

PROFESSIONAL SERVICES AGREEMENT

THIS AGREEMENT is entered into as of the _____ day of _____, _____ by and between the TOWN OF MORAGA, hereinafter called the "Town", and _____, hereinafter called the "Consultant." Town and Consultant shall be sometimes collectively referred to as "Parties."

Recitals

WHEREAS, Town desires to obtain engineering services in connection with planning, investigation, surveying, design, bidding, construction engineering, and any other related ancillary activities related to the 2022 and 2023 Pavement Reconstruction Project; and

WHEREAS, Consultant hereby represents and warrants to the Town that Consultant is fully qualified to perform the services described in Section 2 of this Agreement by virtue of specialized experience and training, education and expertise of its principals and employees. Consultant further represents that it is willing to accept responsibility for performing such services in accordance with the terms and conditions set forth in this Agreement; and

WHEREAS, Town desires to retain Consultant pursuant to this Agreement to provide the services described in Section 2 of this Agreement.

Agreement

NOW, THEREFORE, THE PARTIES HERETO AGREE AS FOLLOWS:

1. Recitals. The Parties agree that the foregoing recitals are true and correct and are hereby incorporated as terms of the Agreement.
2. Scope of Services. Consultant shall perform the services set out in the "Scope of Work" attached hereto as Exhibit "A".
3. Time of Performance. The services of Consultant are to commence no sooner than _____ and, subject to Town Council approval, be completed not later than _____. Consultant shall perform its services in accordance with the schedule in Exhibit "B." Any changes to these dates in either this Section 3 or Exhibit "B" must be approved in writing by the Town of Moraga or its authorized representatives.
4. Compensation and Method of Payment.
 - A. Compensation. The compensation to be paid to Consultant, including both payment for professional services and reimbursable expenses, shall be at the rate and schedules attached hereto as Exhibit "C". However, in no event shall the amount Town pays Consultant exceed _____

Dollars (\$_____). Payment by Town under this Agreement shall not be deemed a waiver of unsatisfactory work, even if such defects were known to the Town at the time of payment.

B. Timing of Payment. Billing for said services shall be made once at the conclusion of the work and submittal of the records and any appropriate report. Town shall review Consultant's billing statement and pay Consultant for services rendered within 45 days of receipt of a complete billing statement that meets all requirements of this Agreement.

C. Changes in Compensation. Consultant will not undertake any work that will incur costs in excess of the amount set forth in Section 4(A) without prior written amendment to this Agreement.

D. Taxes. Consultant shall pay all taxes, assessments and premiums under the federal Social Security Act, any applicable unemployment insurance contributions, Workers Compensation insurance premiums, sales taxes, use taxes, personal property taxes, or other taxes or assessments now or hereafter in effect and payable by reason of or in connection with the services to be performed by Consultant.

E. No Overtime or Premium Pay. Consultant shall receive no premium or enhanced pay for work normally understood as overtime, i.e., hours that exceed forty (40) hours per work week, or work performed during non-standard business hours, such as in the evenings or on weekends. Consultant shall not receive a premium or enhanced pay for work performed on a recognized holiday. Consultant shall not receive paid time off for days not worked, whether it be in the form of sick leave, administrative leave, or for any other form of absence.

F. Litigation Support. Consultant agrees to testify at Town's request if litigation is brought against Town in connection with Consultant's report. Unless the action is brought by Consultant or is based upon Consultant's negligence, Town will compensate Consultant for the preparation and the testimony at Consult's standard hourly rates, if requested by Town and not part of the litigation brought by Town against Consultant.

5. Amendment to Scope of Services. Town shall have the right to amend the Scope of Services within the Agreement attached hereto as Exhibit A, by written notification to the Consultant. In such event, the compensation and time of performance shall be subject to renegotiation upon written demand of either party to the Agreement. Failure of the Consultant to secure Town's written authorization for extra or changed work shall constitute a waiver of any and all right to adjustment in the contract price or time due, whether by way of compensation, restitution, quantum meruit, etc. for work done without the appropriate Town authorization.

6. Duties of Town. Town shall provide all information requested by Consultant that is reasonably necessary to performing the Scope of Services. Town retains all rights of approval

and discretion with respect to assignment of any projects or undertakings contemplated by this Agreement.

7. Ownership of Documents. Title to all plans, specifications, maps, estimates, reports, manuscripts, drawings, descriptions and other final work products compiled by the Consultant under the Agreement shall be vested in the Town, none of which shall be used in any manner whatsoever, by any person, firm, corporation, or agency without the expressed written consent of the Town. Basic survey notes and sketches, charts, computations, and other data prepared or obtained under the Agreement shall be made available, upon request, to the Town without restriction or limitations on their use. Consultant may retain copies of the above-described information but agrees not to disclose or discuss any information gathered, discussed or generated in any way through this Agreement without the written permission of Town during the term of this Agreement, unless required by law.

8. Employment of Other Consultants, Specialists or Experts. Consultant will not employ or otherwise incur an obligation to pay other consultants, specialists or experts for services in connection with this Agreement without the prior written approval of the Town. Any consultants, specialists or experts approved by Town are listed in Exhibit "D."

9. Conflict of Interest.

A. Town and Consultant will comply with the requirements of the Town's Conflict of Interest Code adopted pursuant to California Government Code §87300 et seq., the Political Reform Act (California Government Code §81000 et seq.), the regulations promulgated by the Fair Political Practices Commission (Title 2, §18110 et seq. of the California Code of Regulations), California Government Code §1090 et seq., and any other ethics laws applicable to the performance of the Services and/or this Agreement. Consultant may be required to file with the Town Clerk a completed Form 700 before commencing performance of the Services unless the Town Clerk determines that completion of a Form 700 is not required, pursuant to Town's Conflict of Interest Code. Form 700 forms are available from the Town Clerk.

B. Consultant may not perform Services for any other person or entity that, pursuant to any applicable law or regulation, would result in a conflict of interest or would otherwise be prohibited with respect to Consultant's obligations pursuant to this Agreement. Consultant agrees to cooperate fully with Town and to provide any necessary and appropriate information requested by Town or any authorized representative concerning potential conflicts of interest or prohibitions concerning Consultant's obligations pursuant to this Agreement.

C. Consultant may not employ any Town official, officer or employee in the performance of the Services, nor may any official, officer or employee of Town have any financial interest in this Agreement that would violate California Government Code §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 Town. If

Consultant was an employee, agent, appointee, or official of Town 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 Consultant's performance of the Services, including reimbursement of expenses, and Consultant will be required to reimburse Town for any sums paid to Consultant under this Agreement. Consultant understands that, in addition to the foregoing, penalties for violating Government Code §1090 may include criminal prosecution and disqualification from holding public office in the State of California.

D. Any violation by Consultant of the requirements of this provision will constitute a material breach of this Agreement, and the Town reserves all its rights and remedies at law and equity concerning any such violations.

10. Liability of Members and Employees of Town.

A. No member of the Town and no other officer, employee or agent of the Town shall be personally liable to Consultant or otherwise in the event of any default or breach of the Town, or for any amount which may become due to Consultant or any successor in interest, or for any obligations directly or indirectly incurred under the terms of this Agreement.

11. Indemnity.

A. To the maximum extent permitted by law, Consultant shall, at its own expense, indemnify, defend with counsel acceptable to the Town, (which acceptance will not be unreasonably withheld), and hold harmless Town and its officers, officials, employees, agents and volunteers and the granting agency identified in the Grant Agreement ("Indemnitees") from and against any and all liability, loss, damage, claims, suits, actions, arbitration proceedings, administrative proceedings, regulatory proceedings, civil penalties and fines, expenses and costs (including, without limitation, claims expenses, attorney's fees and costs and fees of litigation) (collectively, "Liability") of every nature, whether actual, alleged or threatened, arising out of or in connection with the Services or Consultant's failure to comply with any of the terms of this Agreement, regardless of any fault or alleged fault of the Indemnitees.

B. If Consultant is a "design professional," as defined in California Civil Code Section 2782.8(c), Consultant shall indemnify, defend, and hold the Indemnitees harmless against Liability only to the extent such Liability arises out of, pertains to, or relates to Consultant's negligence, recklessness, or willful misconduct. In such an event, the cost to defend charged to Consultant shall not exceed Consultant's proportionate percentage of fault.

C. The obligations in this Section 11 shall survive termination of this Agreement.

12. Consultant Not an Agent of Town. Consultant, its officers, employees and agents shall not have any power to bind or commit the Town to any decision.

13. Independent Contractor. Consultant and Town agree that the Consultant will perform the Services as an independent contractor and not as an employee or agent of the Town. Persons employed or utilized by Consultant in the performance of the Services will not be employees or agents of the Town and in the performance of the Consultant's Services, Town shall have no control over the method or means of Consultant's performance of the Services. Consultant is solely responsible for the payment of employment taxes incurred under this Agreement and any similar federal or state taxes.

14. Compliance with Laws.

A. General. Consultant shall use the standard of care in its profession to comply with all applicable federal, State and local laws, codes, ordinances and regulations. Consultant represents and warrants to Town that it has all licenses, permits, qualifications, insurance and approvals of whatsoever nature which are legally required for Consultant to practice its profession. Consultant represents and warrants to Town that Consultant shall, at its sole cost and expense, keep in effect or obtain at all times during the term of this Agreement any licenses, permits, insurance and approvals which are legally required for Consultant to practice its profession.

B. Workers' Compensation. Consultant certifies that it is aware of the provisions of the California Labor Code which require every employee to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that Code, and Consultant certifies that it will comply with such provisions before commencing performance of this Agreement.

C. Prevailing Wage. Consultant and Consultant's sub-consultants, shall, to the extent required by the California Labor Code, pay not less than the latest prevailing wage rates to workers and professionals as determined by the Director of Industrial Relations of the State of California pursuant to California Labor Code, Part 7, Chapter 1, Article 2. Copies of the applicable wage determination are on file at the Town's Public Works Department office.

D. Injury and Illness Prevention Program. Consultant certifies that it is aware of and has complied with the provisions of California Labor Code Section 6401.7, which requires every employer to adopt a written injury and illness prevention program.

E. Town Not Responsible. The Town is not responsible or liable for Consultant's failure to comply with any and all of said requirements.

15. Confidential Information. All data, documents, discussions or other information developed or received by or for Consultant in performance of this Agreement are confidential and not to be disclosed to any person except as authorized by Town, or as required by law.

16. Insurance.

A. Minimum Scope of Insurance. Consultant agrees to have and maintain, for the duration of this Agreement the following minimum levels of insurance coverage:

(1) Consultant agrees to have and maintain, for the duration of this Agreement, a General Liability insurance policy insuring it and its firm to an amount not less than \$1,000,000 (One Million Dollars) combined single limit per occurrence and in the aggregate for bodily injury, personal injury and property damage.

(2) Consultant agrees to have and maintain for the duration of this Agreement an Automobile Liability insurance policy insuring it and its staff to an amount not less than \$1,000,000 (One Million Dollars) combined single limit per accident for bodily injury and property damage.

(3) Consultant shall maintain professional errors and omissions liability insurance for protection against claims alleging negligent acts, errors or omissions which may arise from Consultant's operations under this Agreement, whether such operations be by Consultant or by its employees, subcontractors, or subconsultants. The amount of this insurance shall not be less than \$1,000,000 (One Million Dollars) on a claims-made annual aggregate basis.

(4) A Workers' Compensation and Employers' Liability policy written in accordance with the laws of the State of California and providing coverage for any and all employees of Consultant:

(a) This policy shall provide coverage for Workers' Compensation (Coverage A).

(b) This policy shall also provide required coverage for Employers' Liability (Coverage B.)

(5) All of the following endorsements are required to be made a part of each of the required policies, except for the Professional Liability and Workers' Compensation and Employers' Liability policies, as stipulated below:

(a) "The Town of Moraga, its employees, officers, agents and volunteers are hereby added as additional insureds, but only as respects work done by, for, or on behalf of the named insured."

(b) "This policy shall be considered primary insurance as respects any other valid and collectible insurance the Town may possess, including any self-insured retention the Town may have, and any other insurance the Town does possess shall be considered excess insurance only and shall not contribute with it."

(c) “This insurance shall act for each insured and additional insured as though a separate policy had been written for each. This, however, will not act to increase the limit of liability of the insuring company.”

(6) Consultant shall provide to the Town all certificates of insurance with original endorsements effecting coverage required by this paragraph. Certificates of such insurance shall be filed with the Town on or before commencement of performance of this Agreement. The Town reserves the right to require complete, certified copies of all required insurance policies at any time.

(7) Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the Town, its officers, officials, employees or volunteers.

(8) Consultant’s insurance shall apply separately to each insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer’s liability.

B. All Coverages. Each insurance policy required shall provide that coverage shall not be canceled, except after 30 days’ prior written notice by certified mail, return receipt requested, has been given to the Town. Current certification of such insurance shall be kept on file with the Town Manager at all times during the term of this Agreement.

C. Acceptability of Insurers. Insurance is to be placed with insurers with a Best’s rating of no less than A:VII.

D. Deductibles and Self-Insured Retentions. Any deductibles or self-insured retentions must be declared to and approved by the Town. At the Town’s option, Consultant shall demonstrate financial capability for payment of such deductibles or self-insured retentions.

15. Assignment Prohibited. Neither the Town nor Consultant may assign any right or obligation pursuant to this Agreement. Any attempted or purported assignment of any right or obligation hereunder shall be void and of no effect.

16. Termination of Agreement.

A. This Agreement and all obligations hereunder, except for those indemnity obligations set forth in Section 11, may be terminated at any time, with or without cause, by the Town upon 5 days’ written notice to Consultant. Consultant may terminate this Agreement upon 30 days’ written notice to Town.

B. If Consultant fails to perform any of its material obligations under this Agreement, in addition to all other remedies provided by law, Town may terminate this Agreement immediately upon written notice.

C. Upon termination with or without cause, all finished and unfinished documents, project data and reports shall, at the option of the Town, become its sole property and shall, at Consultant's expense, be delivered to the Town or to any party it may so designate.

D. In the event termination is without cause, Consultant shall be entitled to any compensation owing to it hereunder up to the time of such termination, it being understood that any payments are full compensation for services rendered prior to the time of payment; provided, however, that Consultant shall be entitled to compensation for work in progress at the time of termination.

17. Suspension. The Town shall have the authority to suspend this Agreement and the services contemplated herein, wholly or in part, for such period as he/she 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.

18. Amendment. This Agreement and all exhibits referenced herein constitutes the complete and exclusive statement of the agreement between Town and Consultant shall supersede any previous agreements, whether verbal or written, concerning the same subject matter. This Agreement may be amended or extended from time to time by written agreement of the parties hereto.

19. Interpretation. This Agreement shall be interpreted as though it was a product of a joint drafting effort and no provisions shall be interpreted against a party on the ground that said party was solely or primarily responsible for drafting the language to be interpreted.

20. Time of the Essence. Time is of the essence of this Agreement.

21. Written Notification. Any notice, demand, request, consent, approval or communication that either party desires or is required to give to the other party shall be in writing and either served personally or sent by prepaid, first class mail. Any such notice, demand, etc. shall be addressed to the other party at the address set forth hereinbelow. Either party may change its address by notifying the other party of the change of address. Notice shall be deemed communicated within 48 hours from the time of mailing if mailed as provided in this section.

If to Town: Shawn Knapp, Public Works Director/Town Engineer
Town of Moraga
329 Rheem Blvd
Moraga, CA 94556

If to Consultant:

22. Consultant's Books and Records.

A. 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 Town for a minimum period of three (3) years, or for any longer period required by law, from the date of final payment to Consultant.

B. Consultant shall maintain all documents and records which demonstrate performance under this Agreement for a minimum period of three (3) years, or for any longer period required by law, from the date of termination or completion of this Agreement.

C. Any records or documents required to be maintained pursuant to this Agreement shall be made available for inspection or audit, at any time during regular business hours, upon written request by the Town Attorney, Town Auditor, Town Manager, or a designated representative of any of these officers. Copies of such documents shall be provided to Town for inspection when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records shall be available at Consultant's address indicated for receipt of notices in this Agreement.

D. Town may, by written request by any of the above-named officers, require that custody of the records be given to Town and that the records and documents be maintained in the Town Manager's office. Access to such records and documents shall be granted to any party authorized by Consultant, Consultant's representatives, or Consultant's successor-in-interest.

23. Equal Employment Opportunity. Consultant is an equal opportunity employer and agrees to comply with all applicable state and federal regulations governing equal employment opportunity. Consultant will not discriminate against any employee or applicant for employment because of race, age, sex, creed, color, sexual orientation, marital status or national origin. Consultant will take affirmative action to ensure that applicants are treated during such employment without regard to race, age, sex, creed, color, sexual orientation, marital status or national origin. Such action shall include, but shall not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; lay-offs or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. Consultant further agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.

24. Town Not Obligated to Third Parties. Town shall not be obligated or liable for payment hereunder to any party other than the Consultant.

25. Waiver. No failure on the part of either party to exercise any right or remedy hereunder shall operate as a waiver of any other right or remedy that party may have hereunder.

26. Severability. If any one or more of the provisions contained herein shall for any reason be held to be invalid, illegal or unenforceable in any respect, then such provision or provisions shall be deemed severable from the remaining provisions hereof, and such invalidity, illegality or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had not been contained herein.

27. Exhibits. The following exhibits are attached to this Agreement and incorporated herein by this reference:

Exhibit A: Scope of Services

Exhibit B: Schedule

Exhibit C: Compensation

Exhibit D: Other Consultants, Specialists or Experts Employed by Consultant

28. Execution. This Agreement may be executed in several counterparts, each of which shall constitute one and the same instrument and shall become binding upon the parties when at least one copy hereof shall have been signed by both parties hereto. In approving this Agreement, it shall not be necessary to produce or account for more than one such counterpart.

29. News Releases/Interviews. All Consultant and subconsultant news releases, media interviews, testimony at hearings and public comment shall be prohibited unless expressly authorized by the Town.

30. Venue. In the event that suit shall be brought by either party hereunder, the parties agree that trial of such action shall be held exclusively in a state court in the County of Contra Costa, California.

IN WITNESS WHEREOF, the Town and Consultant have executed this Agreement as of the date first above written.

TOWN OF MORAGA

CONSULTANT

By:

Cynthia Battenberg,
Town Manager

By:

Name:

Title:

ATTEST:

By:

Marty McInturf,
Town Clerk

Address:

Phone No:

APPROVED AS TO FORM:

By:

Michelle Marchetta Kenyon,
Town Attorney

FUNDING:

By:

Norman Veloso,
Administrative Services Director

EXHIBIT A

Scope of Services

[to be inserted]

EXHIBIT B

Schedule of Performance

[to be inserted]

EXHIBIT C

Compensation

[to be inserted]

EXHIBIT D

Other Consultants, Specialists or Experts Employed by Consultant

[To be Inserted]