

**CITY OF HERCULES
PROFESSIONAL SERVICES AGREEMENT**

This Agreement ("**Agreement**") for professional services is made on January 23, 2019, between the City of Hercules, a California municipality ("**City**"), and West Yost Associates, a Wastewater Engineering Consulting Company ("**Consultant**") (individually, a "**Party**," and collectively, the "**Parties**").

1. Scope of Services. Consultant will provide to City the professional services described in the Scope of Services, attached as **Attachment A** and incorporated in this Agreement (the "**Services**"). Only the City Council or the City Manager may authorize any change or addition to the Scope of Services specified in Attachment A.

2. Term. This Agreement will become effective on January 23, 2019 ("**Effective Date**"), and will terminate upon the full and satisfactory completion of the Services or as otherwise specified in Attachment A, unless terminated sooner in accordance with Section 10 of this Agreement. Time is of the essence with respect to all provisions of this Agreement that specify a time for performance.

3. Compensation. For the full and satisfactory completion of the Services, City will pay Consultant in an amount not to exceed \$153,039, without prior written authorization by City, pursuant to the terms set forth in **Attachment B** on Payment, which is attached to and incorporated in this Agreement. Consultant's compensation is intended to encompass all costs required for performing the Services, including overhead and indirect costs. Except as expressly provided in Attachment B, Consultant will not be entitled to reimbursement for expenses it incurs to provide the Services.

3.1 Payment. City will pay Consultant for Services satisfactorily provided during each calendar month within 30 days following City receipt and approval of a detailed invoice. The invoice must include, at a minimum: a description of the specific Services provided; the name of the individual providing the Services; the date(s) upon which the Services were provided; the time spent providing the Services; the amount due for the Services; and the basis for calculating the amount due.

3.2 Additional Services. If the City requests related services beyond the Scope of Services described in Attachment A, the Consultant will provide City a written estimate for the additional services ("**Additional Services**"). Consultant will not provide Additional Services until Consultant has received written authorization from the City to perform the Additional Services. Consultant will not be entitled to payment for Additional Services performed without City's prior written authorization or for costs to correct Consultant's errors or omissions.

4. Independent Contractor. The Parties agree that Consultant will act as an independent contractor under this Agreement and will have control of its work and the manner in which the Services are performed. Consultant is not an employee of City and is not entitled to participate in any health, retirement, or similar employee benefits from the City.

5. Consultant's Warranties.

5.1 Consultant warrants that all Services provided under this Agreement will be performed in accordance with generally accepted professional practices and standards for Consultant's profession in the Bay Area.

5.2 Consultant warrants that all Services provided under this Agreement will be performed in accordance with applicable federal, state, and local laws and regulations, including, but not limited to, conflict of interest laws and City ordinances and policies.

5.3 Consultant warrants that Consultant has no present interest which would conflict in any manner with the performance of Services on the City's behalf.

5.4 Consultant warrants that it will comply with the City's Nepotism and Cronyism Policy.

6. Notice. Any notice, billing, or payment required by this Agreement must be made in writing, and sent to the other Party by personal delivery, U.S. Mail, a reliable overnight delivery service, or by email as a PDF (or comparable) file. Notice is effective upon delivery unless otherwise specified. Notice for each Party will be given as follows:

City:

City of Hercules
111 Civic Drive
Hercules, CA 94547
(510) 799-8200
Attn: City Clerk

Copy to: Mike Roberts, PE
Email: mikeroberts@ci.hercules.ca.us

Consultant:

Name: West Yost Associates
Address: 1777 Botelho Dr., Ste. 240
Walnut Creek, CA 94596
Phone: (925)949-5800
Attn: John Goodwin, Vice President

Copy to: Lani Good, PE
Email: lgood@westyost.com

7. Indemnity. Subsection 7.1 is not applicable to this Agreement if Consultant's Services are "design professional" services as that term is used and defined in Civil Code section 2782.8. Subsection 7.2 is applicable to this Agreement if Consultant's Services are "design professional" services as used and defined in Civil Code section 2782.8.

7.1 To the full extent permitted by law, Consultant will indemnify, defend with counsel acceptable to City, and hold harmless City, its governing body, officers, agents, employees, and volunteers (collectively, "**City Indemnitees**") from and against any and all liability, demands, loss, damage, claims, settlements, expenses, and costs (including, without limitation, attorney fees, expert witness fees, and costs and fees of litigation) (collectively, "**Liability**") of every nature arising out of or in connection with Consultant's acts or omissions with respect to this Agreement, except such Liability caused by the active negligence, sole negligence, or willful misconduct of any of the City Indemnitees. This indemnification obligation is not limited by any limitation on the amount or type of damages or compensation payable under Workers' Compensation or other employee benefit acts, or by insurance coverage limits, and will survive the expiration or early termination of this Agreement. This Subsection 7.1 does not apply if the Services to be provided

under this Agreement are design professional services provided by a licensed architect, landscape architect, professional engineer, or professional land surveyor.

7.2 To the full extent permitted by law, Consultant will indemnify, defend, and hold harmless City, its City Council, officials, officers, agents, employees, and volunteers from and against any and all liability, loss, damage, claims, expenses and costs (including, without limitation, attorney fees and costs and fees of litigation) (collectively, "**Liability**") of every nature which arises out of, pertains to, or relates to the negligence, recklessness, or willful misconduct of Consultant in the performance of this Agreement, except such Liability caused by the active negligence, sole negligence or willful misconduct of City. This indemnification obligation is not limited by any limitation on the amount or type of damages or compensation payable under Workers' Compensation or other employee benefit acts, or by insurance coverage limits, and will survive the expiration or early termination of this Agreement. This Subsection 7.2 is applicable if the Services to be provided under this Agreement are design professional services provided by a licensed architect, landscape architect, professional engineer, or professional land surveyor.

8. Insurance. Before providing any Services under this Agreement, Consultant is required to procure and provide proof of the insurance coverage required by this Section in the form of certificates and endorsements. Each certificate of insurance must state that the coverage afforded by the policy or policies will not be reduced, cancelled or allowed to expire without at least 30 days written notice to City, unless due to nonpayment of premiums, in which case at least 10 days written notice will be made to City. The required insurance must cover the activities of Consultant and its employees or subcontractors relating to or arising from the performance of the Services, and must remain in full force and effect at all times during the term of the Agreement. All required insurance must be issued by an insurer licensed to do business in the State of California, and each such insurer must have an A.M. Best financial strength rating of "A" or better and a financial size rating of "VIII" or better. If Consultant fails to provide any of the required coverage, City may, at its sole discretion, purchase such coverage at Consultant's expense and deduct the cost from payments due to Consultant.

8.1 The following insurance policies and limits are required for this Agreement:

8.1.1 Commercial General Liability Insurance ("CGL"). CGL insurance issued on an occurrence basis, including coverage of liability arising from Consultant's acts or omissions in the performance of Services under this Agreement, with limits of at least \$1,000,000.00 per occurrence.

8.1.2 Automotive. Commercial automotive liability coverage for owned, non-owned and hired vehicles must provide coverage of at least \$1,000,000.00 combined single limit per accident for bodily injury, death, or property damage.

8.1.3 Workers' Compensation Insurance and Employer's Liability. The policy must comply with the requirements of the California Workers' Compensation Insurance and Safety Act, with limits of at least \$1,000,000.00. If Consultant is self-insured, Consultant must provide its duly authorized Certificate of Permission to Self-Insure.

8.1.4 Professional Liability. This insurance must insure against Consultant's errors and omissions in the provision of Services under this Agreement, in an amount no less than \$1,000,000.00 combined single limit.

8.2 Subrogation Waiver. Each required policy must include an endorsement that the insurer agrees to waive any right of subrogation it may have against City or the City's insurers.

8.3 The CGL policy and the automotive liability policy must include the following endorsements:

(1) The City, including its Council, officials, officers, employees, agents, volunteers and consultants (collectively, "**Additional Insured**") must be named as an additional insured for all liability arising out of the operations by or on behalf of the named insured, and the policy must protect the Additional Insured against any and all liability for personal injury, death or property damage or destruction arising directly or indirectly in the performance of the Agreement.

(2) The inclusion of more than one insured will not operate to impair the rights of one insured against another, and the coverages afforded will apply as though separate policies have been issued to each insured.

(3) The insurance provided is primary and no insurance held or owned by City will be called upon to contribute to a loss.

(4) Any umbrella or excess insurance must contain or be endorsed to contain a provision that such coverage will also apply on a primary or non-contributory basis for the benefit of City before the City's own insurance or self-insurance will be called upon to protect it as a named insured.

9. Dispute Resolution. In the event that any dispute arises between the Parties in relation to this Agreement, the Parties agree to meet face to face as soon as possible to engage in a good faith effort to resolve the matter informally. In the event that any dispute arises between the Parties in relation to this Agreement, and the dispute is not resolved by informal discussions, the Parties agree to submit the dispute to mediation.

9.1 Either Party may give written notice to the other Party of a request to submit a dispute to mediation, and a mediation session must take place within 60 days after the date that such notice is given, or sooner if reasonably practicable. The Parties will jointly appoint a mutually acceptable mediator. The Parties further agree to share equally the costs of the mediation, except costs incurred by each Party for representation by legal counsel.

9.2 Good faith participation in mediation pursuant to this Section is a condition precedent to either Party commencing litigation in relation to the dispute.

10. Early Termination.

10.1 Termination for Convenience. City may terminate this Agreement for convenience by giving 10 calendar days written notice to Consultant. In the event City elects to terminate the Agreement without cause, it will pay Consultant for Services satisfactorily provided up to that date.

10.2 Termination for Cause. If either Party breaches this Agreement by failing to timely or satisfactorily perform any of its obligations or otherwise violates the terms of this Agreement, the other Party may terminate this Agreement by giving written notice five calendar days prior to the effective date of termination, specifying the reason and the effective date of the termination. Consultant will be entitled to payment for all Services satisfactorily provided up to the effective date of termination, except that the City may deduct from that payment the amount of costs the City incurred, if any, because of Consultant's breach of the Agreement.

11. Work Product. City will be the sole owner of all rights to any work product in any form which has been prepared by Consultant on City's behalf pursuant to this Agreement, unless otherwise specified in writing by the Parties.

12. Records. Unless otherwise specified in Attachment A, Consultant will maintain records related to this Agreement for a period of four years from expiration or termination of this Agreement, including records of the Services performed, on a daily basis if necessary. Consultant's accounting systems will conform to generally accepted accounting principles, and all records will provide a breakdown of total costs charged under this Agreement, including properly executed payrolls, time records, invoices, and vouchers. Consultant will permit City to inspect and examine Consultant's books, records, accounts, and any and all data relevant to this Agreement at any reasonable time.

13. General Provisions.

13.1 Assignment and Successors. Consultant may not assign its rights or obligations under this Agreement, in part or in whole, without City's written consent. This Agreement is binding on Consultant's and City's lawful heirs, successors, and permitted assigns.

13.2 Third Party Beneficiaries. There are no intended third-party beneficiaries to this Agreement.

13.3 Nondiscrimination. Consultant will not discriminate in the employment of persons under this Agreement because of race, color, ancestry, national origin, religion, sex, marital status, age, medical condition, disability, or other prohibited basis. All nondiscrimination rules or regulations required by law to be included in this Agreement are incorporated by this reference.

13.4 Choice of Law and Venue. This Agreement will be governed by California law, and venue will be in the Superior Court of Contra Costa County, and no other place.

13.5 Integration. This Agreement and the documents incorporated in this Agreement constitute the final, complete, and exclusive terms of the agreement between the City and the Consultant.

13.6 Severability. If any provision of this Agreement is determined to be illegal, invalid, or unenforceable, in part or in whole, the remaining provisions of the Agreement will remain in full force and effect.

13.7 Amendment. No amendment or modification of this Agreement will be binding unless it is in a writing duly authorized and signed by the Parties to this Agreement.

13.8 Provisions Deemed Inserted. Every provision of law required to be inserted in this Agreement will be deemed to be inserted, and this Agreement will be construed and enforced as though included. If it is discovered that through mistake or otherwise that any required provision is not inserted, or not correctly inserted, this Agreement will be amended to make the insertion or correction.

13.9 Precedence. If any provision in any document attached to or incorporated in this Agreement conflicts with or is inconsistent with the provisions set forth in the body of this Agreement, the provisions set forth in the body of this Agreement will control over any such conflicting or inconsistent provisions.

13.10 Waiver. No waiver of a breach, failure of any condition, or any right or remedy contained in or granted by the provisions of this Agreement will be effective unless it is in writing and signed by the Party waiving the breach, failure, right, or remedy. No waiver of any breach, failure, right, or remedy will be deemed a waiver of any other breach, failure, right, or remedy, whether or not similar, nor will any waiver constitute a continuing waiver unless the writing so specifies.

13.11 Force Majeure. If either Party is delayed or hindered in or prevented from the performance of any act required under this Agreement because of strikes, lockouts, inability to procure labor or materials, failure of power, riots, insurrection, war, fire or other casualty, or other reason beyond the reasonable control of the Party delayed, excluding financial inability ("**Force Majeure Event**"), performance of that act will be excused for the period during which the Force Majeure Event prevents such performance, and the period for that performance will be extended for an equivalent period. Delays or failures to perform resulting from lack of funds will not be Force Majeure Events.

13.12 Headings. The headings in this Agreement are included for convenience only and will not affect the construction or interpretation of any provision in this Agreement or any of the rights or obligations of the Parties to this Agreement.

13.13 Execution in Counterparts. This Agreement may be executed in any number of counterparts, each of which will be an original, but all of which together will constitute one instrument.

13.14 Authorization. Each individual signing below warrants that he or she is authorized to do so by the Party that he or she represents, and that this Agreement is legally binding on that Party. If Consultant is a corporation, signatures from two officers of the corporation are required pursuant to California Corporation Code section 313.

[Signature page follows.]

The Parties agree to this Agreement as witnessed by the signatures below:

CITY:

Approved as to form:

s/ _____

s/ _____

David Biggs, City Manager

Patrick Tang, City Attorney

Date: _____

Date: _____

Attest:

s/ _____

Name/Title

Date: _____

CONTRACTOR: _____
Business Name

s/ _____

Name/Title

Date: _____

s/ _____

Name/Title

Date: _____

Attachments:

Attachment A: Scope of Services

Attachment B: Payment