Mylar set.

DELIVERABLES:

- Hard copy check set of the record drawings for review by the CITY.
- Record drawings (1 full size hard copy on bond paper, and 1 electronic copy on DVD in AutoCAD 2013 or later version, PDF and TIF formats).

Street Light Design and Electrical Engineering (Segment 2 only)

Advance Conceptual Design for Segment 2 to include design of conduit and conductor sizing for use by PG&E. Provide street light design including conduit and conductor sizing, electrolier specification and foundation details used in Segment 1 to PG&E to incorporate in their joint trench planning and design. Coordinate with PG&E regarding street light design.

Utility Undergrounding (Rule 20a) Coordination Services (Segment 2 only)

Provide services to assist the City in implementing undergrounding of existing overhead power and communication facilities between north of Corning Avenue and Curtis Avenue (Segment 2 Limits):

- Consult and coordinate with PG&E to confirm the requirements and location of the project.
- Prepare a resolution and boundary map as required in Electric Rule 20.
- Prepare a list of all recorded property owners for up to 30 parcels, with APN#, phone number and address, and most recent tenant if available (for rental properties).
- Prepare Base Map (in AutoCAD) showing the following: boundary, roads, future road improvements, sidewalks, curbs, property lines, buildings, existing water and sewer, easements, and any other known utilities or obstacles.
- Identify required rights-of-way and easements, which must be satisfactory to and approved by PG&E.
- Prepare plat and legal descriptions for up to 15 property acquisitions and easements identified by PG&E.

Additional Services

CITY will provide written direction and a budget for any additional service to be performed. Written authorization must be obtained from the CITY prior to the CONSULTANT beginning additional services. The CITY will not be responsible for additional work that the CONSULTANT performs prior to receiving written authorization.

Services Not Included:

The following services may be required for successful completion of the project, but are specifically not included in this scope of services. CONSULTANT may provide some of these services

pursuant to the “Changes in Services” section of this agreement, or CITY may engage others to provide these services. This is not intended to represent a complete list, but is added only for clarity.

- Right-of-Way acquisition services including appraisals, negotiations, and acquisition.
- Environmental Impact Reports, Special Studies and Reports (Noise, Traffic, Cultural Resources Biology, etc.) or Segment I or Segment II analysis.
- Processing or coordination of the U.S. Fish & Wildlife, Army Corps of Engineers, Department of Fish & Game or other Regional, State or Federal Agency permits.
- Identification or location of any contaminated or hazardous material sites.
- Uncovering or potholing existing underground facilities.
- Plans or calculations for falsework, structural excavations and sheeting or shoring.
- Subsurface water drainage (subdrains), dewatering facilities and pumping stations and force mains for storm drainage and sanitary sewer.
- Geotechnical Engineering or hazardous materials investigations.
- Construction Staging and/or Traffic Control Plans.
- Water, Sewer, or Storm Drain Modifications, Permanent BMPs/Permanent Storm Water Treatment Control Measures.
- Preparation of a SWPPP.
- Street Tree Planting and Irrigation.

SCHEDULE

CONSULTANT will endeavor to complete the PS+E services for each Segment in accordance with the following timeframes after Notice to Proceed (NTP). Schedule for PS&E Submittals is based upon separate NTP’s for each phase.

<u>Task</u>	<u>Weeks After NTP (excluding holidays)</u>
Conceptual Design (All 3 Segments)	5 Weeks
50% PS+E Submittal (Segment 1)	10 Weeks
Review of 50% PS+E (3 weeks including review workshop)	13 Weeks
95% PS+E Submittal (Segment 1)	17 Weeks
Review of 95% PS+E (3 weeks including review workshop)	20 Weeks
Final PS+E Submittal (Segment 1)	24 Weeks
Review/Approval (2 weeks)	26 Weeks

**EXHIBIT B
COMPENSATION SCHEDULE**

For providing the services included in the Scope of Services, CITY shall compensate CONSULTANT on a Charge Rate basis invoiced based upon the actual hours expended by each employee classification for the services performed on the project multiplied by the hourly charge rate for that employee classification as follows. The budget noted below will be a Not-To-Exceed budget:

Professional Service Fees are as follows:

Tasks Descriptions	Segment 1 Fees	Segment 2 Fees
Project Management	\$5,000 **	\$10,000 **
Topographic Field Survey and Utility Mapping (All 3 Segments)	\$7,200 *	\$4,800 *
Conceptual Design (All 3 Segments)	\$23,760 *	\$15,840 *
50% PS&E Submittal (Segment 1)	\$20,800	--
Electrical Engineering for 50% PS&E Submittal (Segment 1)	\$10,600	--
95% PS&E Submittal (Segment 1)	\$33,800	--
Electrical Engineering for 95% PS&E Submittal (Segment 1)	\$8,400	--
Allowance for Structural Engineering (Segment 1)	\$8,400	--
100%/Final PS&E Submittal (Segment 1)	\$9,800	--
Electrical Engineering for Final PS&E Submittal (Segment 1)	\$6,300	--
Post Design Services (Segment 1)	\$3,700	--
Conformed Drawings and Specifications (Segment 1)	\$4,300	--
Services During Construction (Segment 1)	\$10,300	--
Record Drawings (Segment 1)	\$2,200	--
Street Light Design and Electrical Engineering (Segment 2)	--	\$42,100
Utility Undergrounding Coordination (Segment 2)	--	\$77,800
Additional Services as authorized by City	\$15,000 (N)	
Reimbursable	\$3,000 **	\$2,000 **
Total Not to Exceed Amount	\$172,560	\$152,540

* Fee based on authorization of this task for all three Segments at initiation of project. Fees for performing this task for each Segment separately will be higher.

** Fee based on authorization of this task for both Segment 1 and Segment 2 at initiation of project. Performing this task for each Segment separately may result in higher fees.

(N) Remaining Additional Services not authorized by City in Segment 1 may be reallocated to subsequent Segments.

Reimbursable Expense

CITY shall reimburse CONSULTANT for subconsultant costs and reimbursable expenses at cost plus five percent (5%) for processing, however, reimbursable expenses shall not exceed \$1,000. Such reimbursable expenses may include: reproduction of plans and documents, overnight mail,

delivery and courier services, premiums for additional insurance requirements requested by CITY, and other cost and expenses incurred at CITY's request.

EXHIBIT C
INSURANCE DOCUMENTS