

**AGREEMENT BETWEEN THE CITY OF CUPERTINO
AND CITY OF SAN JOSE
FOR PAVEMENT RESTORATION OF
BOLLINGER RD BETWEEN MILLER AVE AND LAWRENCE EXPRESSWAY**

This Agreement (herein “Agreement”) is made and entered into this ___ day of _____, 2020, (herein the “Effective Date”) by and between the City of Cupertino, a California municipal corporation, with its principal place of business located at 10300 Torre Avenue, Cupertino, California 95014 (herein “CUPERTINO”) and the City of San José, a California chartered municipal corporation, with its principal place of business located at 200 E. Santa Clara St. 8th Floor, San Jose, CA 95113 (herein “SAN JOSE”). CUPERTINO and SAN JOSE may be referred to herein individually as a “Party” or as “City” or collectively as the “Parties,” “Cities,” or the “Parties to this Agreement.”

RECITALS

WHEREAS:

- A. CUPERTINO and SAN JOSE find that it is in the public interest to remove and replace failed asphalt on Bollinger Rd between Miller Ave and Lawrence Expressway, over which CUPERTINO and SAN JOSE have jurisdiction; and
- B. It is in the public interest for CUPERTINO and SAN JOSE to complete the PROJECT (as defined in Section 1, below) in a cooperative and economical manner by constructing CUPERTINO’s and SAN JOSE’s portions of the PROJECT together; and
- C. Each Party has agreed to perform its portion of the work as described herein, under its own direction.

In consideration of the above referenced recitals and the following mutual covenants, agreements and obligations of the parties, CUPERTINO and SAN JOSE agree as follows:

AGREEMENT PROVISIONS

1. PROJECT DESCRIPTION:

The work to be performed under this Agreement will consist of milling approximately 38,708 square yards of asphalt to a depth of three (3) inches, placing 5,100 TN of rubberized hot mix asphalt, adjusting utility covers and replacement of traffic markings, markers and legends (herein the “PROJECT”). The work to be performed is more fully described in the document entitled “Scope of Work and Schedule of Performance” set forth in Exhibit A, attached and incorporated by reference.

The City limit between CUPERTINO and SAN JOSE along Bollinger Rd from Miller Ave to Lawrence Expressway is approximately in the center of the street, and CUPERTINO and SAN JOSE each maintains its respective half of the street within its jurisdiction. Therefore, CUPERTINO and SAN JOSE will each be responsible for 50% of project construction costs.

2. CUPERTINO’S OBLIGATIONS:

CUPERTINO agrees as follows:

- A. To act as the lead agency to administer the construction of the PROJECT. Administration shall include preparation of specifications, contract documents and cost estimate; notification of local business; coordination with various agencies; preparation of all necessary environmental

documents; obtaining permits; obtaining bids; awarding the construction agreement; administering the construction agreement; providing materials control and inspection services; and making progress payments to the contractor.

- B. To promptly provide SAN JOSE with awarded final specifications and contract documents for the PROJECT.
- C. To pay CUPERTINO's share of the PROJECT cost. The Project Cost is defined as the actual amount paid to the contractor for construction of the PROJECT. CUPERTINO's share of the Project Cost is 50% of Project Cost.
- D. To cooperate with SAN JOSE should SAN JOSE raise any issues concerning the work in SAN JOSE's jurisdiction that requires correction prior to acceptance or within the warranty period.
- E. To assign as the designated project manager for CUPERTINO for the duration of the PROJECT Jo Anne Johnson (phone number: 408-777-3245). CUPERTINO's project manager shall have all the necessary authority to direct technical and professional work within the scope of the Agreement and shall serve as the principal point of contact with SAN JOSE.
- F. To keep and maintain a complete copy of all records regarding costs and expenditures relating to the PROJECT, together with a complete copy of all plans, specifications, reports, contracts and other documents relating to the PROJECT, and the same shall be available for inspection by SAN JOSE at any time during usual business hours.

3. SAN JOSE'S OBLIGATION:

SAN JOSE agrees as follows:

- A. SAN JOSE shall provide pavement design, striping plans and surveying services for monument preservations.
- B. To pay SAN JOSE's 50% share of the Project Cost to CUPERTINO, up to a maximum amount of \$707,286.00 including contingencies/change orders. CUPERTINO shall not approve change orders in excess of 10% of the project cost without the consent of SAN JOSE. Should SAN JOSE's 50% share of the Project Cost exceed \$707,286.00, SAN JOSE'S ability to pay above \$707,286.00 requires appropriation by San Jose's City Council. SAN JOSE's share of the Project Cost includes 100% of the contractor costs for work on the SAN JOSE-owned portion of the road.
- C. To pay its share of the Project Cost within forty-five (45) business days of receiving and approving the detailed invoice from CUPERTINO, provided that the following conditions are met:
 - 1. The PROJECT has been completed and SAN JOSE has approved the portion of the work in its jurisdiction. Acceptance by SAN JOSE shall be made in writing to CUPERTINO; and
 - 2. The detailed invoice sets forth the cost of construction of all PROJECT work based on the actual contract unit prices paid and negotiated change order(s), if any.
- D. To assign as the designated project manager for SAN JOSE for the duration of the PROJECT Octavio Duran (phone number: 408-794-1986). SAN JOSE's project manager shall have all the

necessary authority to review and approve and accept technical and professional work within the scope of the Agreement and shall serve as the principal point of contact with CUPERTINO. SAN JOSE may request documentation of such costs, and may review the original invoices and weight certificates or request copies of same, which shall be provided within a reasonable time.

4. TERM OF AGREEMENT:

- A. Unless otherwise modified by a written amendment to this Agreement, the term of this Agreement shall be one (1) year from the Effective Date or until the PROJECT acceptance by both parties and final payments of all outstanding balances, whichever is earlier.
- B. Consistent with City of San José Standard Specifications, Section 7-1.23, CUPERTINO shall cause the contractor to provide a warranty period of at least one (1) year from the acceptance date.

5. OWNERSHIP AND MAINTENANCE:

- A. Upon completion of all work under this Agreement, ownership and title to all materials, equipment and appurtenances installed as a part of the PROJECT within the City limits of SAN JOSE will automatically be vested in SAN JOSE, and all materials, equipment and appurtenances installed as a part of the PROJECT within the city limits of CUPERTINO will be vested in CUPERTINO, and no further agreement will be necessary to transfer ownership.
- B. This Agreement does not change any authority or responsibility between CUPERTINO and SAN JOSE with regard to maintenance, operation or further repair responsibility.

6. CONTRACTOR SHALL BE AN INDEPENDENT CONTRACTOR:

Any contractor(s) hired by any Party to perform the work included in the PROJECT shall not be an agent or employee of any Party and will perform such work as independent contractor. All persons employed by or contracted with such contractor(s) to furnish labor and/or materials in connection with the work in the PROJECT shall not be employees of any Party in any respect.

7. TERMINATION:

Once CUPERTINO has awarded the construction contract for the PROJECT, the Agreement can be terminated only upon the mutual written consent and terms acceptable to all Parties.

8. NO PLEDGING OF EITHER CITY'S CREDIT:

Under no circumstances shall either CUPERTINO or SAN JOSE have authority or power to pledge the credit of the other public entity or incur obligation in the name of the other public entity.

9. NO THIRD PARTY BENEFICIARY:

This Agreement shall not be construed or deemed to be an agreement for the benefit of any third party or parties and no third party or parties shall have any claim or right of action hereunder for any cause whatsoever.

10. AMENDMENTS:

No alternation or violation of the terms of this Agreement shall be valid unless made in writing and signed by the parties and incorporated into this Agreement

11. NOTICES:

Notices are to be sent as follows:

To SAN JOSE: Octavio Duran
Senior Engineer - Department of Transportation
City of San José
1404 Mabury Road
San Jose, CA 95133

To CUPERTINO: Jo Anne Johnson
Public Works Project Manager
City of Cupertino
10300 Torre Avenue
Cupertino, CA 95014

12. SEVERABILITY CLAUSE:

In case any one or more of the provisions contained herein shall, for any reason, be held invalid, illegal, or unenforceable in any respect, it shall not affect the validity of the other provisions which shall remain in full force and effect.

13. ENCROACHMENT PERMITS:

All Parties to this Agreement will cooperate and/or provide access to its consultants, engineers and contractors for the PROJECT in the jurisdictional boundaries of each Party. Contractor shall obtain street opening permit from SAN JOSE and SAN JOSE shall provide such a permit at no cost.

14. HOLD HARMLESS/INDEMNIFICATION:

Neither of the respective Parties, their respective City Council, employees, officers, agents and assigns shall be responsible to the other Party for any damage or liability occurring by reason of anything done or omitted to be done by the other Party in connection with the PROJECT.

It is further understood and agreed that pursuant to California Government Code Section 895.4, that each Party shall fully indemnify and hold the other Party harmless from any liability imposed for injury (as defined in Government Code Section 810.8) by reason of anything done or omitted to be done by the indemnifying Party in connection with any work, authority or jurisdiction delegated to the respective Party under this Agreement. This hold harmless and indemnification provision shall apply to any activities, errors or omissions of the indemnifying Party and/or that Party's officers, employees, agents, or any person or entity acting or omitting to act for or on behalf of said Party or such person or entities as are specifically authorized and empowered by that Party to act for it. For the activities, errors, and/or omissions of the contractor retained for the Project, each Party shall defend, indemnify and hold harmless the other Party to the fullest extent legally possible for all work performed in the indemnifying Party's jurisdiction.

15. CAPTIONS:

The captions of the various sections, paragraphs and subparagraphs of this Agreement are for convenience only and shall not be considered nor referred to for resolving questions of interpretation of this Agreement.

16. INSURANCE REQUIREMENTS:

CUPERTINO shall require any contractor awarded a contract for any portion of the work to be done on the PROJECT to secure and maintain in full force and effect at all times during construction and performance of the PROJECT, and until said PROJECT is accepted by all Parties, and any other time periods specified in the 2020 PAVEMENT MAINTENANCE PROJECT - PHASE 2 (Project No. 2020-101) contract documents, bodily injury insurance, and property damage insurance, at no additional cost to either SAN JOSE, with coverage amounts, required endorsements, certificates of insurance, and coverage verifications satisfactory and acceptable to all Parties. SAN JOSE, its respective City Council, commissions, officers, employees, volunteers and agents shall be added as additional insureds on the commercial general liability policy with respect to liability arising out of Contractor's work for CUPERTINO on this Project.

It is mutually understood that during the term of the construction activities on the PROJECT, CUPERTINO will require the successful contractor to carry commercial general liability in amounts of not less than Two Million Dollars (\$2,000,000) per occurrence; automobile liability in an amount not less than Two Million Dollars (\$2,000,000) per accident; and a Workers' Compensation Insurance policy as required by the State of California, with Statutory and Employer's Liability Insurance limits of not less than One Million Dollars (\$1,000,000).

17. STATUTES AND LAW GOVERNING CONTRACT:

This Agreement shall be governed and construed in accordance with the statutes and laws of the State of California. CUPERTINO shall require that any contractor awarded a contract for any portion of the work to be done on the PROJECT comply with the requirements for prevailing wage under Labor Code Section 1770, et seq.

18. WAIVER:

The Parties' waiver of any term, condition or covenant, or breach of any term, condition or covenant shall not be construed as a waiver of any other term, condition or covenant or breach of any other term, condition or covenant.

19. ENTIRE AGREEMENT:

This Agreement contains the entire Agreement between CUPERTINO and SAN JOSE relating to the PROJECT. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force or effect.

20. OTHER AGREEMENTS:

This Agreement shall not prevent either Party from entering into similar agreements with others. The Parties acknowledge and accept the terms and conditions of this Agreement as evidenced by the

following signatures of their duly authorized representatives. It is intent of the Parties that this Agreement shall become operative on the effective date.

The Parties acknowledge and accept the terms and conditions of this Agreement as evidenced by the following signatures of their duly authorized representatives. It is the intent of the Parties that this Agreement shall become operative on the Effective Date.

CITY OF CUPERTINO, CALIFORNIA,

10300 Torre Avenue
Cupertino, California 95014
Phone: (408) 777-3212
Fax: (408) 777-3366

APPROVED AS TO FORM:

HEATHER M. MINNER Date
Cupertino City Attorney

DEBORAH FENG Date
City Manager

ATTEST:

Kirsten Squarcia
City Clerk

CITY OF SAN JOSE, CALIFORNIA

200 E. Santa Clara Street
San Jose, CA 95113
Phone: (408) 277-5777
Fax: (408) 277-3131

APPROVED AS TO FORM:

JON CALEGARI Date
Deputy City Attorney

By: _____ Date
LELAND WILCOX
Chief of Staff
Office of the City Manager

EXHIBIT “A”

SCOPE OF WORK AND SCHEDULE OF PERFORMANCE

The project consists of milling approximately 38,708 square yards of existing asphalt to a depth of three inches and placement of approximately 5,100 tons of Rubberized Hot Mix Asphalt on Bollinger Road between Miller Avenue and Lawrence Expressway, adjustment of utility covers, and replacement of asphalt striping legends and Markers. Fifty percent of work is located within the City of Cupertino and fifty percent of work is located within the City of San Jose.

SAN JOSE to prepare pavement design, striping plans and provide surveying services for monument preservation within project limits.

The work to be performed is fully described in the 2020 PAVEMENT MAINTENANCE PROJECT - PHASE 2, (Project No. 2020-101) contract documents.

The contract documents are herein incorporated to this Agreement by reference.

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