

**MASTER AGREEMENT BETWEEN THE CITY OF CUPERTINO AND
PAVEMENT ENGINEERING INC. FOR INSPECTION AND ASPHALT TESTING &
CONCRETE DESIGN CONSULTANT SERVICES**

THIS MASTER AGREEMENT, for reference dated March , 2017, is by and between CITY OF CUPERTINO, a municipal corporation (hereinafter referred to as "City"), and, PAVEMENT ENGINEERING, INC. whose address is 3820 Cypress Drive, Suite 3, Petaluma, CA, 94954-6964; telephone no. (707) 769-5330 (hereinafter referred to as "Consultant"), and is made with reference to the following:

RECITALS:

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

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

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

D. City and Consultant desire to enter into an agreement for Program and Project Management Services upon the terms and conditions herein.

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

1. **TERM:**

The term of this Agreement shall commence on the date this agreement is executed and shall terminate on June 30, 2018 unless terminated earlier as set forth herein. At City's sole discretion, City may exercise an option to extend the contract term for up to six months. This City shall exercise this option, in writing, on or before June 1, 2018.

2. **SCOPE OF SERVICES**

Consultant shall provide services under this Master Agreement on an “as needed” basis and as set forth in, Exhibit A, Scope of Services, and as specifically defined in a fully executed Service Order as set forth in Exhibit B, Service Order Process; both Exhibits which are attached hereto and incorporated herein by this reference. The City has sole discretion to authorize any Service Order and has no obligation to do so under this Master Agreement.

3. **SCHEDULE OF PERFORMANCE:**

All Consultant services under this Master Agreement shall be completed on or before the end of the Master Agreement Term. Each authorized Service Order shall include its own defined Schedule of Performance. In no case shall any Service Order’s schedule of performance extend beyond the Master Agreement Term.

4. **CONSULTANT COMPENSATION:**

The maximum compensation to be paid to Consultant under this Master Agreement shall not exceed Four Hundred Sixty Nine Thousand Two Hundred Fifty Dollars (\$474,250). The rate of payment is set out in Exhibit C, titled “Compensation”, which is attached hereto and incorporated herein. No payment shall be made under this agreement unless authorized by a fully executed Service Order, beginning with Exhibit A-1. The sum of all Service Orders authorized shall not exceed the maximum compensation for this Master Agreement as defined above.

5. **METHOD OF PAYMENT:**

The method of payment for services performed under this agreement is set out in Exhibit C, titled “Method of Payment”, which is attached hereto and incorporated herein. Consultant shall furnish to City a detailed statement of the work performed for compensation during the term of this Agreement. Consultant may submit monthly invoices for interim progress payments during the course of each authorized Service Order, clearly stating; the total Contract amount, amount paid to date, the work performed and percent complete, and amount due.

All requests for payment from Consultant to City shall be addressed to the City to:

Attention: Roger Lee
City of Cupertino
10300 Torre Ave.
Cupertino CA 95014

6. **TIME IS OF THE ESSENCE:**

Consultant and City agree that time is of the essence regarding the performance of this Agreement.

7. **STANDARD OF CARE:**

Consultant agrees to perform all services hereunder in a manner commensurate with the practice of a professional that specializes in performing professional services of a like nature and complexity, and agrees that all services shall be performed by similarly qualified and experienced personnel who are not employed by the City nor have any contractual relationship with City.

8. **INDEPENDENT PARTIES:**

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

9. **IMMIGRATION REFORM AND CONTROL ACT (IRCA):**

Consultant assumes any and all responsibility for verifying the identity and employment authorization of all of his/her employees performing work hereunder, pursuant to all applicable IRCA or other federal, or state rules and regulations.

Consultant shall indemnify and hold City harmless from and against any loss, damage, liability, costs or expenses arising from any noncompliance of this provision by Consultant.

10. **NON-DISCRIMINATION:**

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

11. **PROJECT COORDINATION**

CITY: The Director of Public Works, or designated agent, shall be representative of City for all purposes under this Agreement. Roger Lee is hereby designated as the Director of Public Works' agent and shall supervise the progress and execution of this Agreement.

CONSULTANT: Consultant shall assign a single Consultant Project Executive to have overall responsibility for the progress and execution of this Agreement for the Consultant. If, subsequent to the execution of the Agreement, circumstances or conditions require a substitute Consultant Project Executive for any reason, the proposed replacement Consultant Project Manager shall be subject to the prior written acceptance and approval of the City Director of Public Works or the above named designated agent.. The designated Consultant Project Executive for the Agreement term shall be Paul Curren.

12. **HOLD HARMLESS:**

A. Indemnity Obligations Subject to Civil Code Section 2782.8.

Where Consultant's services fall within Civil Code Section 2782.8 and where the law establishes a standard of care for Consultant's professional services, and to the extent the Consultant breaches or fails to meet such established standard of care, or is alleged to have breached or failed to meet such standard of care, Consultant shall, to the fullest extent allowed by law, with respect to all services performed in connection with the

Agreement, indemnify, defend, and hold harmless the City and its officers, officials, agents, employees and volunteers from and against any and all liability, claims, actions, causes of action or demands whatsoever against any of them, including any injury to or death of any person or damage to property or other liability of any nature, that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of Consultant or Consultant's employees, officers, officials, agents or independent contractors. Such costs and expenses shall include reasonable attorneys' fees of counsel of City's choice, expert fees and all other costs and fees of litigation. Consultant shall not be obligated under this Agreement to indemnify City to the extent that the damage is caused by the sole or active negligence or willful misconduct of City, its agents or employees.

Notwithstanding the foregoing, the Consultant has no duty to provide or to pay for an up-front defense against unproven claims or allegations, but shall pay or reimburse the City for its reasonable attorneys' fees of counsel of City's choice, expert fees and all other costs and fees of litigation to the extent caused by the negligence, recklessness, or willful misconduct of Consultant or its employees, officers, officials, agents or independent contractors. However, the Consultant shall provide its immediate cooperation to the City, at no additional cost to the City, in defending and resolving such claims.

B. Claims for Other Liability.

For all liabilities other than those included within paragraph A. above, Consultant shall, to the fullest extent allowed by law, with respect to all services performed in connection with the Agreement, indemnify, defend, and hold harmless the City and its officers, officials, agents, employees and volunteers from and against any and all liability, claims, actions, causes of action or demands whatsoever against any of them, including any injury to or death of any person or damage to property or other liability of any nature, whether physical, emotional, consequential or otherwise, arising out, pertaining to, or related to the performance of this Agreement by Consultant or Consultant's employees, officers, officials, agents or independent contractors. Such costs and expenses shall include reasonable attorneys' fees of counsel of City's choice, expert fees and all other costs and fees of litigation.

13. **INSURANCE:**

On or before the commencement of the term of this Agreement, Consultant shall furnish City with certificates showing the type, amount, class of operations covered, effective dates and dates of expiration of insurance coverage in compliance with paragraphs 12A, B, C, D and E. Such certificates, which do not limit Consultant's

indemnification, shall also contain substantially the following statement: "Should any of the above insurance covered by this certificate be canceled or coverage reduced before the expiration date thereof, the insurer affording coverage shall provide thirty (30) days' advance written notice to the City of Cupertino by certified mail, Attention: City Manager." It is agreed that Consultant shall maintain in force at all times during the performance of this Agreement all appropriate coverage of insurance required by this Agreement with an insurance company that is acceptable to City and licensed to do insurance business in the State of California. Endorsements naming the City as additional insured shall be submitted with the insurance certificates.

A. COVERAGE:

Consultant shall maintain the following insurance coverage:

(1) **Workers' Compensation:**

Statutory coverage as required by the State of California.

(2) **Liability:**

Commercial general liability coverage in the following minimum limits:

Bodily Injury: \$500,000
 each occurrence
 \$1,000,000
 aggregate - all other

Property Damage: \$100,000 each occurrence
 \$250,000 aggregate

If submitted, combined single limit policy with aggregate limits in the amounts of \$1,000,000 will be considered equivalent to the required minimum limits shown above.

(3) **Automotive:**

Comprehensive automotive liability coverage in the following minimum limits:

Bodily Injury: \$500,000 each occurrence

Property Damage: \$100,000 each occurrence

or

Combined Single Limit: \$500,000 each occurrence

B. SUBROGATION WAIVER:

Consultant agrees that in the event of loss due to any of the perils for which he/she has agreed to provide comprehensive general and automotive liability insurance, Consultant shall look solely to his/her insurance for recovery. Consultant hereby grants

to City, on behalf of any insurer providing comprehensive general and automotive liability insurance to either Consultant or City with respect to the services of Consultant herein, a waiver of any right to subrogation which any such insurer of said Consultant may acquire against City by virtue of the payment of any loss under such insurance.

C. **FAILURE TO SECURE:**

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

D. **ADDITIONAL INSURED:**

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

E. **SUFFICIENCY OF INSURANCE:**

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

14. **CONFLICT OF INTEREST:**

Consultant warrants that it is not a conflict of interest for Consultant to perform the services required by this Agreement. Consultant may be required to fill out a conflict of interest form or Statement of Economic Interest (Form 700) if the services provided under this Agreement require Consultant to make certain governmental decisions or serve in a staff capacity as defined in Title 2, Division 6, Section 18700, *et seq.* of the California Code of Regulations.

15. **PROHIBITION AGAINST TRANSFERS:**

Consultant shall not assign, sublease, hypothecate, or transfer this Agreement, or any interest therein, directly or indirectly, by operation of law or otherwise, without prior written consent of City. Any attempt to do so without said consent shall be null and void, and any assignee, sub-lessee, hypothecate or transferee shall acquire no right or interest by reason of such attempted assignment, hypothecation or transfer. However, claims for money by Consultant from City under this Agreement may be assigned to a bank, trust company or other financial institution without prior written consent. Written notice of such assignment shall be promptly furnished to City by Consultant.

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

16. **SUBCONSULTANT APPROVAL:**

Unless prior written consent from City is obtained, only those people and sub-consultants whose names are included in this Agreement shall be used in the performance of this Agreement. In the event that Consultant employs sub-consultants, such sub-consultants shall be required to furnish proof of workers' compensation insurance and shall also be required to carry, at a minimum, general, automobile and professional liability insurance equal to the insurance maintained by the Consultant as required by this agreement. In addition, any work or services subcontracted hereunder shall be subject to each provision of this Agreement.

17. **PERMITS AND LICENSES:**

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

18. **REPORTS:**

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

B. All Reports prepared by Consultant may be used by City in execution or implementation of:

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

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

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

E. No report, information or other data given to or prepared or assembled by Consultant pursuant to this Agreement shall be made available to any individual or organization by Consultant without prior approval by City.

F. Electronic and hard copies of Consultant's work product shall constitute the Project deliverables. Documents shall be in Microsoft Word and PDF formats. City holds Consultant harmless for any modifications to the documents.

19. **RECORDS:**

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

Consultant shall maintain adequate records of services provided in sufficient detail to permit an evaluation of services. All such records shall be maintained in accordance with generally accepted accounting principles and shall be clearly identified and readily accessible. Consultant shall provide free access to such books and records to the representatives of City or its designees during normal business hours, and gives City

the right to examine and audit same, and to make transcripts therefrom as necessary, and to allow inspection of all work, data, documents, proceedings and activities related to this Agreement. Such records, together with supporting documents, shall be kept separate from other documents and records and shall be maintained for a period of three (3) years after receipt of final payment.

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

20. **NOTICES:**

All notices, demands, requests or approvals to be given under this Agreement shall be given in writing and conclusively shall be deemed served when delivered personally or on the second business day after the deposit thereof in the United States Mail, postage prepaid, registered or certified, addressed as hereinafter provided.

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

City of Cupertino
10300 Torre Ave.
Cupertino CA 95014
Attention: Roger Lee

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

Pavement Engineering, Inc.
3820 Cypress Drive, Suite 3
Petaluma, CA, 94954-6964
Attention: Eric Nejedlo

21. **TERMINATION:**

In the event Consultant fails or refuses to perform any of the provisions hereof at the time and in the manner required hereunder, Consultant shall be deemed in default in the performance of this Agreement. The City shall notify the Consultant of such default

,in writing, specifying the nature of such default and the steps necessary to cure such default, If, after receipt by Consultant, such default is not cured within the time specified, City may terminate the Agreement forthwith by giving to the Consultant written notice thereof.

City shall have the option, at its sole discretion and without cause, of terminating this Agreement by giving seven (7) days' prior written notice to Consultant as provided herein. Upon termination of this Agreement, each party shall pay to the other party that portion of compensation specified in this Agreement that is earned and unpaid prior to the effective date of termination.

In the event of termination, Consultant shall deliver to City, copies of all reports, documents, and other work performed by Consultant under this Agreement.

22. COMPLIANCES:

Consultant shall comply with all laws, state or federal and all ordinances, rules and regulations enacted or issued by City including, without limitation, the following.

A. **PREVAILING WAGES:** Consultant shall comply with the City's Labor Compliance Program and all other requirements set forth in Labor Code section 1770 et seq. Consultant shall pay prevailing wages. Consultant will submit monthly certified payroll records to the City for all employees and subcontractors in a preapproved format or a City provided form. Any delay in remitting certified payroll reports to the City upon request from the City will result in either delay and/or forfeit of outstanding payment to Consultant

B. **WORKING DAY:** Consultant shall comply with California Labor Code Section 1810, et seq. which provides that work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, must be compensated as overtime, at not less than 1 ½ times the basic rate of pay.

C. **PAYROLL RECORDS:** Consultant shall comply with California Labor Code Section 1776 which requires certified payroll records be maintained with the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with this Agreement. The Payroll Records shall be made available for inspection as provided in California Labor Code Section 1776.

D. APPRENTICES: Consultant shall comply with California Labor Code Section 1777.5 regarding apprentices.

23. **CONFLICT OF LAW:**

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

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

24. **ADVERTISEMENT:**

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

25. **WAIVER:**

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

26. **INTEGRATED CONTRACT:**

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

27. **GIFTS:**

A. Consultant is familiar with City's prohibition against the acceptance of any gift by a City officer or designated employee, which prohibition is found in City Administrative Procedures.

B. Consultant agrees not to offer any City officer or designated employee any gift prohibited by the Administrative Procedures.

C. The offer or giving of any prohibited gift shall constitute a material breach of this Agreement by Consultant. In addition to any other remedies, City may have in law or equity, City may terminate this Agreement for such breach as provided in Section 19 of this Agreement.

28. **INSERTED PROVISIONS:**

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

29. **REPRESENTATION OF AUTHORITY:**

The person executing this agreement on behalf of the CONSULTANT does hereby represent and warrant that the CONSULTANT is a sole proprietor in the State of California and has full right, power, and authority to enter into and carry out all actions contemplated by this Agreement.

30. **CAPTIONS:**

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

IN WITNESS WHEREOF, the parties have caused the Agreement to be executed.

CONSULTANT

Pavement Engineering Inc.
A California Corporation

By _____

William J. Long
Title: Vice President

Date _____

Tax I.D. No.: _____

Address:
3820 Cypress Drive, Suite 3,
Petaluma, CA, 94954-6964

CITY OF CUPERTINO

A Municipal Corporation

By _____

Timm Borden, Director of Public Works

Date _____

APPROVED AS TO FORM:

Randolph Hom, City Attorney

ATTEST:

Grace Schmidt, City Clerk

Contract Amount: \$474,250

Account No.: 270-85-821-900-921