

**AGREEMENT BETWEEN THE CITY OF MILPITAS
AND CITY OF SAN JOSE
FOR PAVEMENT RESTORATION OF
LANDESS AVENUE BETWEEN HIGHWAY 680 AND PIEDMONT RD**

This Agreement (herein "Agreement") is made and entered into this ___ day of _____, 2021, (herein the "Effective Date") by and between the City of Milpitas, a California municipal corporation, with its principal place of business located at 455 E. Calaveras Boulevard, Milpitas, California 94577 (herein "MILPITAS") and the City of San José, a California chartered municipal corporation, with its principal place of business located at 200 E. Santa Clara St., San José, CA 95113 (herein "SAN JOSE"). MILPITAS 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. MILPITAS and SAN JOSE find that it is in the public interest to remove and replace failed asphalt on Landess Avenue between Highway 680 and Piedmont Avenue, over which MILPITAS and SAN JOSE have jurisdiction; and
- B. It is in the public interest for MILPITAS and SAN JOSE to complete the PROJECT (as defined in Section 1, below) in a cooperative and economical manner by constructing MILPITAS' and SAN JOSE's portions of the PROJECT together; and
- C. The Parties acknowledge SAN JOSE is the California Environmental Quality Act ("CEQA") Lead Agency for the PROJECT, and SAN JOSE's compliance with CEQA is a precondition to any construction of the PROJECT, including MILPITAS' portion; and
- D. 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, MILPITAS and SAN JOSE agree as follows:

AGREEMENT PROVISIONS

1. PROJECT DESCRIPTION:

The work to be performed under this Agreement will consist of milling approximately 484,000 square feet of asphalt to a depth of two (2) inches, placing approximately 6,100 tons of rubberized hot mix asphalt, adjusting utility covers, replacement of traffic markings, markers and legends, and installing ADA curb ramps (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 MILPITAS and SAN JOSE along Landess Avenue between Highway 680 and Piedmont Avenue is approximately in the center of the street, and MILPITAS and SAN JOSE each maintains its respective half of the street within its jurisdiction. Therefore, MILPITAS and SAN JOSE will each be responsible for 50% of Pavement Construction Cost (as defined herein). MILPITAS will be

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100% responsible for construction costs related to the installation of ADA curb ramps within its jurisdiction (“ADA Curb Cost”).

The Project Cost includes any and all costs paid to the selected contractor to complete the PROJECT. Pavement Construction Cost includes any and all costs paid to the selected contractor to complete the PROJECT except for the ADA Curb Cost.

2. SAN JOSE’S OBLIGATIONS:

SAN JOSE 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 MILPITAS with awarded final specifications and contract documents for the PROJECT.
- C. To pay SAN JOSE’s share of the Project Cost. The Project Cost is defined as the actual amount paid to the contractor for construction of the PROJECT. SAN JOSE’s share of the Project Cost is 50% of the Pavement Construction Cost.
- D. To cooperate with MILPITAS should MILPITAS raise any issues concerning the work in MILPITAS’ jurisdiction that requires correction by the selected contractor prior to acceptance or within the warranty period of the PROJECT.
- E. To assign as the designated project manager for SAN JOSE for the duration of the PROJECT Anie Yeh (email: anie.yeh@sanjoseca.gov). SAN JOSE’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 MILPITAS at any time during usual business hours.
- G. To allow MILPITAS staff reasonable access to the PROJECT site, at all reasonable times and upon advance notice, to perform observation of any work on the MILPITAS portion of the PROJECT.
- H. To provide MILPITAS with a copy of as-built record drawings for the PROJECT including specifically the MILPITAS portion thereof.
- I. To include, in its contract with the contractor on the PROJECT, a requirement that the contractor include MILPITAS, its officials, officers, employees and agents as additional insureds, and that the contractor indemnify MILPITAS, its officials, officers, employees and agents to the same extent that SAN JOSE is indemnified.

- J. To include a clause in its contract with the contractor on the PROJECT that MILPITAS is an intended third-party beneficiary of the construction contract.
- K. To require the contractor on the PROJECT obtain all required permits and approvals for all PROJECT work, including work associated with the MILPITAS portion thereof.
- L. To provide a final accounting of all PROJECT costs associated with the MILPITAS portion of the PROJECT to MILPITAS within thirty (30) days after the Parties accept the PROJECT as complete.

3. MILPITAS' OBLIGATION:

MILPITAS agrees as follows:

- A. Pay for 50% of the Pavement Construction Cost and 100% of the ADA Curb Cost plus an additional 10% of the Pavement Construction Cost to pay for Project Delivery (as defined herein), which is considered to be MILPITAS' cost share of the PROJECT. Total payments made by MILPITAS under this Agreement shall not exceed the maximum amount of One Million Ninety-Seven Thousand Two Hundred Seventy-Five Dollars (\$1,097,275) ("Total Reimbursement Amount").
- B. "Project Delivery" is defined as engineering, construction management, and associated management and administrative services provided by SAN JOSE as lead agency for the PROJECT.
- C. The Parties understand that the Project Cost is based upon the engineer's estimates and prior to public works bidding for PROJECT, as set forth in Exhibit "B". The engineer's estimate includes a 10% construction contingency which is consistent with SAN JOSE's practice for public works construction contracts awarded to the lowest responsive and responsible bidder as an allowance for potential contract change orders. Should actual costs based upon SAN JOSE's construction contractor's public works bid exceed the Total Reimbursement Amount, Parties shall confer, and any agreement to increase the Total Reimbursement Amount shall be documented in writing by a written amendment to this Agreement.
- D. To pay its share of the Project Cost within forty-five (45) business days of receiving and approving the detailed invoice from SAN JOSE, provided that the following conditions are met:
 - 1. The PROJECT has been completed and MILPITAS has approved the portion of the work in its jurisdiction. Acceptance by MILPITAS shall be made in writing to SAN JOSE. MILPITAS 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.
 - 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.
 - 3. SAN JOSE shall invoice MILPITAS only one (1) time which shall occur after PROJECT completion, and this invoice shall be considered as the final detailed invoice for the PROJECT.

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- E. To assign as the designated project manager for MILPITAS for the duration of the PROJECT Fanny Yu (email: fyu@ci.milpitas.ca.gov). MILPITAS' 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 SAN JOSE .

4. TERM OF AGREEMENT:

- A. Unless otherwise modified by a written amendment to this Agreement, the term of this Agreement shall be until PROJECT acceptance by both parties and final payments of all outstanding balances.
- B. Consistent with City of San José Standard Specifications, Section 7-1.23, SAN JOSE 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 MILPITAS will be vested in MILPITAS, and no further agreement will be necessary to transfer ownership.
- B. This Agreement does not change any authority or responsibility between MILPITAS 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.

The Parties agree and intend that SAN JOSE and MILPITAS are independent entities and do not intend by this Agreement to create any partnership, joint venture, or similar business arrangement, relationship or association between them, except as may be agreed to expressly by this Agreement.

7. TERMINATION:

Once SAN JOSE 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 MILPITAS 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:

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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 José, CA 95133

To MILPITAS: Fanny Yu
City of Milpitas
Engineering
455 E. Calaveras Boulevard
Milpitas, CA 94577

Such notice shall be deemed made when personally delivered or when mailed, forty-eight (48) hours after deposit in the U.S. Mail, first class postage prepaid and addressed to the party at its applicable address. Actual notice shall be deemed adequate notice on the date actual notice occurred, regardless of the method of service.

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 MILPITAS and MILPITAS shall provide such a permit at no cost.

14. HOLD HARMLESS/INDEMNIFICATION:

It is 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:

SAN JOSE 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 2021 MAJOR STREETS RESURFACING PROJECT and 2021 MAJOR STREETS CONCRETE & ADA PROJECT contract documents, insurance coverage described below, at no additional cost to either SAN JOSE or MILPITAS, with coverage amounts, required endorsements, certificates of insurance, and coverage verifications satisfactory and acceptable to all Parties. MILPITAS, 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 the contractor's work for SAN JOSE on this Project.

It is mutually understood that during the term of the construction activities on the PROJECT, SAN JOSE will require the selected 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. SAN JOSE 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. The PROJECT shall be paid for and constructed in accordance with all ordinances, resolutions, rules, regulations, and laws of SAN JOSE to the extent they are consistent with state statutes and the ordinances, resolutions, rules, regulations and laws of MILPITAS.

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 MILPITAS 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.

NVF:JAC:MMK
1/27/2021

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 MILPITAS, CALIFORNIA,
455 E. Calaveras Boulevard
Milpitas, California 94577
Phone: (408) 777-3212
Fax: (408) 777-3366

APPROVED AS TO FORM:

CHRISTOPHER J. DIAZ Date
City Attorney

STEVEN MCHARRIS Date
City Manager

ATTEST:

WENDY WOOD
City Clerk

CITY OF SAN JOSE, CALIFORNIA
200 E. Santa Clara Street
San José, CA 95113
Phone: (408) 277-5777
Fax: (408) 277-3131

APPROVED AS TO FORM:

JON CALEGARI Date
Deputy City Attorney

LELAND WILCOX Date
Chief of Staff
Office of the City Manager

EXHIBIT "A"

SCOPE OF WORK AND SCHEDULE OF PERFORMANCE

The PROJECT consists of milling approximately 484,000 square feet of existing asphalt to a depth of two inches and placement of approximately 6,100 tons of Rubberized Hot Mix Asphalt on Landess Ave between Highway 680 and Piedmont Rd, adjustment of utility covers, installation of asphalt striping legends and markers, and installation of ADA curb ramps. Fifty percent of the roadway work is located within MILPITAS and fifty percent of work is located within the SAN JOSE. Curb ramps on the north side of the PROJECT are within MILPITAS jurisdiction and 100% of the curb ramp work is the responsibility of MILPITAS.

SAN JOSE is to deliver the PROJECT and prepare pavement design, striping plans and provide surveying services for monument preservation within the PROJECT limits.

The work to be performed is fully described in the 2021 MAJOR STREETS RESURFACING PROJECT #1 AND 2021 MAJOR STREETS CONCRETE & ADA PROJECT contract documents.

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

EXHIBIT "B": COST ESTIMATE

Landess Ave Resurfacing Estimate (San Jose and Milpitas Cost Sharing)						
	Item #	Item Description	Unit	Unit Price	Quantity	Total Cost
GENERAL	1	Portable Changeable Message Sign (Revocable)	EA	\$ 10,000.00	2	\$ 20,000.00
	2	Reserve Police Officer for Traffic Control (Revocable)	FA	\$ 70.00	16	\$ 1,120.00
RESURFACING	3	Cold Plane 2"	SF	\$ 0.55	484,000	\$ 264,215.60
	4	Rubberized HMA (1/2") - Type G (In Place)	TON	\$ 145.00	6,100.00	\$ 884,500.00
	5	Remove and Replace 3" AC Pavement	SY	\$ 35.15	1,000.00	\$ 35,148.75
	6	Conform Cut	SF	\$ 0.75	5,665	\$ 4,248.75
UTILITIES	7	Lower Manhole (Revocable)	EA	\$ 643.75	26	\$ 16,737.50
	8	Adjust Manhole to Grade (Revocable)	EA	\$ 643.75	26	\$ 16,737.50
	9	Lower Water Valve (Revocable)	EA	\$ 463.50	36	\$ 16,709.18
	10	Adjust Water Valve to Grade (Revocable)	EA	\$ 476.38	36	\$ 17,173.32
	11	Lower Survey Monument Box (Revocable)	EA	\$ 463.50	6	\$ 2,781.00
ELECTRICAL	12	Adjust Survey Monument Box to Grade (Revocable)	EA	\$ 476.38	6	\$ 2,858.25
	13	Type C (6' x 20') Detector Loop Replacement (Revocable)	EA	\$ 1,030.00	28	\$ 28,840.00
STRIPING & MARKINGS	14	Type D (6' x 6') Bicycle Detector Loop (Revocable)	EA	\$ 378.53	28	\$ 10,598.70
	15	Install Type B,C,D,G,H or Blue Raised Pavement Markers (Revocable)	EA	\$ 6.26	2,000	\$ 12,514.50
	16	Thermoplastic: 2-Way Left Turn Stripe (Revocable)	LF	\$ 3.25	3373.5	\$ 10,963.88
	17	Thermoplastic: Double Yellow Stripe (Revocable)	LF	\$ 3.00	3731	\$ 11,193.00
	18	Thermoplastic: 6" Stripe (Revocable)	LF	\$ 2.70	13,000	\$ 35,100.00
	19	Thermoplastic: 6" Skip Stripe (Revocable)	LF	\$ 2.20	13,000	\$ 28,600.00
	20	Thermoplastic: 8" Stripe (Revocable)	LF	\$ 3.00	4,000	\$ 12,000.00
	21	Thermoplastic: 12" Stripe (Revocable)	LF	\$ 7.50	5,000	\$ 37,500.00
	22	Thermoplastic: Traffic Markings and Legends (Revocable)	SF	\$ 7.50	3,000	\$ 22,500.00
	23	Thermoplastic: Bike Lane Stripe - 6" (Revocable)	LF	\$ 2.70	13,000	\$ 35,100.00
	24	Thermoplastic: Bike Lane Skip Stripe 6" Skip (Revocable)	LF	\$ 2.20	3500	\$ 7,700.00
	25	Thermoplastic: Bike Lane Symbol With Person & Arrow (Revocable)	EA	\$ 160.00	25	\$ 4,000.00
	26	Thermoplastic: Bike Detection Stencil (Revocable)	EA	\$ 100.00	14	\$ 1,400.00
	27	Thermoplastic: Skid Resistant Green Paint Type 1 Pavement Material (Revocable)	SF	\$ 10.00	7,000	\$ 70,000.00
					Total	\$ 1,610,239.92
					Milpitas Share (50%)	\$ 805,119.96
Curb Ramps	8	PCC Wheelchair Ramp (R-10, R-11, or Modified) (Include Base)	EA	\$ 5,300.00	17	\$ 90,100.00
	9	Remove and Replace PCC Curb & Gutter (Revocable) (Include Base)	LF	\$ 73.00	136	\$ 9,928.00
	10	Remove and Replace PCC Sidewalk (Revocable) (Include Base)	SF	\$ 17.00	544	\$ 9,248.00
					Milpitas Share (100%)	\$ 109,276.00
					City of Milpitas Total	
					Pavement (50%)	\$ 805,119.96
					Concrete (100%)	\$ 109,276.00
					Subtotal	\$ 914,395.96
					Delivery/Administration (10%)	\$ 91,439.60
					Construction Contingency (10%)	\$ 91,439.60
					City of Milpitas Total	\$ 1,097,275.15