

**CONSULTING SERVICES AGREEMENT BETWEEN
THE CITY OF SAN LEANDRO AND
BERRY DUNN McNEIL & PARKER, LLC FOR ENTERPRISE RESOURCE PLANNING SYSTEM
UPGRADE ADVISORY & IMPLEMENTATION SERVICES**

THIS AGREEMENT for consulting services is made by and between the City of San Leandro (“City”) and Berry Dunn McNeil & Parker, LLC (“Consultant”) (together sometimes referred to as the “Parties”) as of December 13, 2021 (the “Effective Date”).

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 Effective Date and shall end on March 30, 2024 the date of completion specified in Exhibit B, and Consultant shall complete the work described in Exhibit A on or before 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 referenced 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 standards observed by a competent practitioner of the profession in which Consultant is engaged.
- 1.3** **Assignment of Personnel.** Consultant shall assign only competent personnel to perform services pursuant to this Agreement. 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.
- 1.4** **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 Subsection 1.2 above and to satisfy Consultant's obligations hereunder.
- 1.5** **City of San Leandro Living Wage Rates.** This contract may be covered by the City of San Leandro Living Wage Ordinance (LWO). Consultant's attention is directed to the San Leandro Municipal Code, Title 1, Chapter 6, Article 6. Consultant must submit completed self-certification form and comply with the LWO if covered.

Section 2. **COMPENSATION.** City hereby agrees to pay Consultant a sum not to exceed \$372,000.00, notwithstanding any contrary indications that may be contained in Consultant's proposal, for services to be performed and reimbursable costs incurred under this Agreement. In the event of a conflict between this Agreement and Consultant's proposal, attached as Exhibit B, regarding the amount of compensation, the Agreement shall prevail. 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 in writing, 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. 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 prior to the invoice date. Invoices shall contain the following information:

- Serial identifications of progress bills; i.e., Progress Bill No. 1 for the first invoice, etc.;
- 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;
- 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;
- The Consultant's signature;
- Consultant shall give separate notice to the City when the total number of hours worked by Consultant and any individual employee, agent, or subcontractor of Consultant reaches or exceeds 800 hours within a 12-month period under this Agreement and any other agreement between Consultant and City. Such notice shall include an estimate of the time necessary to complete work described in Exhibit A and the estimate of time necessary to complete work under any other agreement between Consultant and City, if applicable.

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 30 days from the receipt of an invoice that complies with all of the requirements above to pay Consultant.

2.3 **Final Payment.** City shall pay the last 10% of the total sum due pursuant to this Agreement within 60 days after completion of the services and submittal to City of a final invoice, if all services required have been satisfactorily performed.

2.4 **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.

2.5 **Hourly Fees.** Fees for work performed by Consultant on an hourly basis shall not exceed the amounts shown on the compensation schedule attached hereto as Exhibit B.

2.6 **Reimbursable Expenses.** Reimbursable expenses are specified in Exhibit B, and shall not exceed \$7,000. Expenses not listed in Exhibit B are not chargeable to City. Reimbursable expenses are included in the total amount of compensation provided under this Agreement that shall not be exceeded.

2.7 **Payment of Taxes.** Consultant is solely responsible for the payment of employment taxes incurred under this Agreement and any similar federal or state taxes.

2.8 **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 to verify costs incurred to that date.

2.9 **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 authorization from the Contract Administrator.

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.

Section 4. INSURANCE REQUIREMENTS. Before fully executing this Agreement, Consultant, at its own cost and expense, unless otherwise specified below, shall procure the types and amounts of insurance listed below 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. Consistent with the following provisions, 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, and that such insurance is in effect prior to beginning work. Consultant shall maintain the insurance policies required by this section throughout the term of this Agreement. The cost of such insurance shall be included in the Consultant's bid or proposal. 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 to City that such insurance is in effect. **VERIFICATION OF THE REQUIRED INSURANCE SHALL BE SUBMITTED AND MADE PART OF THIS AGREEMENT PRIOR TO EXECUTION.** Consultant shall maintain all required insurance listed herein for the duration of this Agreement.

4.1 Workers' Compensation.

4.1.1 General Requirements. 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 \$1,000,000.00 per accident. In the alternative, Consultant may rely on a self-insurance program to meet these 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 California Labor Code shall be solely in the discretion of the Contract Administrator.

The Workers' Compensation policy shall be endorsed with a waiver of subrogation in favor of the entity for all work performed by the Consultant, its employees, agents, and subcontractors.

4.1.2 Submittal Requirements. To comply with Subsection 4.1, Consultant shall submit the following:

- a. Certificate of Liability Insurance in the amounts specified in the section; and
- b. Waiver of Subrogation Endorsement as required by the section.

4.2 Commercial General and Automobile Liability Insurance.

4.2.1 General Requirements. Consultant, at its own cost and expense, shall maintain commercial general liability insurance for the term of this Agreement in an amount not less than \$1,000,000.00 and automobile liability insurance for the term of this Agreement in an amount not less than \$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 (most recent edition) covering comprehensive General Liability on an “occurrence” basis. Automobile coverage shall be at least as broad as Insurance Services Office Automobile Liability form CA 0001, 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 a certified endorsement to the policy:

- a. The Insurance shall cover on an occurrence or an accident basis, and not on a claims-made basis.
- b. City, its officers, officials, employees, and volunteers are to be covered as additional insureds as respects: liability arising out of work or operations performed by or on behalf of the Consultant; or automobiles owned, leased, hired, or borrowed by the Consultant.
- c. Consultant hereby agrees to waive subrogation which any insurer or contractor may require from vendor by virtue of the payment of any loss. Consultant agrees to obtain any endorsements that may be necessary to effect this waiver of subrogation.
- d. For any claims related to this Agreement or the work hereunder, the Consultant's insurance coverage shall be primary insurance as respects the City, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees, or volunteers shall be excess of the Consultant's insurance and shall not contribute with it.

4.2.4 Submittal Requirements. To comply with Subsection 4.2, Consultant shall submit the following:

- a. Certificate of Liability Insurance in the amounts specified in the section;
- b. Additional Insured Endorsement as required by the section;

- c. Waiver of Subrogation Endorsement as required by the section; and
- d. Primary Insurance Endorsement as required by the section.

4.3 Professional Liability Insurance.

4.3.1 General Requirements. Consultant, at its own cost and expense, 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 \$1,000,000.00 covering the licensed professionals' errors and omissions. Any deductible or self-insured retention shall not exceed \$150,000 per claim.

4.3.2 Claims-Made Limitations. The following provisions shall apply if the professional liability coverage is 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 5 years after completion of the Agreement or the work, so long as commercially available at reasonable rates.
- 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 shall purchase an extended period coverage for a minimum of 5 years after completion of work under this Agreement.
- d. A copy of the claim reporting requirements must be submitted to the City for review prior to the commencement of any work under this Agreement.

4.3.3 Additional Requirements. A certified endorsement to include contractual liability shall be included in the policy.

4.3.4 Submittal Requirements. To comply with Subsection 4.3, Consultant shall submit the Certificate of Liability Insurance in the amounts specified in the section.

4.4 Cyber Liability Insurance.

4.4.1 General Requirements. Consultant, at its own cost and expense, shall maintain cyber liability insurance for the term of this Agreement in an amount not less than \$1,000,000.00 per occurrence. Coverage shall be sufficiently broad to respond to the duties and obligations as is undertaken by Consultant in this Agreement and shall include, but not be limited to, claims involving infringement of intellectual property, including but not limited to

infringement of copyright, trademark, trade dress; invasion of privacy violations; information theft; damage to or destruction of electronic information; release of private information; alteration of electronic information; extortion; and network security. The policy shall provide coverage for liabilities for financial loss resulting or arising from acts, errors, or omissions, in rendering technology services:

- Violation or infringement of any right of privacy, including breach of security and breach of security/privacy laws, rules or regulations globally, now or hereinafter constituted or amended;
- Data theft, damage, unauthorized disclosure, destructions, or corruption, including without limitation, unauthorized access, unauthorized use, identity theft, theft of personally identifiable information or confidential City information in whatever form, transmission of a computer virus or other type of malicious code; and participation in a denial of service attack on third party computer systems;
- Loss or denial of service;
- No cyber terrorism exclusion;

Such coverage must include technology/professional liability including breach of contract, privacy and security liability, privacy regulatory defense and payment of civil fines, payment of credit card provider penalties, and breach response costs, including without limitation, notification costs, forensic analysis, credit protection services, call center services, identity theft protection services, and crisis management/public relations services.

4.4.2 Claims-Made Limitations. The following provisions shall apply if the cyber liability coverage is 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 5 years after completion of the Agreement or the work, so long as commercially available at reasonable rates.
- 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 shall purchase an extended period coverage for a minimum of 5 years after completion of work under this Agreement.
- d. A copy of the claim reporting requirements must be submitted to the City for review prior to the commencement of any work under this Agreement.

4.4.3 Additional Requirements. A certified endorsement to include contractual liability shall be included in the policy.

4.4.4 Submittal Requirements. To comply with Subsection 4.4, Consultant shall submit the Certificate of Liability Insurance in the amounts specified in the section.

4.5 All Policies Requirements.

4.5.1 Acceptability of Insurers. All insurance required by this section is to be placed with insurers with a Bests' rating of no less than A:VII.

4.5.2 Verification of Coverage. Prior to beginning any work under this Agreement, Consultant shall furnish City with complete copies of all Certificates of Liability Insurance delivered to Consultant by the insurer, including complete copies of all endorsements attached to the policies. All copies of Certificates of Liability Insurance and certified endorsements shall show the signature of a person authorized by that insurer to bind coverage on its behalf. If the City does not receive the required insurance documents prior to the Consultant beginning work, it shall not waive the Consultant's obligation to provide them. The City reserves the right to require complete copies of all required insurance policies at any time.

4.5.3 Deductibles and Self-Insured Retentions. Consultant shall disclose to and obtain the written 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. At the option of the City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officers, employees, and volunteers; or the Consultant shall provide a financial guarantee satisfactory to the City guaranteeing payment of losses and related investigations, claim administration and defense expenses.

4.5.4 Wasting Policies. No policy required by this Section 4 shall include a "wasting" policy limit (i.e. limit that is eroded by the cost of defense).

4.5.5 Endorsement Requirements. Each insurance policy required by Section 4 shall be endorsed to state that coverage shall not be canceled by either party, except after 30 days' prior written notice has been provided to the City.

4.5.6 Subcontractors. Consultant shall include all subcontractors as insureds under its policies or shall furnish separate certificates and certified endorsements for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein.

4.6 Submittal of Proof of Insurance Coverage. All certificates of insurance and original endorsements effecting coverage required in this Section 4 must be electronically submitted through the City's online insurance document management program, PINS Advantage. Contractor shall comply with all requirements provided by City related to the PINS Advantage program.

4.7 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
- Terminate this Agreement.

Section 5. **INDEMNIFICATION AND CONSULTANT'S RESPONSIBILITIES.** Refer to the attached Exhibit C, which is incorporated herein and made a part of this Agreement.

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 Subsection 1.3; however, 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 Not an 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 and regulations applicable to the performance of the work hereunder, including but not limited to, the California Building Code, the Americans with Disabilities Act, and any copyright, patent or trademark law. Consultant's failure to comply with any law(s) or regulation(s) applicable to the performance of the work hereunder shall constitute a breach of contract.

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. In addition to the foregoing, Consultant and any subcontractors shall obtain and maintain during the term of this Agreement valid Business Licenses 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 Contract Administrator or this Agreement.

Section 8. TERMINATION AND MODIFICATION.

8.1 **Termination.** City may cancel this Agreement at any time and without cause upon written notification to Consultant.

Consultant may cancel this Agreement upon 90 days' written notice to City and shall include in such notice the reasons for cancellation.

In the event of termination, Consultant shall be entitled to compensation for services performed to the effective date of termination; 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 Contract Administrator, 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 Contract Administrator. Consultant shall not subcontract any portion of the performance contemplated and provided for herein, other than to the subcontractors noted in the proposal, without prior written approval of the Contract Administrator.

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 are not limited to, the following:

- 8.6.1** Immediately terminate the Agreement;
- 8.6.2** Retain the plans, specifications, drawings, reports, design documents, and any other work product prepared by Consultant pursuant to this Agreement;
- 8.6.3** Retain a different consultant to complete the work described in Exhibit A not finished by Consultant; or
- 8.6.4** Charge Consultant the difference between the cost to complete the work described in Exhibit A that is unfinished at the time of breach and the amount that City would have paid Consultant pursuant to Section 2 if Consultant had completed the work.

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 upon termination of the Agreement. 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. City and Consultant agree that, until final approval by City, all data, plans, specifications, reports and other documents are confidential and will not be released 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 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 Subsection 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 \$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 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 Alameda 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 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 Section 1090 *et seq.*

Consultant hereby warrants that it is not now, nor has it been in the previous 12 months, an employee, agent, appointee, or official of the City. If Consultant was an employee, agent, appointee, or official of the City in the previous 12 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 California Government Code Section 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 California Government Code Section 1090 *et seq.*, and, if applicable, will be disqualified from holding public office in the State of California.

At City's sole discretion, Consultant may be required to file with the City a Form 700 to identify and document Consultant's economic interests, as defined and regulated by the California Fair Political Practices Commission. If Consultant is required to file a Form 700, Consultant is hereby advised to contact the San Leandro City Clerk for the Form 700 and directions on how to prepare it.

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 Janelle Cameron ("Contract Administrator"). 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:

BerryDunn
Local Government Consulting Group
c/o Seth Hedstrom, Principal
211 Congress Street
Portland Maine 04102
shedstrom@berrydunn.com

Any written notice to City shall be sent to:

Janelle Cameron
City Manager's Office
835 East 14th Street
San Leandro, CA 94577
jcameron@santeandro.org

With a copy to:

City of San Leandro
Department of Finance
c/o Purchasing Agent
835 East 14th Street
San Leandro, CA 94577

10.11 Integration. This Agreement, including the scope of work attached hereto and incorporated herein as Exhibits A, B, C, and D represents the entire and integrated agreement between City and Consultant and supersedes all prior negotiations, representations, or agreements, either written or oral.

| | |
|------------------|---|
| <u>Exhibit A</u> | Scope of Services |
| <u>Exhibit B</u> | Compensation Schedule & Reimbursable Expenses |
| <u>Exhibit C</u> | Indemnification |
| <u>Exhibit D</u> | COVID-19 Compliance Requirements |

10.12 Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be an original and all of which together shall constitute one agreement.

10.13 Certification per Iran Contracting Act of 2010. In the event that this contract is for one million dollars (\$1,000,000.00) or more, by Consultant's signature below Consultant certifies that Consultant, and any parent entities, subsidiaries, successors or subunits of Consultant are not identified on a list created pursuant to subdivision (b) of Section 2203 of the California Public Contract Code as a person engaging in investment activities in Iran as described in subdivision (a) of Section 2202.5, or as a person described in subdivision (b) of Section 2202.5 of the California Public Contract Code, as applicable.

SIGNATURES ON FOLLOWING PAGE

The Parties have executed this Agreement as of the Effective Date. The persons whose signatures appear below certify that they are authorized to sign on behalf of the respective Party.

CITY OF SAN LEANDRO

BERRYDUNN

Frances Robustelli, City Manager

SETH HEDSTROM, PRINCIPAL

Attest:

Leticia I. Miguel, City Clerk

Budget Approved:

Approved as to Fiscal Authority:

Susan Hsieh, Finance Director

Account Number

Approved as to Form:

Richard D. Pio Roda, City Attorney

Per Section 10.7: Form 700 Required

Janelle Cameron, Assistant City Manager

EXHIBIT A

SCOPE OF SERVICES

Overview

BerryDunn strives to be flexible when it comes to development and execution of an effective work plan. We understand that no two projects are exactly alike and believe that **one of the primary reasons we have been successful with similar projects is our willingness to be flexible in adapting to our clients' unique needs.**

The overarching benefits the City can expect of our approach include:

- A methodology based on our extensive experience conducting similar projects
- Quality assurance processes that incorporate the City's review and approval of all deliverables and key milestones
- Built-in project management and change management best practices—focused on keeping the project on time, on budget, and progressing at a healthy pace
- A comprehensive approach to the City's desired scope of services, helping the City to trust and feel confident in the work completed and the plans for moving forward

Figure 4, on the following page, presents an overview of our work plan intended to achieve the City's desired scope of services, which encompasses each task as described in the RFP's Scope of Services.

Figure 4: Work Plan Overview



Details

BerryDunn is pleased to confirm that we can perform all services requested in the City's scope of services. Below and on the following pages, we expand upon the phases outlined in Figure 4 and detail the tasks associated with the City's desired scope of work.

Phase 0. Project Planning and Ongoing Management

0.1 Conduct initial project planning. We will conduct an initial project planning teleconference with the City's project team to introduce key team members, clarify goals and objectives, identify known project constraints, and refine dates and/or tasks, as appropriate. We will discuss our approach for managing communications, scope, risks, and resources. We will also request names and contact information for the appropriate City staff members involved in the project.

0.2 Develop a Project Work Plan and Schedule. Based on the information gathered from our initial project planning teleconference, we will develop the Project Work Plan and Schedule. In addition to the components gathered from Task 0.1, the Project Work Plan and Schedule will address our approach to providing the services requested by the City, the agreed-upon time frame for each task, and agreed-upon procedures between our project team and the City's related to project control, including quality management and deliverable submission/acceptance management. We will facilitate a teleconference to review the draft Project Work Plan and Schedule with the City's project team before updating the document to final.

▲ *Deliverable 1 – Project Work Plan and Schedule*

0.3 Develop Biweekly Status Updates. Throughout the engagement, our project manager will provide Biweekly Status Updates that describe the activities and accomplishments for the reporting period, plans for the upcoming month, risks or issues encountered during the reporting period, and anticipated problems that might impact any project deliverable. We will meet with the City's project manager to review the status updates.

▲ *Deliverable 2 – Biweekly Status Updates*

Phase 1. Needs Assessment

1.1 Develop project initiation documents. We will develop a strengths, weaknesses, opportunities, and threats (SWOT) web survey to understand issues and challenges with the City's current system—Tyler Eden. This survey will also include an OCM awareness, desire, knowledge, ability reinforcement (ADKAR) initial assessment. We anticipate issuing this survey to the core City department users and using their responses to help determine the City's current and future ERP needs. Prior to issuing the web survey, we will review questions with the City's project team. The web survey results will act as one of many data points in developing our evaluation of the current system. We will also develop an information request sheet to gather available documentation that will be helpful to us during the project (e.g., organizational charts, documentation on existing systems, and requirements). These initiation documents will also include an announcement memo and functional area listing. Once complete, we will review the SWOT web survey, OCM ADKAR initial assessment, announcement memo, and functional area listing with the City in a work session to solicit feedback before updating to them to final.

1.2 Administer a web survey and an information request, and review the results. Once final, we will administer the SWOT web survey and information request to the City to collect documentation and gather information prior to fact-finding meetings. We will respectfully request that the City provide the requested information in a timely fashion, in advance of our work, to enable us to be more efficient, become more knowledgeable of the current environment, and make best use of City personnel's time.

1.3 Facilitate a stakeholder kickoff presentation. We will prepare for and facilitate a stakeholder kickoff presentation with City leadership and all project stakeholders. This stakeholder kickoff presentation will serve as an opportunity to introduce project team members, discuss goals, present our project approach and methodology, review the schedule of key project dates, and answer questions. As part of this presentation, the City's project sponsor is expected to participate and speak to the goals and objectives of the initiative.

1.4 Facilitate fact-finding and business process analysis meetings. We will conduct fact-finding and business process analysis meetings by City department and functional area—including Finance, Human Resources, IT, Public Works, Engineering and Transportation, Community Development, Police, Recreation and Human Resources, and Library. We will explore experiences in daily interaction with the City's systems, along with any additional areas we identify prior to or during the kickoff presentation. The purpose of these meetings is to review, evaluate, and document the City's existing and future processes. Where appropriate, we will also observe these processes firsthand.

1.5 Conduct follow-up as needed. At the conclusion of the fact-finding meetings, we will conduct follow-up as needed to gain further clarity into the City's business processes.

1.6 Develop a Needs Assessment Report. Drawing on the information gathered through our review of documentation, web survey results, and fact-finding sessions, we will prepare a Needs Assessment Report. This memo will include but not be limited to:

- An overview of how City departments use Tyler Eden currently
- The benefits an upgrade will provide to the City
- A review and analysis of financial, general accounting, payroll, human resources, benefits, and other business processes

Phase 1. Needs Assessment

- Identified weaknesses, associated risks, gaps, and opportunities for the upgrade project
- Best practice functions, processes, and requirements
- Current technical environment
- Recommended integrations with other applications used by City staff—such as Accela, ActiveNet, Library systems, and Neogov
- Tyler Munis product and module reviews and recommendations
- An inventory of the City's necessary reporting
- Enhancements to day-to-day operations
- OCM considerations and plans for developing an change management readiness strategy
- Other recommended key decision points

We will provide a draft of the Needs Assessment Report to the City's project team for review and facilitate a series of work sessions via teleconference to explain our findings, discuss and confirm recommended improvements, gain feedback, and build consensus related to the presented decision points. We believe that it is important to obtain the City's validation and approval of these findings, as this information will serve as the basis for future requirements. We will then revise the report and update to final.

Deliverable 3 – Needs Assessment Report

Phase 2. Tyler Munis Contract Negotiations

2.1 Develop Preliminary Functional and Technical Requirements. BerryDunn has developed a database of technical and functional requirements based on our experience with other governmental agencies and our knowledge of software system functionality and best practices. Drawing from this database, we will make refinements for those processes that are critical or unique to the City. These requirements will support supplemental functionality requirements with key reporting, interface, and conversion enhancements. In our recent experience, those areas have significantly differentiated vendors' solutions and required a specific focus in the selection activities. Our analysis typically results in about 75% of the requirements being defined upfront for most of our clients.

Deliverable 4 – Preliminary Functional and Technical Requirements

2.2 Facilitate work sessions to review requirements. We will facilitate a series of work sessions with the City's stakeholders and our project team members to review the preliminary requirements. We will reconvene many of the same stakeholders that met during fact-finding activities to discuss the future Tyler Munis system capabilities. These sessions will also include a focus on the technical aspects involved with the City's project. Using the preliminary list, we will review and confirm each item and assign a relative criticality to communicate to vendors responding to the list as part of their RFP responses. We will also review potential interfaces and data conversion objects. Once these have been reviewed, we will update the list to final. Our role in facilitating this work sessions is to contribute our focused knowledge of the vendor marketplace and align the items requested in the list with the goals and objectives of the project. For example, we might comment that functionality being requested is beyond the core capabilities of vendors and might represent a cost increase. Conversely, we can

Phase 2. Tyler Munis Contract Negotiations

help recommend requirements to include that might be commonplace today, but beyond the familiarity of City stakeholders.

▲ *Deliverable 5 – Final Functional and Technical Requirements*

2.3 Develop a Sole Source RFP Package. We will develop a Sole Source RFP Package using a proven format that incorporates information pertaining to the history of the project, a high-level description of the City's current environment, desired approach to implementing a new Tyler Munis ERP solution, Final Functional and Technical Requirements, and a structured list of points for vendors to address in their responses. Our project team will also work with the City to develop objective evaluation criteria to include in the RFP. We will then prepare a scoring matrix to track significant strengths and limitations of each proposal reviewed. Upon completion, we will coordinate a work session with the City's PMT to review the draft Sole Source RFP Package and collect any feedback or additional terms for inclusion before updating to final. We will provide the final RFP to the City's project team for distribution through standard channels.

▲ *Deliverable 6 – Sole Source RFP Package*

2.4 Assist with responding to questions and developing addenda. Our project team will assist the City's project team in responding to Tyler's questions and developing corresponding addenda.

2.5 Develop a Proposal Executive Summary Memo. We will review Tyler's proposal to identify issues, risks, exceptions, omissions, and objections, compiling them into a single Proposal Executive Summary Memo. The memo will identify key areas for consideration by the City's Steering Committee related to each Tyler's ability to meet minimum requirements, and their alignment with the evaluation criteria within the Sole Source RFP Package. This memo will also include a comparison of vendor responses to the Final Functional and Technical Requirements.

▲ *Deliverable 7 – Proposal Executive Summary Memo*

2.6 Prepare for and facilitate demonstrations, and debrief. We will meet with the City's project team to discuss the format of vendor demonstration scenarios. We will develop a draft demonstration scenario template and provide it to the City's project team for review. After finalizing an approved version, we will provide the scenarios to Tyler in advance of their demonstrations. We will attend demonstrations and assist the City's project team with facilitation of demonstrations as well. Our project team's extensive background in the demonstration process will provide the City's project team with a unique perspective on how to evaluate and participate in vendor demonstrations. At the conclusion of demonstrations, we will debrief with the City and gather key themes and takeaways.

2.7 Prepare for and conduct reference checks, and debrief. We will assist the City's project team with identifying tasks that should be accomplished prior to reference checks. We will also coordinate with the City's project team to discuss the suggested approach for the reference checks. Once conducted, we will debrief with the City to review results.

2.8 Clarify open items with Tyler as needed. At the conclusion of demonstrations and reference checks, we will clarify open items with Tyler as needed. We will review results of our inquiries with the City as applicable.

Phase 2. Tyler Munis Contract Negotiations

▲ Deliverable 8 – Demonstration Facilitation and Vendor Due Diligence

2.9 Assist with the contract negotiations process. Our project team will support the City in the contract negotiations process. We have been involved in contract negotiations from the client, vendor, and independent consultant perspectives, and understand how the contract impacts the implementation process. In conducting contract negotiations, we will draw on these experiences to help ensure the City's best interests are being met. We will also work with the City's project team and legal counsel, as well as Tyler, to develop a draft contract, using the City's contracting procedures and Tyler's proposal as starting points. We will review the contract documents with the City's project team to help ensure that requirements are clearly defined and to establish that the City agrees to the schedule, implementation process, fee arrangement, scope of services, vendor resources, deliverables, costs, acceptance criteria, and terms and conditions. We will also be present during negotiations with Tyler. Should it become clear at any point during negotiations that the preferred vendor's solution or contract terms will not meet the needs of the City, we might recommend halting negotiations until terms are agreed-upon. In recognition of the many variables not yet known related to the contract negotiation timeline and work effort, we plan to commit up to 40 hours, billed as incurred.

▲ Deliverable 9 – Contract Negotiations Assistance

2.10 Prepare for and help plan a written recommendation to City Council. At the conclusion of the City's requested work effort, we will assist the City by preparing a written recommendation for City Council. We will also plan to attend this meeting the City's project team to help answer questions or provide clarity during this process. The goal is to provide support to City staff as it relates to their decision to upgrade from Tyler Eden to Tyler Munis.

▲ Deliverable 10 – City Council Presentation Support

Optional Phase 3. Implementation Support

With this level of service, our project team will act as the implementation project manager. In this role, we will identify project risks and issues, monitor project activities, provide recommendations to mitigate risks, and lead the coordination of vendor activities. There will be minimal tasks owned by City stakeholders. This level of service assumes the City will provide a PMT that we will oversee.

3.1 Conduct an initial implementation planning work session. We will conduct an initial implementation planning work session with the City's project team to introduce unfamiliar team members, clarify goals and objectives, identify known project constraints, and refine dates and/or tasks as appropriate. As part of this meeting, we will discuss our approach to scope, risk, and resource management. These discussions will inform the development of the Project Charter.

3.2 Develop an Implementation Project Charter. Based on our initial implementation planning work session, we will draft an Implementation Project Charter that encompasses the full scope of the City's implementation. This governance document will include a change management plan, stakeholder register, communication plan, risks and issues register, and status report templates. We will provide the City with the Project Charter and governance documentation and facilitate a work session with the

Optional Phase 3. Implementation Support

City's project team to discuss the documents and collect feedback. We will then update the documents and submit them to the City in final form.

▲ Deliverable 11 – Implementation Project Charter

3.3 Review the vendor's implementation plans. *We will provide an in-depth review of Tyler's implementation plans, including the Management Plan and Project Plan. We will discuss our recommended changes and considerations with the City's project team before communicating requested changes to Tyler. The goal is to collaboratively discuss preferred changes based upon the City's, Tyler's, and BerryDunn's collective experience and perspective for the most advantageous end products.*

▲ Deliverable 12 – Project Plan Review

3.4 Develop project management documents. *Following the review of Tyler's plans, we will develop any necessary supplemental materials we believe to be critical to the City's implementation. These may include further definition of stakeholders, risk management, project documentation, and other items. The particular content areas will be determined by what is included in Tyler's plans, with the goal of removing any redundancy that may cause confusion to project stakeholders. This documentation will be reviewed and confirmed with the City's project team before being put into use.*

▲ Deliverable 13 – Project Management Documents

3.5 Conduct implementation activities. *One of the keys to project success is enabling the City's teams to take on appropriate roles and responsibilities and to make informed decisions for both implementation and long-term operational success and ownership of the Tyler Munis software. Our project management approach is designed with this in mind. Throughout the implementation, we will bring our prior implementation and local government experience to provide a forward-looking perspective, reduce risk, and promote the achievement of the goals and objectives. We anticipate being involved in the following key project management activities of the implementation:*

- ✓ *Reviewing the Project Plan and Schedule in conjunction with other City project team members*
- ✓ *Managing the project scope, deliverables, and timeline with assistance from other City project team members*
- ✓ *Helping to ensure that the City's project team stays focused, tasks are completed on schedule, and the project stays on track*
- ✓ *Coordinating project tasks with assistance from other City project team members*
- ✓ *Functioning as the main point of contact for Tyler's project manager or the City's project manager, participating in daily project activities (when applicable), and tracking project tasks*
- ✓ *Facilitating stakeholder orientation meetings*
- ✓ *Holding monthly meetings with the City's executive committee to update project status and to research a verdict on any escalated process decisions that need to be made*
- ✓ *Reviewing the project budget, including change orders, and Tyler's contract compliance*

Optional Phase 3. Implementation Support

- ✓ *Reviewing vendor invoices against project milestones prior to payment*
- ✓ *Facilitating collaboration between the vendor and the City's technical resource teams to promote a high-performing and highly available deployment*
- ✓ *Facilitating the development of workflow processes with Tyler and City staff*
- ✓ *Facilitating the data conversion process with Tyler and City staff*
- ✓ *Facilitating the development of software interfaces/integrations with Tyler and City staff*
- ✓ *Working with Tyler and City staff to help ensure vendor accountability by:*
 - *Identifying any opportunities to leverage technical enhancements to improve the products and services delivered to the City*
 - *Facilitating the gathering and sharing of any technical information requested by Tyler*
- ✓ *Providing risk management, including the following:*
 - *Identifying project risks*
 - *Developing mitigation strategies*
 - *Communicating project risks to the City and Tyler staff*
 - *Assigning key activities to mitigate or resolve project risks*
 - *Providing weekly or biweekly tracking of project risks and issues, completed tasks, and upcoming project activities*
- ✓ *Providing change management oversight, including the development and maintenance of a change management plan that might include the following:*
 - *Target state definition*
 - *Change structure and governance approach*
 - *Change impact assessment*
 - *Stakeholder (or user) analysis*
 - *Communication plan*
- ✓ *Facilitating the user acceptance testing (UAT) process, including:*
 - *Reviewing Tyler's test plan and any applicable test scripts*
 - *Assessing testing activities*
 - *Recommending modifications to the testing plan to increase the likelihood of success*
 - *Directing City staff in the development of tailored test scripts*
 - *Managing logistics related to scheduling UAT activities*
 - *Providing analysis of test results*
 - *Overseeing regression testing and required configuration changes*
- ✓ *Facilitating oversight of vendor training activities, including:*
 - *Reviewing Tyler's training plan and training materials*
 - *Overseeing Tyler's training activities*
 - *Recommending modifications to the training delivery*
 - *Providing feedback on Tyler's training documentation*
 - *Performing a go-live readiness assessment by phase*
 - *Providing go-live support*

Deliverable 14 – Project Management Activities

Optional Phase 3. Implementation Support

3.6 Conduct a project closeout work session. This work session will involve discussing project lessons learned, measuring achievement of project goals and objectives, discussing incomplete implementation tasks, and conducting transition planning for moving to long-term operation of the ERP solution and associated policies and processes. We will document all the items discussed in a Project Closeout Memo.

3.7 Develop a Project Closeout Memo. Based on the information gathered from our closeout work session, BerryDunn will develop a Project Closeout Memo, which will document lessons learned, compare project outcomes to project goals and objectives, list any remaining action items to conclude the implementation, and identify tasks, roles, and responsibilities for transitioning to operational use of the Tyler Munis solution and associated policies and processes.

- ▲ Deliverable 15 – Project Closeout Memo

EXHIBIT B

COMPENSATION SCHEDULE & REIMBURSABLE EXPENSES

| Phase | Hours Estimate | Cost |
|---|----------------|-----------------|
| Phase 0. Project Planning and Ongoing Management | 28 | \$5,200 |
| Phase 1. Needs Assessment | 130 | \$26,200 |
| Phase 2. Tyler Munis Contract Negotiations | 192 | \$38,400 |
| Total | 350 | \$69,800 |
| <i>Travel Expense Estimate</i> | - | \$7,000 |

Optional Phase 3's timeline and implementation project management costs will largely depend on the contract the City negotiates with Tyler and the role BerryDunn serves during this process. For planning purposes, implementation project management services will be based on an hourly rate of \$205 for services completed through March 30, 2024. Table 2 contains our estimates based upon an assumed 12-month implementation

Table 2: Costs and Hours for Optional Phase 3

| Phase | Monthly Hours | Months | Cost |
|--|---------------|--------|-----------|
| Phase 3. Implementation Support | 120 | 12 | \$295,200 |

We welcome the opportunity to discuss implementation costs estimates further with the City and adjust based on the needs of the City, as appropriate.

EXHIBIT C
INDEMNIFICATION

Consultant shall indemnify, defend with counsel acceptable to City, and hold harmless City and its officers, elected officials, employees, agents and volunteers from and against any and all liability, loss, damage, claims, expenses, and costs (including without limitation, attorney's fees and costs and fees of litigation) (collectively, "Liability") for physical injury, property damage, or death arising out of or in connection with Consultant's performance of the services called for or its failure to comply with any of its obligations contained in this Agreement, except such Liability caused by the sole negligence or willful misconduct of City.

For claims based on negligence in professional services only, the Consultant agrees, to the fullest extent permitted by law, to indemnify and hold harmless the City against damages, liabilities, and costs arising from the negligent acts of the Consultant in the performance of professional services under this Agreement, to the extent that Consultant is responsible for such damages, liabilities, and costs on a comparative basis of fault and responsibility between the Consultant and City. The Consultant shall not be obligated to indemnify the City for the City's own negligence.

Notwithstanding the forgoing, to the extent this Agreement is a "construction contract" as defined by California Civil Code Section 2782, as may be amended from time to time, such duties of Consultant to indemnify shall not apply when to do so would be prohibited by California Civil Code Section 2782.

The Consultant's obligation to defend and indemnify shall not be excused because of the Consultant's inability to evaluate Liability or because the Consultant evaluates Liability and determines that the Consultant is not liable to the claimant. The Consultant must respond within 30 days to the tender of any claim for defense and indemnity by the City. If the Consultant fails to accept or reject a tender of defense and indemnity within 30 days, in addition to any other remedy authorized by law, so much of the money due the Consultant under and by virtue of this Agreement as shall reasonably be considered necessary by the City, may be retained by the City until disposition has been made of the claim or suit for damages, or until the Consultant accepts or rejects the tender of defense, whichever occurs first.

Consultant shall also indemnify, defend and hold harmless the City from all suits or claims for infringement of any patent rights, copyrights, trade secrets, trade names, trademarks, service marks, or any other proprietary rights of any person or persons because of the City or any of its officers, employees, volunteers, or agents use of articles, products things, or services supplied in the performance of Consultant's services under this Agreement, however, the cost to defend charged to Consultant shall not exceed Consultant's proportionate percentage fault.

EXHIBIT D

The novel coronavirus (“COVID-19”) has been declared a worldwide pandemic by the World Health Organization. The City of San Leandro is currently in a local emergency and state of emergency due to the COVID-19 pandemic.

COVID-19 is extremely contagious, and is believed to spread mainly from person-to-person contact, through touched surfaces, and in airborne particles. As a result, federal, state, and local governments, including the City of San Leandro, and federal, state, county, and local health agencies recommend social distancing and additional cleaning protocols to limit the spread of the disease. The City has taken steps and put in place preventative measures recommended by federal, state, and local health agencies to reduce the spread of COVID-19. These measures include steps each person must take to prevent the spread of COVID-19 and include, but are not limited to, requiring face coverings, frequent hand washing and/or use of hand sanitizer, social distancing where possible, limiting of person-to-person contact, frequent cleanings of high-touch surfaces, and avoiding entering any building if they have COVID-19 symptoms.

Consultant shall obey all local orders and abide by all applicable preventative measures recommended by federal, state, county, and local health agencies and any preventative measures specifically implemented by the City. Consultant agrees that when entering any City buildings, Consultant will follow all COVID-19 related signage, wear a face covering, follow all social distancing protocols, and abide by any other COVID-19 preventative measure that are in place when performing the services described in this Agreement. Consultant shall also adhere to any subsequently communicated COVID-19 preventative measures as directed by City staff. The COVID-19 preventative measures are subject to change over time, and Consultant shall maintain knowledge of and adhere to the current COVID-19 preventative measures when interacting with City employees, officials, volunteers, agents, and representatives, and when entering City buildings.