

CONSULTANT AGREEMENT

THIS AGREEMENT, entered into this ___ day of _____, 201_, by and between CITY OF ALAMEDA, a municipal corporation (the "City"), and _____, a _____ (California corporation, partnership, sole proprietor, individual), whose address is _____ (the "Consultant"), is made with reference to the following:

RECITALS:

A. City is a municipal corporation duly organized and validly existing under the laws of the State of California with the power to carry on its business as it is now being conducted under the statutes of the State of California and the Charter of the City; and

B. Consultant is specially trained, experienced and competent to perform the special services which will be required by this Agreement; and

C. Consultant possesses the skill, experience, ability, background, certification and knowledge to provide the services described in this Agreement on the terms and conditions described herein; and

D. City and Consultant desire to enter into an agreement for _____ upon the terms and conditions herein.

NOW, THEREFORE, it is mutually agreed by and between the undersigned parties as follows:

1. TERM:

The term of this Agreement shall commence on the ___ day of _____, 201_, and shall terminate on the ___ day of _____, 201_, unless terminated earlier as set forth herein.

2. SERVICES TO BE PERFORMED:

Consultant shall perform each and every service set forth in Exhibit "A" which is attached hereto and incorporated herein by this reference, including all incidental services customarily furnished in accordance with generally accepted practice ("the Services"). City retains the right to modify requested services at any time.

3. COMPENSATION TO CONSULTANT:

A. Consultant shall be compensated for the Services performed in accordance with this Agreement at the rates set forth in Exhibit B. Payment under this contract shall not exceed _____. Payment shall be made by checks drawn on the treasury of the City.

B. Additional Services:

(1) City shall pay Consultant for authorized Additional Services on an hourly basis, in accordance with the schedule of fees attached hereto as Exhibit B. City shall pay only for Additional Services authorized by the City Manager or designee in writing or requested verbally by City and confirmed in writing by Consultant within five (5) working days.

(2) Consultant and City shall agree upon an estimated not-to-exceed cost for any proposed Additional Services or, in the case of a verbal request, Consultant shall provide City with a written estimated not-to-exceed cost for such Additional Services at least one (1) working day prior to commencing the Additional Services. In no event shall City pay for Additional Services made necessary by Consultant's errors or oversights.

C. Consultant shall submit written applications for progress payments in a form satisfactory to City on or before the first day of each month on account of the Basic Services, Additional Services and Reimbursable Expenses completed during the preceding month. Payment applications for Additional Services shall identify each person performing services, the time each person spends on each task (in units not to exceed one quarter hour) and shall be based on the rates in Exhibit B. Payment Applications for Reimbursable Expenses shall be supported by invoices or such other documents as City may reasonably request.

D. Within thirty (30) days after receipt of each application for progress payment, City shall verify the accuracy of the progress payment application, correct the charges where appropriate, and make payment to Consultant in an amount equal to the amount of such application, as verified or corrected by City. If City disagrees with any portion of a billing, the City shall promptly notify Consultant of the disagreement, and the City and the Consultant shall attempt to resolve the disagreement. City's payment of any amounts shall not constitute a waiver of any disagreement and City shall promptly pay all amounts not in dispute. No payment made hereunder shall be evidence of acceptance of any part of the Services.

E. The City may withhold payment, in whole or in part, to the extent reasonably necessary to protect the City from claims, demands, causes of action, costs, expenses, liabilities, losses, damages, or injuries of any kind arising from or related to the Services. Failure by City to deduct any sums from a progress payment shall not constitute a waiver of the City's right to assert a claim against Consultant or to withhold payment at a future time. The City may keep any moneys which would otherwise be payable at any time hereunder and apply the same, or so much as may be necessary therefor, to the payment of any expenses, losses, or damages as determined by the City, incurred by the City for which Consultant is liable under the Agreement or state law.

F. Consultant shall not stop or delay performance of Services under this Agreement on account of payment disputes with City, provided that City continues to make payment of undisputed amounts.

G. Consultant shall maintain complete and accurate records of the number of hours worked by persons and subconsultants, and Reimbursable Expenses, on the Project during each phase under this Agreement. All such records shall be maintained on a generally accepted

accounting basis and shall be clearly identified and readily accessible. All accounting records shall provide an understandable breakdown of costs charged to this Agreement.

4. SCHEDULE FOR PERFORMANCE:

Time is of the essence regarding the performance of this Agreement. Consultant shall promptly commence performance of the Services upon execution of this Agreement, and shall diligently pursue performance of the Services until completion. Consultant shall perform the Services in strict accordance with the schedule attached hereto as Exhibit "C" (the "Schedule") and any updates to the Schedule approved by City. Consultant shall work such overtime or engage such personnel and equipment as necessary to maintain the Schedule without additional compensation unless the delay is caused by circumstances entirely outside of Consultant's control.

5. STANDARDS OF CARE AND SAFETY REQUIREMENTS:

A. Consultant agrees to perform all the Services in a manner at least equal to the prevailing standards of like professionals in the San Francisco Bay Area and agrees that the Services shall be performed by qualified and experienced personnel who are not employed by the City and have no contractual relationship with City.

B. Consultant shall not maintain, commit, or permit the maintenance or commission of any nuisance in connection with the performance of the Services under this Agreement.

C. The Services performed under this Agreement shall be performed in such a manner as to provide safety to the public and to meet or exceed the safety standards outlined by CAL-OSHA. City reserves the right to issue restraints or cease and desist orders to Consultant when unsafe or harmful acts or conditions are observed or documented relative to the performance of the Services.

D. Consultant shall maintain the work sites free of hazards to persons and/or property resulting from his or her operations. Any hazardous condition noted by Consultant, which is not a result of his or her operations, shall immediately be documented to City.

6. INDEPENDENT PARTIES:

City and Consultant intend that the Consultant's status under this Agreement is that of an independent contractor as defined in Labor Code Section 3353. The manner and means of conducting the Services are under the control of Consultant, except to the extent they are limited by statute, rule or regulation and the express terms of this Agreement. No civil service status or other right of employment will be acquired by virtue of Consultant's services. None of the benefits provided by City to its employees, including but not limited to, unemployment insurance, workers' compensation plans, vacation and sick leave are available from City to Consultant, its employees or agents. Deductions shall not be made for any state or federal taxes, FICA payments, PERS payments, or other purposes normally associated with an employer-employee relationship from any fees due Consultant. Payments of the above items, if required, are the responsibility of Consultant.

7. IMMIGRATION REFORM AND CONTROL ACT (IRCA):

Consultant assumes any and all responsibility for verifying the identity and employment authorization of all of his/her employees performing work hereunder, pursuant to all applicable IRCA or other federal, or state rules and regulations. Consultant shall indemnify and hold City harmless from and against any loss, damage, liability, costs or expenses arising from any noncompliance of this provision by Consultant.

8. NON-DISCRIMINATION:

Consistent with City's policy that harassment and discrimination are unacceptable employer/employee conduct, Consultant agrees that harassment or discrimination directed toward a job applicant, a City employee, or a citizen by Consultant or Consultant's employee or subconsultant on the basis of race, religious creed, color, national origin, ancestry, handicap, disability, marital status, pregnancy, sex, age, or sexual orientation will not be tolerated. Consultant agrees that any and all violations of this provision shall constitute a material breach of this Agreement.

9. LOCAL HIRE REQUIREMENTS:

Consultant acknowledges the City's local preference policies set forth in Alameda Municipal Code Sections 2-62.1-.6 (extending City contract award preferences to local businesses with fixed addresses in the City), and will comply with any local hiring requirements set forth by the funding source of the contract and/or all applicable law.

10. HOLD HARMLESS:

A. Consultant shall indemnify, defend, and hold harmless City, its City Council, boards, commissions, officials, employees, and volunteers ("Indemnitees") from and against any and all loss, damages, liability, claims, suits, costs and expenses whatsoever, including reasonable attorneys' fees ("Claims"), arising from or in any manner connected to Consultant's performance of Services, whether alleged or actual. If Claims are filed against Indemnitees which allege negligence on behalf of the Consultant, Consultant shall have no right of reimbursement against Indemnitees for the costs of defense even if negligence is not found on the part of Consultant. However, Consultant shall not be obligated to indemnify Indemnitees from Claims arising from the sole or active negligence or willful misconduct of Indemnitees.

B. Neither termination of this Agreement nor completion of the Services shall release Consultant from its obligations under this Section 10.

C. Consultant's compliance with the insurance requirements does not relieve Consultant from the obligations described in this Section 10, which shall apply whether or not such insurance policies are applicable to a claim or damages.

11. INSURANCE:

On or before the commencement of the term of this Agreement, Consultant shall furnish City with certificates showing the type, amount, class of operations covered, effective dates and dates of expiration of insurance coverage in compliance with paragraphs 11 A, B, C, D and E. Such certificates, which do not limit Consultant's indemnification, shall also contain substantially the following statement: "Should any of the above insurance covered by this certificate be canceled or coverage reduced before the expiration date thereof, the insurer affording coverage shall provide thirty (30) days' advance written notice to the City of Alameda by certified mail, Attention: Risk Manager." It is agreed that Consultant shall maintain in force at all times during the performance of this Agreement all insurance required by this Agreement with an insurance company that is acceptable to City and licensed to do insurance business in the State of California. Endorsements naming the City as additional insured shall be submitted with the insurance certificates.

A. COVERAGE:

Consultant shall maintain the following insurance coverage:

(1) **Workers' Compensation and Employers' Liability:** Statutory coverage as required by the State of California.

(2) **General Liability:** Commercial general liability coverage in the following minimum limits:

Bodily Injury: \$1,000,000 each occurrence
 \$2,000,000 aggregate

Property Damage: \$1,000,000 each occurrence
 \$2,000,000 aggregate

If submitted, combined single limit policy with aggregate limits in the amounts of \$2,000,000 will be considered equivalent to the required minimum limits shown above.

(3) **Automotive:** Comprehensive automotive liability coverage in the following minimum limits:

Bodily Injury: \$1,000,000 each occurrence

Property Damage: \$1,000,000 each occurrence

or

Combined Single Limit: \$1,000,000 each occurrence

(4) **Professional Liability**: Professional liability insurance which includes coverage for the professional acts, errors and omissions of Consultant in the amount of at least \$1,000,000.

B. **SUBROGATION WAIVER**: Consultant agrees that in the event of loss due to any of the perils for which he/she has agreed to provide comprehensive general and automotive liability insurance, Consultant shall look solely to his/her insurance for recovery. Consultant hereby grants to City, on behalf of itself and any insurer providing comprehensive general and automotive liability insurance to Consultant with respect to the services of Consultant herein, a waiver of any right to subrogation which any such insurer of Consultant may acquire against City by virtue of the payment of any loss under such insurance.

C. **FAILURE TO SECURE**: If Consultant at any time during the term hereof should fail to secure or maintain the foregoing insurance, City shall be permitted to obtain such insurance in the Consultant's name or as an agent of the Consultant and shall be compensated by the Consultant for the costs of the insurance premiums at the maximum rate permitted by law and computed from the date written notice is received that the premiums have not been paid.

D. **ADDITIONAL INSURED**: City, its City Council, boards and commissions, officers, employees and volunteers shall be named as an additional insured by endorsement under all insurance coverages, except any professional liability insurance, required by this Agreement. The naming of an additional insured shall not affect any recovery to which such additional insured would be entitled under this policy if not named as such additional insured. An additional insured named herein shall not be held liable for any premium, deductible portion of any loss, or expense of any nature on this policy or any extension thereof. Any other insurance held by an additional insured shall not be required to contribute anything toward any loss or expense covered by the insurance provided by this policy.

E. **SUFFICIENCY OF INSURANCE**: The insurance limits required by City are not represented as being sufficient to protect Consultant. Consultant is advised to confer with Consultant's insurance broker to determine adequate coverage for Consultant.

12. CONFLICT OF INTEREST:

Consultant warrants that it is not a conflict of interest for Consultant to perform the Services required by this Agreement. Consultant may be required to fill out a conflict of interest form if the services provided under this Agreement require Consultant to make certain governmental decisions or serve in a staff capacity as defined in Title 2, Division 6, Section 18700 of the California Code of Regulations.

13. PROHIBITION AGAINST TRANSFERS:

A. Consultant shall not assign, sublease, hypothecate, or transfer this Agreement, or any interest therein, directly or indirectly, by operation of law or otherwise, without prior written consent of City. Any attempt to do so without said consent shall be null and void, and any assignee, sublessee, hypothecate or transferee shall acquire no right or interest by reason of such attempted assignment, hypothecation or transfer. However, claims for money by Consultant

from City under this Agreement may be assigned to a bank, trust company or other financial institution without prior written consent. Written notice of such assignment shall be promptly furnished to City by Consultant.

B. The sale, assignment, transfer or other disposition of any of the issued and outstanding capital stock of Consultant, or of the interest of any general partner or joint venturer or syndicate member or cotenant, if Consultant is a partnership or joint venture or syndicate or cotenancy, which shall result in changing the control of Consultant, shall be construed as an assignment of this Agreement. Control means fifty percent (50%) or more of the voting power of the corporation.

14. SUBCONSULTANT APPROVAL:

A. Unless prior written consent from City is obtained, only those people and subconsultants whose names and resumes are attached to this Agreement as Exhibit D shall be used in the performance of this Agreement.

B. In the event that Consultant employs subconsultants, such subconsultants shall be required to furnish proof of workers' compensation insurance and shall also be required to carry general, automobile and professional liability insurance in reasonable conformity to the insurance carried by Consultant. In addition, any work or services subcontracted hereunder shall be subject to each provision of this Agreement.

15. PERMITS AND LICENSES:

Consultant, at his/her sole expense, shall obtain and maintain during the term of this Agreement, all appropriate permits, certificates and licenses including, but not limited to, a City Business License, that may be required in connection with the performance of Services hereunder.

16. OWNERSHIP OF DOCUMENTS:

A. Each and every Document, draft, work product, map, record and other document, hereinafter collectively referred to as "Document," reproduced, prepared or caused to be prepared by Consultant pursuant to or in connection with this Agreement, shall be the exclusive property of City. Consultant shall not copyright any Document required by this Agreement and shall execute appropriate documents to assign to City the copyright to Documents created pursuant to this Agreement. Any Document, information and data acquired or required by this Agreement shall become the property of City, and all publication rights are reserved to City.

B. City's ownership interest in the Documents includes the following single, exclusive license from Consultant for the Project: Consultant, for itself, its employees, heirs, successors and assigns, hereby grants (and if any subsequent grant is necessary, agrees to grant) to City an irrevocable, perpetual, royalty-free, fully paid-up, sole and exclusive license and right to use and exercise any and all of the copyrights or other intellectual property rights that Consultant may author or create, alone or jointly with others, in or with respect to the Documents, including without limitation all drawings, designs and graphic representations.

City's license shall include the right to sublicense, shall be for all purposes with respect to each right of copyright, and shall be without restriction.

C. All Documents prepared by Consultant may be used by City in execution or implementation of:

- (1) The original Project for which Consultant was hired;
- (2) Completion of the original Project by others;
- (3) Subsequent additions to the original project; and/or
- (4) Other City projects as appropriate.

D. Consultant shall, at such time and in such form as City may require, furnish Documents concerning the status of services required under this Agreement.

E. All Documents required to be provided by this Agreement shall be printed on recycled paper. All Documents shall be copied on both sides of the paper except for one original, which shall be single sided.

F. All Documents, information, data, and exhibits prepared or assembled by Consultant in connection with the performance of its services pursuant to this Agreement are confidential until released by the City to the public, and the Consultant shall not make any of these documents or information available to any individual or organization not employed by the Consultant or the City without the written consent of the City before any such release.

17. RECORDS:

A. Consultant shall maintain complete and accurate records with respect to sales, costs, expenses, receipts and other such information required by City that relate to the performance of services under this Agreement.

B. Consultant shall maintain adequate records of the Services provided in sufficient detail to permit an evaluation of services. All such records shall be maintained in accordance with generally accepted accounting principles and shall be clearly identified and readily accessible. Consultant shall provide free access to such books and records to the representatives of City or its designees at all proper times, and gives City the right to examine and audit same, and to make transcripts therefrom as necessary, and to allow inspection of all work, data, documents, proceedings and activities related to this Agreement. Such records, together with supporting documents, shall be kept separate from other documents and records and shall be maintained for a period of three (3) years after receipt of final payment.

C. If supplemental examination or audit of the records is necessary due to concerns raised by City's preliminary examination or audit of records, and the City's supplemental examination or audit of the records discloses a failure to adhere to appropriate internal financial controls, or other breach of contract or failure to act in good faith, then Consultant shall

reimburse City for all reasonable costs and expenses associated with the supplemental examination or audit.

D. Pursuant to California Government Code Section 8546.7, the parties to this Agreement shall be subject to the examination and audit of representative of the Auditor General of the State of California for a period of three (3) years after final payment under the Agreement. The examination and audit shall be confined to those matters connected with the performance of this Agreement including, but not limited to, the cost of administering the Agreement.

18. NOTICES:

All notices, demands, requests or approvals to be given under this Agreement shall be given in writing, addressed as hereinafter provided.

All notices, demands, requests, or approvals from Consultant to City shall be addressed to City at:

City of Alameda
2263 Santa Clara Avenue
Alameda CA 94501
Attention: Finance Director

cc: City Attorney's Office

All notices, demands, requests, or approvals from City to Consultant shall be addressed to Consultant at:

The parties must designate, in writing, any change in the individual to who notice is to be addressed. Notices shall be deemed to be received upon personal delivery to the addresses above; if sent by overnight delivery, upon delivery as shown by delivery service records; if sent by facsimile, upon receipt as confirmed by the sending facsimile equipment; if by United States Postal Service, five days after deposit in the mail.

19. SUSPENSION AND TERMINATION:

A. The City may suspend this Agreement and Consultant's performance of the Services, wholly or in part, for such period as it deems necessary due to unfavorable conditions or to the failure on the part of the Consultant to perform any provision of this Agreement. Consultant will be paid for satisfactory services performed through the date of temporary suspension. In the event that Consultant's services hereunder are delayed for a period in excess of six (6) months due to causes beyond Consultant's reasonable control, Consultant's compensation shall be subject to renegotiation.

B. If Consultant at any time refuses or neglects to prosecute its Services in a timely fashion or in accordance with the Project schedule, or is adjudicated a bankrupt, or commits any act of insolvency, or makes an assignment for the benefit of creditors without City's consent, or fails to make prompt payment to persons furnishing labor, equipment, materials or services, or fails in any respect to properly and diligently prosecute its services, or otherwise fails to perform fully any and all of the agreements herein contained, Consultant shall be in default.

C. If Consultant fails to cure the default within seven (7) days after written notice thereof, City may, at its sole option, take possession of any Documents (as defined in Section 16) or other materials (in paper and electronic form) prepared or used by Consultant in connection with the Project and (1) provide any such work, labor, materials or services as may be necessary to overcome the default and deduct the cost thereof from any money then due or thereafter to become due to Consultant under this Agreement; or (2) terminate Consultant's right to proceed with this Agreement.

D. In the event City elects to terminate, City shall have the right to immediate possession of all Documents and work in progress prepared by Consultant, whether located at the Project, at Consultant's place of business, or at the offices of a subconsultant, and may employ any other person or persons to finish the Services and provide the materials therefor. In case of such default termination, Consultant shall not be entitled to receive any further payment under this Agreement until the Services are complete. At that time, if the expenses incurred by City in obtaining Services for the Project exceed such unpaid balance, then Consultant shall promptly pay to City the amount by which such expense exceeds the unpaid balance of the Not-to-Exceed Amount. The expense referred to in the previous sentence shall include expenses incurred by City in causing the services called for under this Agreement to be provided by others, for attorneys' fees, and for any costs or damages sustained by City by reason of Consultant's default or defective work.

E. In addition to the foregoing right to terminate for default, City reserves the absolute right to terminate this Agreement without cause, upon 72-hours' written notice to Consultant. In the event of termination without cause, Consultant shall be entitled to payment which shall be calculated as follows: (1) Payment for Basic Services then satisfactorily completed and accepted by City, plus (2) Payment for Additional Services satisfactorily completed and accepted by City, plus (3) Reimbursable Expenses actually incurred by Consultant, as approved by City. In no event will Consultant be paid more than the Not to Exceed Amount. The amount of any payment made to Consultant prior to the date of termination of this Agreement shall be deducted from the amounts described in (1), (2) and (3) above. Consultant shall not be entitled to any claim or lien against City or the Project for any additional compensation or damages in the event of such termination and payment. In addition, the City's right to withhold funds under Section 3 shall be applicable in the event of a termination for convenience.

F. If this Agreement is terminated by City for default and it is later determined that the default termination was wrongful, such termination automatically shall be converted to and treated as a termination for convenience under this Section, paragraph E and Consultant shall be entitled to receive only the amounts payable hereunder in the event of a termination for convenience.

20. COMPLIANCE WITH LAW:

Consultant shall comply with all state or federal laws and regulations as well as all ordinances, rules and regulations enacted or issued by City (collectively, “Applicable Laws”).

21. CONFLICT OF LAW:

A. This Agreement shall be interpreted under, and enforced by the laws of the State of California excepting any choice of law rules which may direct the application of laws of another jurisdiction. The Agreement and obligations of the parties are subject to all valid laws, orders, rules, and regulations of the authorities having jurisdiction over this Agreement (or the successors of those authorities.)

B. Any suits brought pursuant to this Agreement shall be filed with the courts of the County of Alameda, State of California.

22. ADVERTISEMENT:

Consultant shall not post, exhibit, display or allow to be posted, exhibited, displayed any signs, advertising, show bills, lithographs, posters or cards of any kind pertaining to the services performed under this Agreement unless prior written approval has been secured from City to do otherwise.

23. WAIVER:

A waiver by City of any breach of any term, covenant, or condition contained herein shall not be deemed to be a waiver of any subsequent breach of the same or any other term, covenant, or condition contained herein, whether of the same or a different character.

24. INTEGRATED CONTRACT:

This Agreement, including exhibits, represents the full and complete understanding of every kind or nature whatsoever between the parties hereto with regard to the Services, and all preliminary negotiations and agreements of whatsoever kind or nature are merged herein. No verbal agreement or implied covenant shall be held to vary the provisions hereof. Any modification of this Agreement will be effective only by written execution signed by both City and Consultant.

TABLE OF EXHIBITS

Exhibit A	Scope of Services
Exhibit B	Compensation
Exhibit C	Schedule for Performance
Exhibit D	Approved Subconsultants

25. INSERTED PROVISIONS:

Each provision and clause required by law to be inserted into the Agreement shall be deemed to be enacted herein, and the Agreement shall be read and enforced as though each were included herein. If through mistake or otherwise, any such provision is not inserted or is not correctly inserted, the Agreement shall be amended to make such insertion on application by either party.

26. CAPTIONS:

The captions in this Agreement are for convenience only, are not a part of the Agreement and in no way affect, limit or amplify the terms or provisions of this Agreement.

IN WITNESS WHEREOF, the parties have caused the Agreement to be executed on the day and year first above written.

(Consultant Name)
(Entity Type)
Signature One

CITY OF ALAMEDA
A Municipal Corporation

(Print Name)
(Print Title)

John Russo
City Manager

If 2 signatures needed for entity type:
Signature Two

APPROVED AS TO FORM:

(Print Name)
(Print Title)

Janet C. Kern
City Attorney

RECOMMENDED FOR APPROVAL:

Finance Director

