

## AGREEMENT FOR CONSULTANT SERVICES

THIS AGREEMENT is made and entered into on January 21, 2020 by and between TOWN OF LOS GATOS, a California municipal corporation, ("Town") and Nichols Consulting Engineers, ("Consultant"), whose address is 501 Canal Blvd., Suite 1, Richmond, CA 94804. This Agreement is made with reference to the following facts.

### I. RECITALS

- 1.1 The Town desires to engage Consultant to provide engineering/planning services for the Town's Stormwater Master Plan.
- 1.2 The Consultant represents and affirms that it is willing to perform the desired work pursuant to this Agreement.
- 1.3 Consultant warrants it possesses the distinct professional skills, qualifications, experience, and resources necessary to timely perform the services described in this Agreement. Consultant acknowledges Town has relied upon these warranties to retain Consultant.

### II. AGREEMENTS

- 2.1 Scope of Services. Consultant shall provide services as described in that certain Proposal sent to the Town, which is hereby incorporated by reference and attached as Exhibit A.
- 2.2 Term and Time of Performance. This contract will remain in effect from date of execution to June 30, 2022. Consultant shall perform the services described in this agreement as listed in Exhibit A.
- 2.3 Compliance with Laws. The Consultant shall apply the reasonable standard of care to comply with all applicable laws, codes, ordinances, and regulations of governing federal, state and local laws. Consultant represents and warrants to Town that it has all licenses, permits, qualifications and approvals of whatsoever nature which are legally required for Consultant to practice its profession. Consultant shall maintain a Town of Los Gatos business license pursuant to Chapter 14 of the Code of the Town of Los Gatos.
- 2.4 Sole Responsibility. Consultant shall be responsible for employing or engaging all persons necessary to perform the services under this Agreement.
- 2.5 Information/Report Handling. All documents furnished to Consultant by the Town and all reports and supportive data prepared by the Consultant under this Agreement are the Town's property and shall be delivered to the Town upon the completion of Consultant's services or at the Town's written request. All reports, information, data, and exhibits prepared or assembled by Consultant in connection with the performance of its services

pursuant to this Agreement are confidential until released by the Town to the public, and the Consultant shall not make any of these documents or information available to any individual or organization not employed by the Consultant or the Town without the written consent of the Town before such release. The Town acknowledges that the reports to be prepared by the Consultant pursuant to this Agreement are for the purpose of evaluating a defined project, and Town's use of the information contained in the reports prepared by the Consultant in connection with other projects shall be solely at Town's risk, unless Consultant expressly consents to such use in writing. Town further agrees that it will not appropriate any methodology or technique of Consultant which is and has been confirmed in writing by Consultant to be a trade secret of Consultant.

2.6 Compensation. Compensation for Consultant's professional services **shall not exceed \$199,985**, inclusive of all costs. Payment shall be based upon Town approval of each task.

2.7 Billing. Billing shall be monthly by invoice within thirty (30) days of the rendering of the service and shall be accompanied by a detailed explanation of the work performed by whom at what rate and on what date. Also, plans, specifications, documents or other pertinent materials shall be submitted for Town review, even if only in partial or draft form.

Payment shall be net thirty (30) days. All invoices and statements to the Town shall be addressed as follows:

Invoices:

Town of Los Gatos

Attn: Accounts Payable

P.O. Box 655

Los Gatos, CA 95031-0655

2.8 Availability of Records. Consultant shall maintain the records supporting this billing for not less than three years following completion of the work under this Agreement. Consultant shall make these records available to authorized personnel of the Town at the Consultant's offices during business hours upon written request of the Town.

2.9 Assignability and Subcontracting. The services to be performed under this Agreement are unique and personal to the Consultant. No portion of these services shall be assigned or subcontracted without the written consent of the Town.

2.10 Independent Contractor. It is understood that the Consultant, in the performance of the work and services agreed to be performed, shall act as and be an independent contractor and not an agent or employee of the Town. As an independent contractor he/she shall not obtain any rights to retirement benefits or other benefits which accrue to Town employee(s). With prior written consent, the Consultant may perform some obligations under this Agreement by subcontracting but may not delegate ultimate responsibility for performance or assign or transfer interests under this Agreement. Consultant agrees to

testify in any litigation brought regarding the subject of the work to be performed under this Agreement. Consultant shall be compensated for its costs and expenses in preparing for, traveling to, and testifying in such matters at its then current hourly rates of compensation, unless such litigation is brought by Consultant or is based on allegations of Consultant's negligent performance or wrongdoing.

- 2.11 Conflict of Interest. Consultant understands that its professional responsibilities are solely to the Town. The Consultant has and shall not obtain any holding or interest within the Town of Los Gatos. Consultant has no business holdings or agreements with any individual member of the Staff or management of the Town or its representatives nor shall it enter into any such holdings or agreements. In addition, Consultant warrants that it does not presently and shall not acquire any direct or indirect interest adverse to those of the Town in the subject of this Agreement, and it shall immediately disassociate itself from such an interest, should it discover it has done so and shall, at the Town's sole discretion, divest itself of such interest. Consultant shall not knowingly and shall take reasonable steps to ensure that it does not employ a person having such an interest in this performance of this Agreement. If after employment of a person, Consultant discovers it has employed a person with a direct or indirect interest that would conflict with its performance of this Agreement, Consultant shall promptly notify Town of this employment relationship, and shall, at the Town's sole discretion, sever any such employment relationship.
- 2.12 Equal Employment Opportunity. Consultant warrants that it is an equal opportunity employer and shall comply with applicable regulations governing equal employment opportunity. Neither Consultant nor its subcontractors do and neither shall discriminate against persons employed or seeking employment with them on the basis of age, sex, color, race, marital status, sexual orientation, ancestry, physical or mental disability, national origin, religion, or medical condition, unless based upon a bona fide occupational qualification pursuant to the California Fair Employment & Housing Act.

### III. INSURANCE AND INDEMNIFICATION

- 3.1 Minimum Scope of Insurance:
- i. Consultant agrees to have and maintain, for the duration of the contract, General Liability insurance policies insuring him/her and his/her firm to an amount not less than: one million dollars (\$1,000,000) combined single limit per occurrence for bodily injury, personal injury and property damage.
  - ii. Consultant agrees to have and maintain for the duration of the contract, an Automobile Liability insurance policy ensuring him/her and his/her staff to an amount not less than one million dollars (\$1,000,000) combined single limit per accident for bodily injury and property damage.

- iii. Consultant shall provide to the Town all certificates of insurance, with original endorsements effecting coverage. Consultant agrees that all certificates and endorsements are to be received and approved by the Town before work commences.
- iv. Consultant agrees to have and maintain, for the duration of the contract, professional liability insurance in amounts not less than \$1,000,000 which is sufficient to insure Consultant for professional errors or omissions in the performance of the particular scope of work under this agreement.

General Liability:

- i. The Town, its officers, officials, employees and volunteers are to be covered as insured as respects: liability arising out of activities performed by or on behalf of the Consultant; products and completed operations of Consultant, premises owned or used by the Consultant. This requirement does not apply to the professional liability insurance required for professional errors and omissions.
- ii. The Consultant's insurance coverage shall be primary insurance as respects the Town, its officers, officials, employees and volunteers. Any insurance or self-insurances maintained by the Town, its officers, officials, employees or volunteers shall be excess of the Consultant's insurance and shall not contribute with it.
- iii. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the Town, its officers, officials, employees or volunteers.
- iv. The Consultant'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.

3.2 All Coverages. Each insurance policy required in this item shall be endorsed to state that coverage shall not be suspended, voided, cancelled, reduced in coverage or in limits except after thirty (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 at all times during the term of this agreement with the Town Clerk.

3.3 Workers' Compensation. In addition to these policies, Consultant shall have and maintain Workers' Compensation insurance as required by California law and shall provide evidence of such policy to the Town before beginning services under this Agreement. Further, Consultant shall ensure that all subcontractors employed by Consultant provide the required Workers' Compensation insurance for their respective employees.

3.4 Indemnification. The Consultant shall save, keep, hold harmless and indemnify and defend the Town its officers, agent, employees and volunteers from all damages, liabilities, penalties, costs, or expenses in law or equity that may at any time arise or be set up because of damages to property or personal injury received by reason of, or in the course of performing work to the extent cause by a willful or negligent act or omissions of the Consultant, or any of the Consultant's officers, employees, or agents or any subconsultant. In no event shall the cost to defend charged to the Consultant exceed the Consultants proportionate percentage of fault.

#### IV. GENERAL TERMS

4.1 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, nor does waiver of a breach or default under this Agreement constitute a continuing waiver of a subsequent breach of the same or any other provision of this Agreement.

4.2 Governing Law. This Agreement, regardless of where executed, shall be governed by and construed to the laws of the State of California. Venue for any action regarding this Agreement shall be in the Superior Court of the County of Santa Clara.

4.3 Termination of Agreement. The Town and the Consultant shall have the right to terminate this agreement with or without cause by giving not less than fifteen days (15) written notice of termination. In the event of termination, the Consultant shall deliver to the Town all plans, files, documents, reports, performed to date by the Consultant. In the event of such termination, Town shall pay Consultant an amount that bears the same ratio to the maximum contract price as the work delivered to the Town bears to completed services contemplated under this Agreement, unless such termination is made for cause, in which event, compensation, if any, shall be adjusted in light of the particular facts and circumstances involved in such termination.

4.4 Amendment. No modification, waiver, mutual termination, or amendment of this Agreement is effective unless made in writing and signed by the Town and the Consultant.

4.5 Disputes. In any dispute over any aspect of this Agreement, the prevailing party shall be entitled to reasonable attorney's fees, including costs of appeal.

4.6 Notices. Any notice required to be given shall be deemed to be duly and properly given if mailed postage prepaid, and addressed to:

Town of Los Gatos  
Attn: Town Clerk  
110 E. Main Street  
Los Gatos, CA 95030


Nichols Consulting  
501 Canal Blvd., Suite 1  
Richmond, CA 94804

or personally delivered to Consultant to such address or such other address as Consultant designates in writing to Town.

- 4.7 Order of Precedence. In the event of any conflict, contradiction, or ambiguity between the terms and conditions of this Agreement in respect of the Products or Services and any attachments to this Agreement, then the terms and conditions of this Agreement shall prevail over attachments or other writings.
- 4.8 Entire Agreement. This Agreement, including all Exhibits, constitutes the complete and exclusive statement of the Agreement between the Town and Consultant. No terms, conditions, understandings or agreements purporting to modify or vary this Agreement, unless hereafter made in writing and signed by the party to be bound, shall be binding on either party.

IN WITNESS WHEREOF, the Town and Consultant have executed this Agreement.

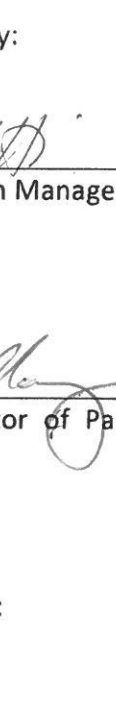
Town of Los Gatos by:

  
\_\_\_\_\_  
Laurel Prevetti, Town Manager

Consultant, by:

  
\_\_\_\_\_

Recommended by:

  
\_\_\_\_\_  
Matt Morley, Director of Parks and Public Works

Greg Fasiano, Principal & Secretary  
Printed Name and Title

Approved as to Form:

  
\_\_\_\_\_  
Robert Schultz, Town Attorney

Attest:

  
\_\_\_\_\_  
Shelley Neis, CMC, Town Clerk



AGREEMENT ROUTING SHEET  
(FOR INTERNAL USE ONLY)

Initiating Department: PPW Contact Name/Phone: M. Morley/L. Petersen x5773

Agreement Title: Agreement for Consultant Services

Term of Agreement: From upon execution *TM rec'd 2-12-2020* To 6/30/22

Date Approved By Council: 1/21/20 Item or Resolution #: 8

Vendor Name: Nichols Consulting Engineers Vendor #: 2829

Vendor Email: ajadkowski@ncenet.com Vendor Phone: 510-215-3620

Vendor Contact: Andre Jadkowski

Business License #: \* mailed check 1/23/20 Expiration Date: 12/31/20

Insurance (IHH) #: IHH:19.318 Expiration Date: 5/17/20

Insurance waiver requested (a completed Release of Liability is attached)

Please Select:

BONDS INCLUDED

This is a standard agreement form that has not been altered.

# of Originals 1

Alterations have been made to the following paragraph(s)/section(s):

See attachment. Town Attorney approved

Vendor Agreement

Sole Source

Amount of Agreement: NTE \$199,985

Program and Account #: 411-816-0413-82303

Funds Budgeted

Not enough money in line item, will be absorbed

Budget adjustment requested in Town Council staff report

Mid-year adjustment requested

Routing	Action(s)	Date Completed	Signature
1. Clerk	1. Assign Agreement # <u>20.019</u> 2. Verify attachments included/labeled 3. Verify no automatic renewals without defined termination date 4. Verify Insurance	<u>2-3-20</u>	<u>OC</u>
2. Finance	1. Confirm Fiscal Impact <u>budget adj. pending</u> 2. Confirm contract amount agrees with Council approval 3. Verify Purchasing Policy Compliance (Bids/Sole Source/Bus Purpose/RFP) 4. Check Payment Terms <u>NET 30</u>	<u>2/7/20</u>	<u>MY</u>
3. Attorney	1. Approve Insurance Waiver 2. Review and Sign Agreement	<u>2/2/20</u>	<u>WJ</u>
4. Assistant Town Manager	1. Review Agreement 2. Follow up with Departments if needed	<u>2/13/20</u>	<u>WJ</u>
5. Town Manager	1. Review and Sign Agreement	<u>2-14-20</u>	<u>WJ</u>
6. Clerk	1. Scan to Laserfiche and file agreement 2. Laserfiche will email department pdf of signed agreement (Department sends agreement to vendor)		

2-12-20





**Agreement Narrative:**

If your agreement has gone before the Town Council for approval, please reference that fact and include a very brief description of the purpose of the agreement. Identify bids/business purpose for vendor selection/RFP/Sole Source. If hourly rate please identify how cost was determined. If your agreement has not gone to the Town Council for approval, include a discussion of the purpose of the agreement, how the Town's purchasing procedures were followed, and any special instructions.

Please insert narrative here:

The 2019/20-2023/24 CIP Budget includes funds for consultant development of a Town-wide Stormwater Master Plan. This master plan will provide the Town with the necessary tools and capital improvement projects to address flood management and water quality within the Town's drainage system.

The Town advertised a request for proposals for consultant services for the Stormwater Master Plan on 8/27/19 and received four proposals on the due date of 9/30/19. Proposals were received from NCE, WEMF, BKF and Schaaf and Wheeler. Following the interviews, NCE was deemed the most qualified to complete the work.

As required by the public contracts code, the Town negotiated a scope and cost for the project with NCE. The total cost for the work will be \$199,985.

2/18  
start  
date

PPW is targeting 2/18 for vendor to begin work due to upcoming budget discussions with Council. Vendor will provide us with budget info for the Town's Stormwater system.

**Department Checklist (to be completed by originating department):**

Agreement Signed by Vendor:

List Exhibits/Attachments with Title(s): Exhibit A: Proposal

Copy of insurance certificates or Release of Liability

Originals of bonds issued for contract

First page of Town Council report

Scope of work aligns to Council Report and contractor proposal/exhibits

DIR #: n/a

Date Project Awarded: \_\_\_\_\_

Date Staff submitted Project to DIR: \_\_\_\_\_

Project # \_\_\_\_\_

## Standard Agreement

NCE has reviewed the Town's agreement for consultant services provided. After careful consideration, we would appreciate the opportunity to discuss the changes noted below. The proposed indemnification changes are requested to meet the requirements of SB496.

### Agreement Article Number, Name: Article 2.3, Compliance with Laws

**Proposed Change:** The Consultant shall apply the reasonable standard of care to comply with all applicable laws, codes, ordinances, and regulations of governing federal, state and local laws. Consultant represents and warrants to Town that it has all licenses, permits, qualifications and approvals of whatsoever nature which are legally required for Consultant to practice its profession. Consultant shall maintain a Town of Los Gatos business license pursuant to Chapter 14 of the Code of the Town of Los Gatos.

Commented [RS1]: Accept

**Reason for Change:** This addition is requested because there should be a measurable and reasonable standard of care applied to all the work provided by a professional complying with the common law standard.

### Agreement Article Number, Name: Article 3.4, Indemnification

**Proposed Change:** The Consultant shall save, keep, hold harmless and indemnify and reimburse the apportioned costs to defend the Town its officers, agent, employees and volunteers from all pure economic damages, liabilities, penalties, costs, or expenses in law or equity that may at any time arise or be set up because of damages to property or personal injury received by reason of, or in the course of performing work which may be occasioned by to the extent caused by a willful or negligent act or omissions of the Consultant, or any of the Consultant's officers, employees, or agents or any subconsultant. In no event shall the cost to defend charged to the Consultant exceed the Consultants proportionate percentage of fault.

Commented [RS2]: Do Not Accept

Commented [RS3]: Do Not Accept

Commented [RS4]: Accept

Commented [RS5]: Accept

**Reason for Change:** The addition of "reimburse the apportioned costs to" is requested to reflect the requirements of California case law due to the Crawford and CH2MHill decisions that required the engineer to defend upfront for all causes of action even if they weren't found liable, the language is needed to clarify an equitable apportionment of the costs specifically due to the contractor's negligence. Professional liability insurance will reimburse the costs attributable to the contractor's negligence, but does not pay for defense upfront. In addition, CA SB496 limits the "duty to defend" to the comparative fault of the professional in private and public contracts and is required to be in effect after 1/1/2018 amending CA Civil Code 2782.8(a).

The addition of "pure economic" is requested because the Consultant should only be responsible for the pure economic damages as those are the only ones that could be reasonably estimated or foreseen, which appropriately apportions risk.

The removal of "which may be occasioned by" and replacement with "to the extent caused by" is requested because the Consultant should only be responsible for those claims that have been proven to be a result of their negligence or willful misconduct per CA SB496 that requires comparative fault and is required to be in effect after 1/1/2018 amending CA Civil Code 2782.8(a).

The addition of "In no event shall the cost to defend charged to the Consultant exceed the Consultants proportionate percentage of fault" is requested to add language required by CA SB496 that requires comparative fault and is required to be in effect after 1/1/2018 amending CA Civil Code 2782.8(a).

### Agreement Article Number, Name: Article 4.6, Disputes

**Proposed Change:** In any dispute over any aspect of this Agreement, the prevailing party shall be entitled to reasonable attorney's fees, including costs of appeal. TOWN and CONSULTANT agree that they shall first submit any and all unsettled claims, counterclaims, disputes, and other matters in question between them arising out of or relating to this Agreement to mediation in accordance with the Construction Industry Mediation Rules of the American Arbitration Association, effective as of the date of this agreement.

Commented [RS6]: Do Not Accept

**Reason for Change:** This change is requested to provide a fair and efficient mechanism for resolving any disputes.



**TOWN OF LOS GATOS  
COUNCIL AGENDA REPORT**

MEETING DATE: 01/21/2020

ITEM NO: 8

---

DATE: January 16, 2020  
TO: Mayor and Town Council  
FROM: Laurel Prevetti, Town Manager  
SUBJECT: Authorize the Following Actions for PPW Project No. 816-0413, Stormwater Master Plan:  
a. Approve an Agreement for Consultant Services with NCE Consultants for Development of a Town Stormwater Master Plan in a not to exceed amount of \$200,000, and  
b. Approve an Expenditure Budget Adjustment – in the amount of \$30,000 from the Town’s available Storm Drain Funds.

**RECOMMENDATION:**

Authorize the following actions for PPW Project No. 816-0413, Stormwater Master Plan:  
a. Approve an agreement for consultant services with NCE Consultants for development of a Town Stormwater Master Plan (Attachment 1) in a not to exceed amount of \$200,000, and  
b. Approve an expenditure budget adjustment in the amount of of \$30,000 from the Town’s available Storm Drain Funds.

**BACKGROUND:**

The Town’s 2019/20-2023/24 Capital Improvement Program calls for development of a Town-wide Stormwater Master Plan. The project development, through a consultant, would provide the Town with the necessary planning tools and identified capital improvement projects to address stormwater infrastructure management within the Town.

The goal of the project is to manage stormwater runoff proactively to protect water quality and minimize impacts of localized downstream flooding by identifying infrastructure improvements for collection, conveyance, and treatment of stormwater runoff. The plan would prioritize and provide an implementation plan for the stormwater infrastructure improvements.

**PREPARED BY:** Lisa Petersen  
Assistant Parks and Public Works Director/Town Engineer

---

Reviewed by: Town Manager, Assistant Town Manager, Town Attorney, Finance Director, and Director of Parks and Public Works

---

PAGE 2 OF 3

SUBJECT: Authorize the Following Actions for PPW Project No. 816-0413, Stormwater Master Plan:

- a. Approve an Agreement for Consultant Services with NCE Consultants for Development of a Town Stormwater Master Plan in a not to exceed amount of \$200,000
- b. Approve a Budget Transfer of \$30,000 from the Town's Storm Drain Funds to the Project

DATE: January 16, 2020

DISCUSSION:

PPW issued a Request for Proposals (RFP) for development of a Stormwater Master Plan on August 27, 2019. The RFP was sent out to consultants on the Town's on-call engineering list and several additional firms specializing in stormwater planning. The RFP was also advertised on the Town's RFP/RFQ webpage. Proposals were due to PPW by September 30, 2019.

On the RFP due date, the Town received proposals from three firms:

- BKF Consultants
- Schaaf and Wheeler
- NCE Consultants

A Town consultant selection committee, which included the Town's consultant project manager, was formed to review the proposals. After review of the proposals by the committee, all three firms were deemed qualified and were invited for an in-person interview with the selection committee.

Following the interviews, NCE Consultants was deemed the most qualified to complete the work by the Town selection committee. NCE presented a team that had extensive experience in the field and had successfully worked on numerous similar projects in the area. Additionally, reference checks from other cities provided back-up for the team's past work excellence.

As required by the State Public Contracts Code, following selection of NCE as the most qualified consultant, PPW staff negotiated both the scope and cost with them for development of the Stormwater Master Plan. The final fee negotiated was within the cost allocation listed in the Request for Proposals. The total negotiated fee for the project is just under \$200,000.

CONCLUSION:

Authorize the following actions for PPW Project No. 816-0413, Stormwater Master Plan:

- a. Approve an Agreement for Services with NCE Consultants for development of a Town Stormwater Master Plan (Attachment 1) in a not to exceed amount of \$200,000, and
- b. Approve a budget transfer of \$30,000 from the Town's Storm Drain Funds to the project.

PAGE 3 OF 3

SUBJECT: Authorize the Following Actions for PPW Project No. 816-0413, Stormwater Master Plan:

- a. Approve an Agreement for Consultant Services with NCE Consultants for Development of a Town Stormwater Master Plan in a not to exceed amount of \$200,000
- b. Approve a Budget Transfer of \$30,000 from the Town's Storm Drain Funds to the Project

DATE: January 16, 2020

COORDINATION:

This has been coordinated with the Town's Finance Department and Town Attorney's Office.

FISCAL IMPACT:

An expenditure budget adjustment in the amount of \$30,000 is requested from the Town's Storm Drain Funds.

Stormwater Master Plan 411- Project 816-0413 - 82303		
	Budget	Costs
GFAR	\$ 180,000	
Requested Expenditure Budget Adjustment from available Storm Drain Funds	\$ 30,000	
<b>Total Budget</b>	<b>\$ 210,000</b>	
NCE Consultants Contract		\$ 200,000
<b>Total Expenditures</b>		<b>\$ 200,000</b>
<b>Remaining Balance</b>		<b>\$ 10,000</b>

ENVIRONMENTAL ASSESSMENT:

This is not a project defined under CEQA, and no further action is required.

Attachment:

- 1. Agreement for Consultant Services.