

DESIGN PROFESSIONAL SERVICES AGREEMENT

Project: _____

THIS AGREEMENT is entered into as of the _____ day of _____, _____ by and between the TOWN OF MORAGA, herein called the "Town", and _____, herein called the "Design Professional".

Recitals

WHEREAS, Town desires to obtain _____ services in connection with _____; and

WHEREAS, Design Professional hereby warrants to the Town that Design Professional is skilled and able to provide such services described in Section 1 of this Agreement; and

WHEREAS, Town desires to retain Design Professional pursuant to this Agreement to provide the services described in Section 1 of this Agreement.

Agreement

NOW, THEREFORE, THE PARTIES HERETO AGREE AS FOLLOWS:

1. Scope of Services. Subject to such policy direction and approvals as the Town through its staff may determine from time to time, Design Professional shall perform the services set out in the "Scope of Work" attached hereto as Exhibit "A".

2. Time of Performance. The services of Design Professional are to commence no sooner than _____ and, subject to Town Council approval, be completed not later than _____. Design Professional shall perform its services in accordance with the schedule in Exhibit B. Any changes to these dates in either Section 2 or Exhibit "B" must be approved in writing by _____ or its representatives.

3. Compensation and Method of Payment.

A. Compensation. The compensation to be paid to Design Professional, 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 Design Professional 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 monthly and include adequate documentation demonstrating work performed during the billing period. Town

shall review Design Professional's billing statement and pay Design Professional for services rendered within 45 days of receipt of a complete billing statement that meets all requirements of this Agreement.

C. Changes in Compensation. Design Professional will not undertake any work that will incur costs in excess of the amount set forth in Paragraph 3(A) without prior written amendment to this Agreement as may be directed in writing by Town Manager, as payment in full for the work.

D. Taxes. Design Professional 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 Design Professional.

E. No Overtime or Premium Pay. Design Professional 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. Design Professional shall not receive a premium or enhanced pay for work performed on a recognized holiday. Design Professional 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. Design Professional agrees to testify at Town's request if litigation is brought against Town in connection with Design Professional's report. Unless the action is brought by Design Professional or is based upon Design Professional's negligence, Town will compensate Design Professional for the preparation and the testimony at Design Professional's standard hourly rates, if requested by Town and not part of the litigation brought by Town against Design Professional.

4. Amendment to Scope of Work. Town shall have the right to amend the Scope of Work within the Agreement by written notification to the Design Professional. 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 Design Professional to secure Town's written authorization, by the Town Manager, 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.

5. Duties of Town. Town shall provide all information requested by Design Professional that is reasonably necessary to performing the Scope of Work. Town retains all rights of approval and discretion with respect to the projects and undertakings contemplated by this Agreement.

6. Ownership of Documents. Title to all plans, specifications, maps, estimates, reports, manuscripts, drawings, descriptions and other final work products compiled by the Design Professional 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. Design Professional 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.

7. Employment of Other Design Professionals, Specialists or Experts. Design Professional 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.

8. Conflict of Interest.

A. Design Professional covenants and represents that neither it, nor any officer or principal of its firm, has, or shall acquire any interest, directly or indirectly, which would conflict in any manner with the interests of Town or which would in any way hinder Design Professional's performance of services under this Agreement. Design Professional further covenants that in the performance of the Agreement, no person having any such interest shall be employed by it as an officer, employee, agent or subcontractor without the express written consent of the Town. Design Professional agrees to at all times avoid conflicts of interest, or the appearance of any conflicts of interest, with the interests of the Town in the performance of this Agreement.

B. Design Professional is not a designated employee within the meaning of the Political Reform Act because Design Professional:

(1) will conduct research and arrive at conclusions with respect to its rendition of information, advice, recommendation or counsel independent of the control and direction of the Town or of any Town official, other than normal contract monitoring; and

(2) possesses no authority with respect to any Town decision beyond the rendition of information, advice, recommendation or counsel. (2 Cal. Code Regs. § 18700(a)(2).)

9. Interest of Members and Employees of Town. No member of the Town and no other officer, employee or agent of the Town who exercises any functions or responsibilities in connection with the carrying out of any project to which this Agreement pertains, shall have any personal interest, direct or indirect, in this Agreement, nor shall any such person participate in any decision relating to this Agreement which affects its personal interests or the interest of any corporation, partnership or association in which he/she is directly or indirectly interested.

10. Liability of Members and Employees of Town. No member of the Town and no other officer, employee or agent of the Town shall be personally liable to Design Professional or otherwise in the event of any default or breach of the Town, or for any amount which may

become due to Design Professional or any successor in interest, or for any obligations directly or indirectly incurred under the terms of this Agreement

11. Indemnity.

A. To the fullest extent permitted by law (including, without limitation, California Civil Code Sections 2782 and 2782.8), Design Professional shall defend (with legal counsel reasonably acceptable to the Town) indemnify and hold harmless Town and its officers, agents, departments, officials, representatives and employees (collectively "Indemnitees") from and against any and all claims, loss, cost, damage, injury (including, without limitation, injury to or death of an employee of Design Professional or its sub-Design Professionals), expense and liability of every kind, nature and description (including, without limitation, fines, penalties, incidental and consequential damages, court costs, attorneys fees, litigation expenses and fees of expert consultants or expert witnesses incurred in connection therewith, and costs of investigation), that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of Design Professional, any sub-Design Professional, anyone directly or indirectly employed by them, or anyone that they control (collectively "Liabilities"). Such obligations to defend, hold harmless and indemnify any Indemnitee shall not apply to the extent that such Liabilities are caused by the sole negligence, active negligence, or willful misconduct of such Indemnitee.

B. Neither termination of this Agreement nor completion of the Services shall release Design Professional from its obligations under this Section 11, as long as the event giving rise to the claim, loss, cost, damage, injury, expense or liability occurred prior to the effective date of any such termination or completion.

C. Design Professional agrees to obtain executed indemnity agreements with provisions identical to those set forth in this section from each and every subconsultant or any other person or entity involved by, for, with or on behalf of Design Professional in the performance of this Agreement. If Design Professional fails to obtain such indemnity obligations from others as required, Design Professional shall be fully responsible for all obligations under this Section. Town's failure to monitor compliance with this requirement imposes no additional obligations on Town and will in no way act as a waiver of any rights hereunder. The obligation to indemnify and defend Town as set forth herein is binding on the successors, assigns or heirs of Design Professional and shall survive the termination of this Agreement or this section.

D. Design Professional's compliance with the insurance requirements does not relieve Design Professional from the obligations described in this Section 11, which shall apply whether or not such insurance policies are applicable to a claim or damages.

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

13. Independent Contractor. It is understood that Design Professional, in the performance of the work and services agreed to be performed by Design Professional, shall act as and be an independent contractor and not an agent or employee of Town; and as an independent

contractor, Design Professional shall obtain no rights to retirement benefits or other benefits which accrue to Town's employees, and Design Professional hereby expressly waives any claim it may have to any such rights.

14. Compliance with Laws.

A. General. Design Professional shall use the standard of care in its profession to comply with all applicable federal, state and local laws, codes, ordinances and regulations. Design Professional represents and warrants to Town that it has all licenses, permits, qualifications, insurance and approvals of whatsoever nature which are legally required for Design Professional to practice its profession. Design Professional represents and warrants to Town that Design Professional 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 Design Professional to practice its profession.

B. Workers' Compensation. Design Professional 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 Design Professional certifies that it will comply with such provisions before commencing performance of this Agreement.

C. Prevailing Wage. Design Professional and Design Professional'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. Design Professional 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 Design Professional'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 Design Professional 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.

(1) Design Professional 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) Design Professional 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) Design Professional shall maintain professional errors and omissions liability insurance for protection against claims alleging negligent acts, errors or omissions which may arise from Design Professional's operations under this Agreement, whether such operations be by Design Professional 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 Design Professional:

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

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

(c) Contractor hereby agrees to waive subrogation which any insurer of Contractor may acquire from Contractor by virtue of the payment of any loss. Contractor agrees to obtain any endorsement that may be necessary to effect this waiver of subrogation.

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

(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) Design Professional 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) Design Professional’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, Design Professional shall demonstrate financial capability for payment of such deductibles or self-insured retentions.

17. Assignment Prohibited. Neither the Town nor Design Professional 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.

18. Termination of Agreement.

A. This Agreement and all obligations hereunder may be terminated at any time, with or without cause, by the Town upon 5 days’ written notice to Design Professional. Design Professional may terminate this Agreement upon 30 days’ written notice to Town.

B. If Design Professional 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 Design Professional's expense, be delivered to the Town or to any party it may so designate.

D. In the event termination is without cause, Design Professional 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 Design Professional shall be entitled to compensation for work in progress at the time of termination.

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

20. Amendment. This Agreement constitutes the complete and exclusive statement of the agreement between Town and Design Professional 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.

21. 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.

22. Litigation Costs. If either party becomes involved in litigation arising out of this Agreement or the performance thereof, the court in such litigation shall award reasonable costs and expenses, including attorneys' fees, to the prevailing party. In awarding attorneys' fees, the court will not be bound by any court fee schedule, but shall, if it is in the interest of justice to do so, award the full amount of costs, expenses, and attorneys' fees paid or incurred in good faith.

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

24. 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: **Edric Kwan, Town Engineer**
Town of Moraga
329 Rheem Blvd.
Moraga, CA 94556

If to Design Professional: _____

25. Design Professional's Books and Records.

A. Design Professional 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 Design Professional.

B. Design Professional 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 Design Professional'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 Design Professional, Design Professional's representatives, or Design Professional's successor-in-interest.

26. Equal Employment Opportunity. Design Professional is an equal opportunity employer and agrees to comply with all applicable state and federal regulations governing equal employment opportunity. Design Professional will not discriminate against any employee or applicant for employment because of race, age, sex, creed, color, sexual orientation, marital status or national origin. Design Professional 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. Design Professional further agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.

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

28. 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.

29. 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.

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

- A. Exhibit A: Scope of Work
- B. Exhibit B: Schedule
- C. Exhibit C: Compensation
- D. Exhibit D: Other Consultants, Specialists or Experts Employed by Design Professional

31. 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.

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

33. 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 Design Professional have executed this Agreement as of the date first above written.

TOWN OF MORAGA

DESIGN PROFESSIONAL

By: _____

By: _____

Cynthia Battenberg,
Town Manager

Title: _____

APPROVED AS TO FORM:

By: _____

Michelle Marchetta Kenyon,
Town Attorney

FUNDING:

By: _____

Norman Veloso,
Administrative Services Director

SAMPLE

EXHIBIT A

Scope of Work

[to be inserted]

SAMPLE

EXHIBIT B

Schedule of Performance

[to be inserted]

SAMPLE

EXHIBIT C

Compensation

[to be inserted]

SAMPLE

EXHIBIT D

Other Consultants, Specialists or Experts Employed by Design Professional

[To be Inserted]

SAMPLE