

**CITY OF SAN LEANDRO / REDEVELOPMENT  
AGENCY OF THE CITY OF SAN LEANDRO**

**STAFF REPORT**

**DATE:** June 6, 2011

**TO:** Stephen Hollister, City Manager/Executive  
Director

**FROM:** Luke Sims, Community Development Director *LS*

**VIA:** Cynthia Battenberg, *CB* Business Development Manager

**BY:** Jeff Kay, Business Development Analyst *JK*

APPROVED AND  
FORWARDED  
TO CITY COUNCIL /  
REDEVELOPMENT  
AGENCY

*Stephen Hollister*  
Stephen Hollister  
City Manager/Executive Director

**SUBJECT PROJECT/PROJECT DESCRIPTION:**

MATTER OF APPROVAL OF A CONSULTING SERVICES AGREEMENT WITH TELLUS VENTURES AND AN EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT WITH OSISOFT, INC. RELATING TO THE INSTALLATION OF FIBER OPTIC FACILITIES TO IMPROVE BROADBAND CONNECTIVITY

**SUMMARY AND RECOMMENDATION**

Staff recommends that the Redevelopment Agency approve the attached resolution authorizing a consulting services agreement with Tellus Venture Associates for development of a broadband strategy and assistance negotiating a license agreement for installation of fiber optic facilities. Staff also recommends that the City Council approve the attached resolution authorizing an Exclusive Negotiating Rights Agreement with OSISOFT, Inc. for the purpose of negotiating a license agreement to install fiber optic facilities within the City's existing conduit.

**BACKGROUND**

**Analysis**

Increasingly, fast and reliable internet service is becoming a requirement for successful business enterprises. Although this need was once restricted to businesses in "high-tech" sectors, broadband service that facilitates fast transfers of large quantities of data is now a prerequisite for almost every industry. Given these trends, the City recognizes that enhancement of our broadband infrastructure can be an effective tool for business development. The U.S. Department of Commerce has estimated that communities that gain access to broadband service experience an employment increase of 1-1.4 percentage points and an increase in rental values of up to 6 percentage points. High-speed connections have also been proven to reduce a business' carbon footprint by facilitating off-site communications and telecommuting.

Although almost all parts of San Leandro presently have access to some level of broadband service via cable and telecom service providers, significant shortcomings in speed, cost, and reliability exist in some areas, particularly in industrial locations. In these cases, businesses are often left with limited options for slow service at comparatively high costs. Without improvements to our broadband infrastructure, these areas will struggle to attract and retain businesses, particularly those in emerging industries.

This report covers two recommended actions that are related to internet connectivity issues. First is approval of a Consulting Services Agreement with Tellus Venture Associates for development of a broadband strategy. Second is approval of an Exclusive Negotiating Rights Agreement (ENRA) with OSIsoft, Inc. for the purposes of negotiating a licensing agreement to install fiber optic facilities in the City's existing conduit.

### **Broadband Strategy**

Recognizing the importance of broadband infrastructure, the Redevelopment Advisory Committee recommended that the facilitation of technology infrastructure enhancements to underserved business areas be identified as a priority project for all project areas. This recommendation was incorporated in the 2010-14 Redevelopment Agency Implementation Plan. Toward that goal, staff has initiated development of a broadband strategy to accomplish the following:

- Assess current conditions and identify shortcomings in the availability of broadband to industrial and commercial businesses;
- Identify and assess options for addressing service shortcomings, including negotiations with current service providers, identification of new service providers, and potential for infrastructure improvements to improve service levels; and
- Develop a comprehensive strategy to ensure that high-quality broadband service is available at reasonable costs to as many businesses as possible.

Staff has already begun meeting with service providers and reaching out to businesses to gain a better understanding of current conditions. Development of a full strategy, however, will require additional technical expertise. After discussions with staff from several other cities in California, staff solicited proposals from three firms. Tellus Venture Associates is recommended for this service because the firm has extensive experience providing comprehensive connectivity studies and assisting with broadband system management for public agencies. San Leandro can capitalize on Tellus' experience to take advantage of best practices and lessons learned from similar efforts undertaken in other cities.

Tellus' proposed scope of services includes development of a broadband strategy and assistance negotiating a license agreement for installation of fiber optic facilities (see following section). Work would be completed for both tasks – development of a broadband strategy and assistance negotiating a licensing agreement – on a time and materials basis for a not-to-exceed cost of \$45,000.

### **ENRA with OSIsoft, Inc.**

OSIsoft, Inc., a San Leandro-based software company, has approached the City with a proposal, called "Lit San Leandro," to run fiber optic cable through an existing City conduit loop. As shown in Attachment A, the loop runs through Downtown San Leandro, west along Davis Street, through the City's industrial areas, and back to Downtown along East 14<sup>th</sup> Street. The loop currently houses fiber optic cable that is used for data communications between City facilities, transferring of police and law enforcement data, and for the operation of a traffic signal system.

Under the OSIsoft proposal, the company or a newly formed entity would enter into a license agreement with the City for use of excess conduit capacity to run new fiber that is independent of the City's existing system. This new fiber would then be connected to the outside world (the internet and data centers) via leased fiber on a regional line owned by BART. OSIsoft is also considering constructing a data center, or "server farm," in San Leandro although that possibility would not be covered by the ENRA.

The purpose of the proposed fiber loop is to provide adequate capacity for data-intensive businesses in San Leandro. Most immediately, the loop would provide additional broadband capacity for OSIsoft as the company plans an expansion. The loop would also enhance business development efforts, because it would provide a mechanism for any business within reasonable proximity of the loop to tap into a high-capacity system. OSIsoft has indicated to the City that their intent would be to minimize connection costs, emphasizing the system's ability to attract businesses over its potential to generate profits.

Access to this loop would be most attractive to businesses with extremely high data needs, such as those involved in any form of "cloud" storage. At present the City's ability to attract these types of businesses is limited.

After an initial review, staff believes that the OSIsoft proposal holds great potential to allow OSIsoft to continue growing in San Leandro and to attract new businesses with high data needs that cannot be met in most traditional markets. However, numerous details would need to be worked out prior to execution of a full license agreement for use of the City's conduit. The recommended approval of an ENRA would grant OSIsoft the exclusive right to negotiate for the use of the conduit for a period of twelve months. This approach allows the City to be responsive to the Lit San Leandro proposal while still providing adequate time to negotiate a licensing agreement that provides maximum benefits while protecting the City's interests.

Details to be negotiated include, but are not limited to:

- Procedures for ensuring the security of City data on the existing fiber lines.
- Term of the agreement.
- Price paid to the City, if any, for licensing of the conduit.
- The nature of the business entity that will construct and operate the loop. So far, OSIsoft and the City have begun to review models such as a private corporation, a non-profit, or a public private partnership.
- Potential for the City to reserve some share of the new fiber for City data needs.
- Potential for the operating entity or the City to reserve some share of the new fiber for use by internet service providers to offer services to smaller customers in areas not immediately adjacent to the loop.

- Guidelines for determining price structures and policies governing how businesses could connect to the loop.
- Method of distributing profits, should any be generated, after OSIssoft recoups its initial capital investment.
- Options for installing new fiber in areas where the existing conduit does not have sufficient capacity.

The Lit San Leandro project has the potential to provide high-capacity data connections to businesses that are close to the fiber loop. In this sense, it can be considered a component of the larger need to improve broadband connectivity citywide.

One of the tasks in the Consulting Services Agreement with Tellus Venture Associates is assistance with negotiation of the license agreement. Tellus will assist the City by providing technical expertise as well as information on how other cities have handled similar arrangements.

An alternative to the recommended ENRA would be to approach a wider array of businesses and service providers to assess their interest in partnering with the City for development of a fiber loop. Given that OSIssoft is a locally based company, with plans for expansion within San Leandro, and has taken the initiative to devise the Lit San Leandro proposal, staff recommends negotiating exclusively with them at this time. Comparative data from other cities and the experience of Tellus will be used to ensure that the terms of a licensing agreement are fair for both parties.

#### **Current City Council/Redevelopment Agency Policy**

The San Leandro Redevelopment Agency 2010-14 Implementation Plan listed the following as a priority project for all redevelopment project areas:

“Facilitate technology infrastructure enhancements, including but not limited to high-speed internet services, to underserved business districts in order to support business operations and to attract new business to the City.”

#### **City Council Committee Review and Action**

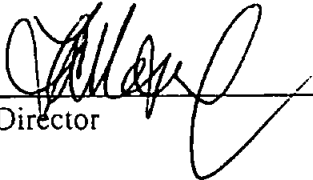
These items were reviewed at the May 12, 2011 meeting of the Business and Housing Development Committee, and the Committee recommended forwarding them to the City Council for approval.

#### **Fiscal Impact**

The Consulting Services Agreement with Tellus Venture Associates is based on a not-to-exceed cost of \$45,000, which will be funded by a new appropriation from the available fund balance of the West San Leandro/MacArthur Boulevard Redevelopment Project Area. The ENRA with OSIssoft will not have any direct fiscal impact. Any fiscal impact resulting from a future licensing agreement will be subject to Council review prior to adoption.

#### **Budget Authority**

Execution of the Consulting Services Agreement with Tellus Venture Associates requires an appropriation of \$45,000 from the available fund balance of the West San Leandro/MacArthur Boulevard Redevelopment Project Area (964-82-001-5120).

  
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Tracy, Vesely, Finance Director

**Attachments**

Attachment A: Map of existing, City-owned fiber optic loop.

**CONCLUSION**

Staff recommends that the Redevelopment Agency approve the attached resolution authorizing a consulting services agreement with Tellus Venture Associates for development of a broadband strategy and assistance negotiating a license agreement for installation of fiber optic facilities. Staff also recommends that the City Council approve the attached resolution authorizing an exclusive negotiating rights agreement with OSIssoft, Inc. for the purpose of negotiating a license agreement to install fiber optic facilities within the City's existing conduit.

Attachment A:



IN THE REDEVELOPMENT AGENCY OF THE CITY OF SAN LEANDRO

RESOLUTION NO. 2011- RDA

RESOLUTION OF THE REDEVELOPMENT AGENCY OF THE  
CITY OF SAN LEANDRO APPROVING A CONSULTING SERVICES AGREEMENT WITH  
TELLUS VENTURE ASSOCIATES FOR DEVELOPMENT OF A BROADBAND STRATEGY  
AND ASSISTANCE NEGOTIATING A LICENSE AGREEMENT FOR INSTALLATION OF  
FIBER OPTIC FACILITIES

An Agreement between the Redevelopment Agency of the City of San Leandro and Tellus  
Venture Associates, a copy of which is attached, has been presented to this Agency.

The Agency is familiar with the contents thereof.

The Executive Director has recommended approval of said agreement.

NOW, THEREFORE, the Redevelopment Agency of the City of San Leandro does  
RESOLVE as follows:

That said agreement is hereby approved and execution thereof is hereby authorized.

That the cost of said agreement shall not exceed \$45,000 and appropriation of necessary  
funds for the agreement is hereby authorized from the West San Leandro/MacArthur Boulevard  
Redevelopment Project Area fund balance.

Introduced by Agency Member and passed and adopted this 6th  
day of June, 2011 by the following called vote:

Members of the Agency:

AYES:

NOES:

ABSENT:

ATTEST: \_\_\_\_\_  
Marian Handa, Agency Secretary

**CONSULTING SERVICES AGREEMENT BETWEEN  
THE REDEVELOPMENT AGENCY OF THE CITY OF SAN LEANDRO AND  
TELLUS VENTURE ASSOCIATES**

THIS AGREEMENT for consulting services is made by and between the Redevelopment Agency of the City of San Leandro ("City") and Tellus Venture Associates ("Consultant") (together referred to as the "Parties") as of June 6, 2011 (the "Effective Date").

**Section 1. SERVICES.** Subject to the terms and conditions set forth in this Agreement, Consultant shall provide to City the services described in the Scope of Work attached as Exhibit A, and incorporated herein, at the time and place and in the manner specified therein. In the event of a conflict in or inconsistency between the terms of this Agreement and Exhibit A, the Agreement shall prevail.

- 1.1 **Term of Services.** The term of this Agreement shall begin on the Effective Date and shall end on June 5, 2012, and Consultant shall complete the work described in Exhibit A on or before that date, unless the term of the Agreement is otherwise terminated or extended, as provided for in Section 8. The time provided to Consultant to complete the services required by this Agreement shall not affect the City's right to terminate the Agreement, as referenced in Section 8.
- 1.2 **Standard of Performance.** Consultant shall perform all services required pursuant to this Agreement according to the standards observed by a competent practitioner of the profession in which Consultant is engaged.
- 1.3 **Assignment of Personnel.** Consultant shall assign only competent personnel to perform services pursuant to this Agreement. In the event that City, in its sole discretion, at any time during the term of this Agreement, desires the reassignment of any such persons, Consultant shall, immediately upon receiving notice from City of such desire of City, reassign such person or persons.
- 1.4 **Time.** Consultant shall devote such time to the performance of services pursuant to this Agreement as may be reasonably necessary to meet the standard of performance provided in Section 1.1 above and to satisfy Consultant's obligations hereunder.

**Section 2. COMPENSATION.** City hereby agrees to pay Consultant a sum not to exceed forty-five thousand dollars (\$45,000.00), notwithstanding any contrary indications that may be contained in Consultant's proposal, for services to be performed and reimbursable costs incurred under this Agreement. In the event of a conflict between this Agreement and Consultant's proposal, attached as Exhibit A, regarding the amount of compensation, the Agreement shall prevail. City shall pay Consultant for services rendered pursuant to this Agreement at the time and in the manner set forth herein. The payments specified below shall be the only payments from City to Consultant for services rendered pursuant to this Agreement. Consultant shall submit all invoices to City in the manner specified herein. Except as specifically authorized by City in writing, Consultant shall not bill City for duplicate services performed by more than one person.



Consultant and City acknowledge and agree that compensation paid by City to Consultant under this Agreement is based upon Consultant's estimated costs of providing the services required hereunder, including salaries and benefits of employees and subcontractors of Consultant. Consequently, the parties further agree that compensation hereunder is intended to include the costs of contributions to any pensions and/or annuities to which Consultant and its employees, agents, and subcontractors may be eligible. City therefore has no responsibility for such contributions beyond compensation required under this Agreement.

**2.1 Invoices.** Consultant shall submit invoices, not more often than once a month during the term of this Agreement, based on the cost for services performed and reimbursable costs incurred prior to the invoice date. Invoices shall contain the following information:

- Serial identifications of progress bills; i.e., Progress Bill No. 1 for the first invoice, etc.;
- The beginning and ending dates of the billing period;
- A Task Summary containing the original contract amount, the amount of prior billings, the total due this period, the balance available under the Agreement, and the percentage of completion;
- At City's option, for each work item in each task, a copy of the applicable time entries or time sheets shall be submitted showing the name of the person doing the work, the hours spent by each person, a brief description of the work, and each reimbursable expense;
- The total number of hours of work performed under the Agreement by Consultant and each employee, agent, and subcontractor of Consultant performing services hereunder;
- The Consultant's signature;
- Consultant shall give separate notice to the City when the total number of hours worked by Consultant and any individual employee, agent, or subcontractor of Consultant reaches or exceeds 800 hours within a 12-month period under this Agreement and any other agreement between Consultant and City. Such notice shall include an estimate of the time necessary to complete work described in Exhibit A and the estimate of time necessary to complete work under any other agreement between Consultant and City, if applicable.

**2.2 Monthly Payment.** City shall make monthly payments, based on invoices received, for services satisfactorily performed, and for authorized reimbursable costs incurred. City shall have 30 days from the receipt of an invoice that complies with all of the requirements above to pay Consultant.

**2.3 Final Payment.** City shall pay the last 10% of the total sum due pursuant to this Agreement within 60 days after completion of the services and submittal to City of a final invoice, if all services required have been satisfactorily performed.

**2.4 Total Payment.** City shall pay for the services to be rendered by Consultant pursuant to this Agreement. City shall not pay any additional sum for any expense or cost whatsoever

incurred by Consultant in rendering services pursuant to this Agreement. City shall make no payment for any extra, further, or additional service pursuant to this Agreement.

In no event shall Consultant submit any invoice for an amount in excess of the maximum amount of compensation provided above either for a task or for the entire Agreement, unless the Agreement is modified prior to the submission of such an invoice by a properly executed change order or amendment.

- 2.5 **Hourly Fees.** Fees for work performed by Consultant on an hourly basis shall not exceed the amounts shown on the compensation schedule attached hereto as Exhibit B.
- 2.6 **Reimbursable Expenses.** Reimbursable expenses are specified in Exhibit B. Expenses not listed in Exhibit B are not chargeable to City. Reimbursable expenses are included in the total amount of compensation provided under this Agreement and shall not be exceeded.
- 2.7 **Payment of Taxes.** Consultant is solely responsible for the payment of employment taxes incurred under this Agreement and any similar federal or state taxes.
- 2.8 **Payment upon Termination.** In the event that the City or Consultant terminates this Agreement pursuant to Section 8, the City shall compensate the Consultant for all outstanding costs and reimbursable expenses incurred for work satisfactorily completed as of the date of written notice of termination. Consultant shall maintain adequate logs and timesheets to verify costs incurred to that date.
- 2.9 **Authorization to Perform Services.** The Consultant is not authorized to perform any services or incur any costs whatsoever under the terms of this Agreement until receipt of authorization from the Contract Administrator.

**Section 3. FACILITIES AND EQUIPMENT.** Except as set forth herein, Consultant shall, at its sole cost and expense, provide all facilities and equipment that may be necessary to perform the services required by this Agreement. City shall make available to Consultant only the facilities and equipment listed in this section, and only under the terms and conditions set forth herein.

City shall furnish physical facilities such as desks, filing cabinets, and conference space, as may be reasonably necessary for Consultant's use while consulting with City employees and reviewing records and the information in possession of the City. The location, quantity, and time of furnishing those facilities shall be in the sole discretion of City. In no event shall City be obligated to furnish any facility that may involve incurring any direct expense, including but not limited to computer, long-distance telephone or other communication charges, vehicles, and reproduction facilities.

**Section 4. INSURANCE REQUIREMENTS.** Before beginning any work under this Agreement, Consultant, at its own cost and expense, unless otherwise specified below, shall procure the types and amounts of insurance listed below against claims for injuries to persons or damages to property that may arise from or in connection with the performance of the work hereunder by the Consultant and its agents,

representatives, employees, and subcontractors. Consistent with the following provisions, Consultant shall provide proof satisfactory to City of such insurance that meets the requirements of this section and under forms of insurance satisfactory in all respects, and that such insurance is in effect prior to beginning work to the City. Consultant shall maintain the insurance policies required by this section throughout the term of this Agreement. The cost of such insurance shall be included in the Consultant's bid. Consultant shall not allow any subcontractor to commence work on any subcontract until Consultant has obtained all insurance required herein for the subcontractor(s) and provided evidence that such insurance is in effect to City. Verification of the required insurance shall be submitted and made part of this Agreement prior to execution. Consultant shall maintain all required insurance listed herein for the duration of this Agreement.

**4.1 Workers' Compensation.** Consultant shall, at its sole cost and expense, maintain Statutory Workers' Compensation Insurance and Employer's Liability Insurance for any and all persons employed directly or indirectly by Consultant. The Statutory Workers' Compensation Insurance and Employer's Liability Insurance shall be provided with limits of not less than ONE MILLION DOLLARS (\$1,000,000.00) per accident. In the alternative, Consultant may rely on a self-insurance program to meet those requirements, but only if the program of self-insurance complies fully with the provisions of the California Labor Code. Determination of whether a self-insurance program meets the standards of the Labor Code shall be solely in the discretion of the Contract Administrator. The insurer, if insurance is provided, or the Consultant, if a program of self-insurance is provided, shall waive all rights of subrogation against the City and its officers, officials, employees, and volunteers for loss arising from work performed under this Agreement.

**4.2 Commercial General and Automobile Liability Insurance.**

**4.2.1 General requirements.** Consultant, at its own cost and expense, shall maintain commercial general and automobile liability insurance for the term of this Agreement in an amount not less than ONE MILLION DOLLARS (\$1,000,000.00) per occurrence, combined single limit coverage for risks associated with the work contemplated by this Agreement. If a Commercial General Liability Insurance or an Automobile Liability form or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the work to be performed under this Agreement or the general aggregate limit shall be at least twice the required occurrence limit. Such coverage shall include but shall not be limited to, protection against claims arising from bodily and personal injury, including death resulting therefrom, and damage to property resulting from activities contemplated under this Agreement, including the use of owned and non-owned automobiles.

**4.2.2 Minimum scope of coverage.** Commercial general coverage shall be at least as broad as Insurance Services Office Commercial General Liability occurrence form CG 0001 (most recent edition) covering comprehensive General Liability on an "occurrence" basis. Automobile coverage shall be at least as broad as Insurance Services Office Automobile Liability form CA 0001 (most recent edition), Code 1 (any auto). No endorsement shall be attached limiting the coverage.

**4.2.3 Additional requirements.** Each of the following shall be included in the insurance coverage or added as a certified endorsement to the policy:

- a. The Insurance shall cover on an occurrence or an occurrence basis, and not on a claims-made basis.
- b. City, its officers, officials, employees, and volunteers are to be covered as insureds as respects: liability arising out of work or operations performed by or on behalf of the Consultant; or automobiles owned, leased, hired, or borrowed by the Consultant
- c. For any claims related to this Agreement or the work hereunder, the Consultant's insurance covered shall be primary insurance as respects the City, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees, or volunteers shall be excess of the Consultant's insurance and shall not contribute with it.
- d. Each insurance policy required by this clause shall be endorsed to state that coverage shall not be canceled by either party, except after 30 days' prior written notice has been provided to the City.

**4.3 Professional Liability Insurance.**

**4.3.1 General requirements.** Consultant, at its own cost and expense, shall maintain for the period covered by this Agreement professional liability insurance for licensed professionals performing work pursuant to this Agreement in an amount not less than ONE MILLION DOLLARS (\$1,000,000.00) covering the licensed professionals' errors and omissions. Any deductible or self-insured retention shall not exceed \$150,000 per claim.

**4.3.2 Claims-made limitations.** The following provisions shall apply if the professional liability coverage is written on a claims-made form:

- a. The retroactive date of the policy must be shown and must be before the date of the Agreement.
- b. Insurance must be maintained and evidence of insurance must be provided for at least five years after completion of the Agreement or the work, so long as commercially available at reasonable rates.
- c. If coverage is canceled or not renewed and it is not replaced with another claims-made policy form with a retroactive date that precedes the date of this Agreement, Consultant must purchase an extended period coverage

for a minimum of five years after completion of work under this Agreement.

- d. A copy of the claim reporting requirements must be submitted to the City for review prior to the commencement of any work under this Agreement.

#### **4.4 All Policies Requirements.**

**4.4.1 Acceptability of insurers.** All insurance required by this section is to be placed with insurers with a Bests' rating of no less than A: VII.

**4.4.2 Verification of coverage.** Prior to beginning any work under this Agreement, Consultant shall furnish City with complete copies of all policies delivered to Consultant by the insurer, including complete copies of all endorsements attached to those policies. All copies of policies and endorsements shall show the signature of a person authorized by that insurer to bind coverage on its behalf. If the City does not receive the required insurance documents prior to the Consultant beginning work, it shall not waive the Consultant's obligation to provide them. The City reserves the right to require complete copies of all required insurance policies at any time.

**4.4.3 Deductibles and Self-Insured Retentions.** Consultant shall disclose to and obtain the written approval of City for the self-insured retentions and deductibles before beginning any of the services or work called for by any term of this Agreement. At the option of the City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officers, employees, and volunteers; or the Consultant shall provide a financial guarantee satisfactory to the City guaranteeing payment of losses and related investigations, claim administration and defense expenses.

**4.4.4 Wasting Policies.** No policy required by this Section 4 shall include a "wasting" policy limit (i.e. limit that is eroded by the cost of defense).

**4.4.5 Waiver of Subrogation.** Consultant hereby agrees to waive subrogation which any insurer or contractor may require from vendor by virtue of the payment of any loss. Consultant agrees to obtain any endorsements that may be necessary to affect this waiver of subrogation.

The Workers' Compensation policy shall be endorsed with a waiver of subrogation in favor of the entity for all work performed by the consultant, its employees, agents, and subcontractors.

**4.4.6 Subcontractors.** Consultant shall include all subcontractors as insureds under its policies or shall furnish separate certificates and endorsements for each

subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein.

**4.5 Remedies.** In addition to any other remedies City may have if Consultant fails to provide or maintain any insurance policies or policy endorsements to the extent and within the time herein required, City may, at its sole option exercise any of the following remedies, which are alternatives to other remedies City may have and are not the exclusive remedy for Consultant's breach:

- Obtain such insurance and deduct and retain the amount of the premiums for such insurance from any sums due under the Agreement;
- Order Consultant to stop work under this Agreement or withhold any payment that becomes due to Consultant hereunder, or both stop work and withhold any payment, until Consultant demonstrates compliance with the requirements hereof; and/or
- Terminate this Agreement.

**Section 5. INDEMNIFICATION AND CONSULTANT'S RESPONSIBILITIES.**

Consultant shall indemnify, defend with counsel acceptable to City, and hold harmless City and its officers, officials, employees, agents and volunteers from and against any and all liability, loss, damage, claims, expenses, and costs (including without limitation, attorney's fees and costs and fees of litigation) (collectively, "Liability") of every nature arising out of or in connection with Consultant's performance of the Services or its failure to comply with any of its obligations contained in this Agreement, except such Liability caused by the sole negligence or willful misconduct of City.

The Consultant's obligation to defend and indemnify shall not be excused because of the Consultant's inability to evaluate Liability or because the Consultant evaluates Liability and determines that the Consultant is not liable to the claimant. The Consultant must respond within 30 days, to the tender of any claim for defense and indemnity by the City, unless this time has been extended by the City. If the Consultant fails to accept or reject a tender of defense and indemnity within 30 days, in addition to any other remedy authorized by law, so much of the money due the Consultant under and by virtue of this Agreement as shall reasonably be considered necessary by the City, may be retained by the City until disposition has been made of the claim or suit for damages, or until the Consultant accepts or rejects the tender of defense, whichever occurs first.

Notwithstanding the forgoing, to the extent this Agreement is a "construction contract" as defined by California Civil Code Section 2782, as may be amended from time to time, such duties of consultant to indemnify shall not apply when to do so would be prohibited by California Civil Code Section 2782.

In the event that Consultant or any employee, agent, or subcontractor of Consultant providing services under this Agreement is determined by a court of competent jurisdiction or the California Public Employees Retirement System (PERS) to be eligible for enrollment in PERS as an employee of City, Consultant shall indemnify, defend, and hold harmless City for the payment of any employee and/or employer contributions

for PERS benefits on behalf of Consultant or its employees, agents, or subcontractors, as well as for the payment of any penalties and interest on such contributions, which would otherwise be the responsibility of City.

**Section 6. STATUS OF CONSULTANT.**

**6.1 Independent Contractor.** At all times during the term of this Agreement, Consultant shall be an independent contractor and shall not be an employee of City. City shall have the right to control Consultant only insofar as the results of Consultant's services rendered pursuant to this Agreement and assignment of personnel pursuant to Subparagraph 1.3; however, otherwise City shall not have the right to control the means by which Consultant accomplishes services rendered pursuant to this Agreement. Notwithstanding any other City, state, or federal policy, rule, regulation, law, or ordinance to the contrary, Consultant and any of its employees, agents, and subcontractors providing services under this Agreement shall not qualify for or become entitled to, and hereby agree to waive any and all claims to, any compensation, benefit, or any incident of employment by City, including but not limited to eligibility to enroll in the California Public Employees Retirement System (PERS) as an employee of City and entitlement to any contribution to be paid by City for employer contributions and/or employee contributions for PERS benefits.

**6.2 Consultant Not an Agent.** Except as City may specify in writing, Consultant shall have no authority, express or implied, to act on behalf of City in any capacity whatsoever as an agent. Consultant shall have no authority, express or implied, pursuant to this Agreement to bind City to any obligation whatsoever.

**Section 7. LEGAL REQUIREMENTS.**

**7.1 Governing Law.** The laws of the State of California shall govern this Agreement.

**7.2 Compliance with Applicable Laws.** Consultant and any subcontractors shall comply with all laws applicable to the performance of the work hereunder.

**7.3 Other Governmental Regulations.** To the extent that this Agreement may be funded by fiscal assistance from another governmental entity, Consultant and any subcontractors shall comply with all applicable rules and regulations to which City is bound by the terms of such fiscal assistance program.

**7.4 Licenses and Permits.** Consultant represents and warrants to City that Consultant and its employees, agents, and any subcontractors have all licenses, permits, qualifications, and approvals of whatsoever nature that are legally required to practice their respective professions. Consultant represents and warrants to City that Consultant and its employees, agents, any subcontractors shall, at their sole cost and expense, keep in effect at all times during the term of this Agreement any licenses, permits, and approvals that are legally required to practice their respective professions. In addition to the foregoing,

Consultant and any subcontractors shall obtain and maintain during the term of this Agreement valid Business Licenses from City.

- 7.5 Nondiscrimination and Equal Opportunity.** Consultant shall not discriminate, on the basis of a person's race, religion, color, national origin, age, physical or mental handicap or disability, medical condition, marital status, sex, or sexual orientation, against any employee, applicant for employment, subcontractor, bidder for a subcontract, or participant in, recipient of, or applicant for any services or programs provided by Consultant under this Agreement. Consultant shall comply with all applicable federal, state, and local laws, policies, rules, and requirements related to equal opportunity and nondiscrimination in employment, contracting, and the provision of any services that are the subject of this Agreement, including but not limited to the satisfaction of any positive obligations required of Consultant thereby.

Consultant shall include the provisions of this Subsection in any subcontract approved by the Contract Administrator or this Agreement.

## **Section 8. TERMINATION AND MODIFICATION.**

- 8.1 Termination.** City may cancel this Agreement at any time and without cause upon written notification to Consultant.

Consultant may cancel this Agreement upon 90 days' written notice to City and shall include in such notice the reasons for cancellation.

In the event of termination, Consultant shall be entitled to compensation for services performed to the effective date of termination; City, however, may condition payment of such compensation upon Consultant delivering to City any or all documents, photographs, computer software, video and audio tapes, and other materials provided to Consultant or prepared by or for Consultant or the City in connection with this Agreement.

- 8.2 Extension.** City may, in its sole and exclusive discretion, extend the end date of this Agreement beyond that provided for in Subsection 1.1. Any such extension shall require a written amendment to this Agreement, as provided for herein. Consultant understands and agrees that, if City grants such an extension, City shall have no obligation to provide Consultant with compensation beyond the maximum amount provided for in this Agreement. Similarly, unless authorized by the Contract Administrator, City shall have no obligation to reimburse Consultant for any otherwise reimbursable expenses incurred during the extension period.

- 8.3 Amendments.** The parties may amend this Agreement only by a writing signed by all the parties.

- 8.4 Assignment and Subcontracting.** City and Consultant recognize and agree that this Agreement contemplates personal performance by Consultant and is based upon a



determination of Consultant's unique personal competence, experience, and specialized personal knowledge. Moreover, a substantial inducement to City for entering into this Agreement was and is the professional reputation and competence of Consultant. Consultant may not assign this Agreement or any interest therein without the prior written approval of the Contract Administrator. Consultant shall not subcontract any portion of the performance contemplated and provided for herein, other than to the subcontractors noted in the proposal, without prior written approval of the Contract Administrator.

- 8.5 Survival.** All obligations arising prior to the termination of this Agreement and all provisions of this Agreement allocating liability between City and Consultant shall survive the termination of this Agreement.
- 8.6 Options upon Breach by Consultant.** If Consultant materially breaches any of the terms of this Agreement, City's remedies shall included, but not be limited to, the following:
- 8.6.1** Immediately terminate the Agreement;
  - 8.6.2** Retain the plans, specifications, drawings, reports, design documents, and any other work product prepared by Consultant pursuant to this Agreement;
  - 8.6.3** Retain a different consultant to complete the work described in Exhibit A not finished by Consultant; or
  - 8.6.4** Charge Consultant the difference between the cost to complete the work described in Exhibit A that is unfinished at the time of breach and the amount that City would have paid Consultant pursuant to Section 2 if Consultant had completed the work.

## **Section 9. KEEPING AND STATUS OF RECORDS.**

- 9.1 Records Created as Part of Consultant's Performance.** All reports, data, maps, models, charts, studies, surveys, photographs, memoranda, plans, studies, specifications, records, files, or any other documents or materials, in electronic or any other form, that Consultant prepares or obtains pursuant to this Agreement and that relate to the matters covered hereunder shall be the property of the City. Consultant hereby agrees to deliver those documents to the City upon termination of the Agreement. It is understood and agreed that the documents and other materials, including but not limited to those described above, prepared pursuant to this Agreement are prepared specifically for the City and are not necessarily suitable for any future or other use. City and Consultant agree that, until final approval by City, all data, plans, specifications, reports and other documents are confidential and will not be released to third parties without prior written consent of both parties.
- 9.2 Consultant's Books and Records.** Consultant shall maintain any and all ledgers, books of account, invoices, vouchers, canceled checks, and other records or documents

evidencing or relating to charges for services or expenditures and disbursements charged to the City under this Agreement for a minimum of 3 years, or for any longer period required by law, from the date of final payment to the Consultant to this Agreement.

- 9.3 **Inspection and Audit of Records.** Any records or documents that Section 9.2 of this Agreement requires Consultant to maintain shall be made available for inspection, audit, and/or copying at any time during regular business hours, upon oral or written request of the City. Under California Government Code Section 8546.7, if the amount of public funds expended under this Agreement exceeds \$10,000.00, the Agreement shall be subject to the examination and audit of the State Auditor, at the request of City or as part of any audit of the City, for a period of 3 years after final payment under the Agreement.

## **Section 10 MISCELLANEOUS PROVISIONS.**

- 10.1 **Attorneys' Fees.** If a party to this Agreement brings any action, including an action for declaratory relief, to enforce or interpret the provision of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. The court may set such fees in the same action or in a separate action brought for that purpose.
- 10.2 **Venue.** In the event that either party brings any action against the other under this Agreement, the parties agree that trial of such action shall be vested exclusively in the state courts of California in the County of Alameda or in the United States District Court for the Northern District of California.
- 10.3 **Severability.** If a court of competent jurisdiction finds or rules that any provision of this Agreement is invalid, void, or unenforceable, the provisions of this Agreement not so adjudged shall remain in full force and effect. The invalidity in whole or in part of any provision of this Agreement shall not void or affect the validity of any other provision of this Agreement.
- 10.4 **No Implied Waiver of Breach.** The waiver of any breach of a specific provision of this Agreement does not constitute a waiver of any other breach of that term or any other term of this Agreement.
- 10.5 **Successors and Assigns.** The provisions of this Agreement shall inure to the benefit of and shall apply to and bind the successors and assigns of the parties.
- 10.6 **Use of Recycled Products.** Consultant shall prepare and submit all reports, written studies and other printed material on recycled paper to the extent it is available at equal or less cost than virgin paper.
- 10.7 **Conflict of Interest.** Consultant may serve other clients, but none whose activities within the corporate limits of City or whose business, regardless of location, would place

Consultant in a "conflict of interest," as that term is defined in the Political Reform Act, codified at California Government Code Section 81000 *et seq.*

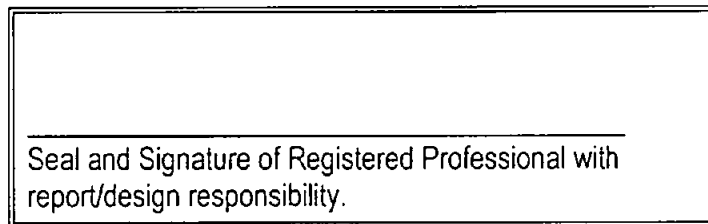
Consultant shall not employ any City official in the work performed pursuant to this Agreement. No officer or employee of City shall have any financial interest in this Agreement that would violate California Government Code Sections 1090 *et seq.*

Consultant hereby warrants that it is not now, nor has it been in the previous 12 months, an employee, agent, appointee, or official of the City. If Consultant was an employee, agent, appointee, or official of the City in the previous twelve months, Consultant warrants that it did not participate in any manner in the forming of this Agreement. Consultant understands that, if this Agreement is made in violation of Government Code § 1090 *et seq.*, the entire Agreement is void and Consultant will not be entitled to any compensation for services performed pursuant to this Agreement, including reimbursement of expenses, and Consultant will be required to reimburse the City for any sums paid to the Consultant. Consultant understands that, in addition to the foregoing, it may be subject to criminal prosecution for a violation of Government Code § 1090 and, if applicable, will be disqualified from holding public office in the State of California.

- 10.8 **Solicitation.** Consultant agrees not to solicit business at any meeting, focus group, or interview related to this Agreement, either orally or through any written materials.
- 10.9 **Contract Administration.** This Agreement shall be administered by Cynthia Battenberg, Assistant to the City Manager ("Contract Administrator"). All correspondence shall be directed to or through the Contract Administrator or her designee.
- 10.10 **Notices.** Any written notice to Consultant shall be sent to:

Any written notice to City/Agency shall be sent to:

- 10.11 **Professional Seal.** Where applicable in the determination of the contract administrator, the first page of a technical report, first page of design specifications, and each page of construction drawings shall be stamped/sealed and signed by the licensed professional responsible for the report/design preparation. The stamp/seal shall be in a block entitled "Seal and Signature of Registered Professional with report/design responsibility," as in the following example.



- 10.12 **Integration.** This Agreement, including the scope of work attached hereto and incorporated herein as Exhibits A and B represents the entire and integrated agreement between City and Consultant and supersedes all prior negotiations, representations, or agreements, either written or oral.

Exhibit A

Exhibit B

- 10.13 **Counterparts.** This Agreement may be executed in multiple counterparts, each of which shall be an original and all of which together shall constitute one agreement.

[SIGNATURES ON FOLLOWING PAGE]

The Parties have executed this Agreement as of the Effective Date.

REDEVELOPMENT AGENCY OF THE  
CITY OF SAN LEANDRO

CONSULTANT

\_\_\_\_\_  
Stephen L. Hollister, Executive Director

\_\_\_\_\_  
(Insert Name of Consultant)

Attest:

\_\_\_\_\_  
Marian Handa, Secretary

Approved as to Form:

\_\_\_\_\_  
Jayne Williams, Agency Counsel

Approved as to Budget Authority:

\_\_\_\_\_  
Tracy Vesely, Agency Treasurer

Account/Amount: 964-82-001-5120 / \$45,000

## EXHIBIT A

### SCOPE OF SERVICES

1. The Consultant's Task 1 will be to advise and assist the City in the development and negotiation of an agreement with OSIsoft, Inc. or its assignees to provide access to City-owned facilities and resources and undertake other measures for the purpose of building a broadband network. A conceptual description of this network is contained in a document entitled "Lit San Leandro Project" which has been provided to the Consultant by the City.

While carrying out Task 1, the Consultant agrees to attend up to seven meetings (or series of meetings within a single day) in the San Francisco Bay Area at the City's request and bill for time spent onsite. Additional meetings may be subject to minimum billing as described below at the Consultant's discretion. Included in those meetings will be meetings with representatives from OSIsoft and one presentation to both the City Council and the Business and Housing Development Committee. The time and location of these meetings will be determined by the City, subject to the reasonable availability of the Consultant.

2. The Consultant's Task 2 will be to provide the City with a written summary analysis of options at the beginning of this negotiation. This report will be in addition to any memorandums or contract drafts or presentations or similar material prepared or reviewed by the Consultant in the course of completing Task 1. This report will include a brief comparison of comparable or alternative methods of implementing private fiber systems used in other California municipalities. At the City's request, the Consultant will present this analysis at a meeting determined by the City, subject to the reasonable availability of the Consultant.

3. The Consultant's Task 3 will be to provide the City with a written summary analysis of results at the conclusion of this negotiation. This report will be in addition to any memorandums or contract drafts or presentations or similar material prepared or reviewed by the Consultant in the course of completing Task 1. This analysis will include
  1. an assessment of the economic viability of the OSIsoft proposal including its potential to attract new business to San Leandro,
  2. an analysis of the feasibility of the proposal with an emphasis on conduit capacity issues (City to provide technical documentation), security risks, and ongoing maintenance issues and
  3. an assessment of the opportunity cost of leasing conduit for this proposal as opposed to other possible uses of that capacity.

At the City's request, the Consultant will present this analysis at a meeting determined by the City, subject to the reasonable availability of the Consultant.

4. The Consultant's Task 4 will be to advise and assist the City in the development of a broadband policy as requested by the City. The scope of this Task will involve helping the City identify shortcomings in the current availability of broadband service for industrial and commercial businesses, identifying options to remedy the shortcoming. The final deliverable for this Task will be a report which includes a description of the current status, and overview of options to provide enhanced services, and estimates of the relative costs and challenges associated with the alternatives.

The City will provide resources necessary to conduct this negotiation and research at no cost to the Consultant including but not limited to GIS data, business license data, technical documentation of City facilities, legal counsel and meeting space.

The Consultant shall give full effort to fulfill City's need both in the quality of contents and delivery schedule of service. The Consultant represents that it has the necessary professional expertise, qualifications and capability, and all required licenses and/or certifications to provide the services herein.

The total, not-to-exceed amount for all work performed and reimbursable expenses incurred under this agreement is \$45,000 (forty five thousand dollars). Except as noted above, invoicing will be done on a calendar month basis for time and expense billable within a given month. Invoices are due and payable upon receipt, and invoices more than 30 days past due will be subject to an additional one and a half percent per month charge.

## EXHIBIT B

### COMPENSATION SCHEDULE AND REIMBURSABLE EXPENSES

For work performed under this agreement, including work by subcontractors, the Consultant will bill the City at the project rate of \$250 per hour. Any such work must be approved in advance and in writing by the City. Work done at the Consultant's office is tracked and billed by the quarter hour. Work done at locations outside the Consultant's office may be subject to a minimum 4-hour and a maximum 8-hour daily charge at the Consultant's discretion. Travel time is not billable as such, provided the City allows reasonable arrangements and expenses (where applicable) to minimize such time.

The Consultant is responsible for "course of business" expense, such as domestic phone calls, travel within the greater Monterey and San Francisco Bay Areas (including travel to San Leandro), normal office expenses, subscriptions, normal on-line expense and such.

All other direct expenses, including but not limited to other travel, report and presentation production, and research and client service expenses, are reimbursable provided that any significant expenses are approved in advance when possible. All reimbursable expenses will be billed in the month incurred and on a pass-through basis, without mark up.



IN THE CITY COUNCIL OF THE CITY OF SAN LEANDRO

RESOLUTION NO. 2011-

RESOLUTION APPROVING EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT WITH  
OSISOFT, INC. FOR DEVELOPMENT OF  
LICENSE AGREEMENT TO INSTALL FIBER OPTIC FACILITIES

An Exclusive Negotiating Rights Agreement between the City of San Leandro and OSISOFT, Inc., a copy of which is attached, has been presented to this Council.

The Council is familiar with the contents thereof.

The City Manager has recommended approval of said agreement.

NOW, THEREFORE, the City Council of the City of San Leandro does RESOLVE as follows:

That said Exclusive Negotiating Rights Agreement is hereby approved and execution thereof is hereby authorized.

Introduced by Councilmember  
day of June, 2011 by the following called vote:

and passed and adopted this 6<sup>th</sup>

Members of the Council:

AYES:

NOES:

ABSENT:

ATTEST: \_\_\_\_\_  
Marian Handa, City Clerk

**EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT**

**by and between**

**CITY OF SAN LEANDRO**

**and**

**OSI SOFT, INC.**

THIS EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT (this "Agreement") is entered into effective as of \_\_\_\_\_, 2010 ("Effective Date") by and between the City of San Leandro, a municipal corporation ("City") and OSIsoft, Inc., a privately held corporation ("OSIsoft"). City and OSIsoft are hereinafter collectively referred to as the "Parties."

## RECITALS

A. OSIsoft proposes to install fiber optic facilities throughout a defined area (the "Project") by utilizing available space within City owned and managed rights of way, vaults and conduit (the "Conduit" or "Property"), as depicted in the attached map and related diagrams incorporated herein and made a part hereof, as Exhibit A.

B. Staff desires to pursue negotiations with OSIsoft regarding OSIsoft's proposed development of the Project such that the City Manager will execute an agreement granting OSIsoft exclusive rights to negotiate with City for the purpose of reaching agreement on a license or other agreement ("the License") whose terms and conditions would govern the development of the Project.

**NOW THEREFORE**, in consideration of the mutual covenants and agreements set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Good Faith Efforts to Negotiate. The Parties shall use their best efforts to successfully negotiate a License or other agreement which shall describe the terms and conditions governing the development and management of the Project. The Parties shall diligently and in good faith pursue such negotiations. This Agreement does not impose a binding obligation on City to convey or license City Property to OSIsoft, nor does it obligate the City to grant any approvals or authorizations required for the Project. Without limiting the generality of the foregoing, OSIsoft expressly acknowledges that a license resulting from negotiations contemplated herein shall become effective only if the license is approved by the City Council as required by applicable law and compliance with all other requirements of law, including without limitation the California Environmental Quality Act.

1.1 License Agreement. The Parties agree that the License or other agreement shall include the following terms:

1.1.1 Price. The price for a revocable, un-assignable and non-exclusive use of the Property shall be the fair market value, determined by a method mutually acceptable to City and OSIsoft.

1.1.2 AS-IS Conveyance. The City will have no responsibility for environmental remediation of any kind. The City makes no representations or warranties regarding the physical condition of the Property or its suitability for OSIsoft's use, but the City

will disclose to OSIsoft any conditions now known or later discovered that could affect the suitability of the Property for OSIsoft's use.

1.1.3 Project. The Project will consist of installation of OSIsoft's fiber optic facilities within existing City Conduit, which is currently occupied by City owned and managed fiber optic wiring and related facilities. The particular sections and area of Conduit, as well as the exact configuration and location of OSIsoft's proposed facilities within the Conduit will be the subject of the License or other agreement.

1.1.4 Development Costs; Design Review. OSIsoft will be responsible for all Project costs, including without limitation all design, development, and construction costs and the cost of all improvements, if any. The License will specify the schedule for OSIsoft's submission and City review of design and construction drawings and plans.

1.1.5 Development Schedule. The License will include a schedule describing the anticipated dates by which OSIsoft shall obtain entitlements, commence construction, and complete the Project.

1.1.6 Business Development Plan and Schedule. The License will include a section or Exhibit that describes how the Project will benefit the City's Economic Development Plan, and/or General Plan. The License will also describe how OSIsoft proposes to allow businesses or other entities access to the Project.

2. OSIsoft's Exclusive Right to Negotiate With City. City agrees that it will not, during the term of this Agreement (the "**Term**") directly or indirectly, through any officer, employee, agent, or otherwise, solicit, initiate or encourage the submission of bids, offers or proposals by any person or entity with respect to the acquisition of any interest in City owned conduit or the development of the conduit, and City shall not engage any broker, financial adviser or consultant to initiate or encourage proposals or offers from other parties with respect to the disposition or development of the conduit or any portion thereof. Furthermore, City shall not, directly or indirectly, through any officer, employee, agent or otherwise, engage in negotiations concerning any such transaction with, or provide information to, any person other than OSIsoft and its representatives with a view to engaging, or preparing to engage, that person with respect to the development of the Project or any portion thereof.

3. Term. The Term of this Agreement shall commence on the Effective Date, and shall terminate twelve (12) months thereafter, unless extended or earlier terminated as provided herein. The City Manager is authorized to extend the Term by any additional number of days or months upon the mutual written agreement of the Parties.

4. Relationship of Parties. The Parties agree that nothing in this Agreement shall be deemed or interpreted to create between them the relationship of lessor and lessee, of buyer and seller, or of partners or joint venturers.

5. OSIsoft's Studies; Right of Entry. During the Term, OSIsoft shall use its best efforts to prepare, at OSIsoft's expense, any studies, surveys, plans, specifications and reports ("OSIsoft Studies") OSIsoft deems necessary or desirable in OSIsoft's sole discretion, to determine the viability of the Project. Such studies may include, without limitation, marketing, feasibility, seismic and environmental studies, financial feasibility analyses and design studies. OSIsoft shall be responsible for obtaining City's advance written permission for access to the Property as may be necessary to prepare the OSIsoft Studies. In connection with entry to the Property, OSIsoft shall and hereby agrees to indemnify, defend (with counsel approved by City) and hold harmless the Indemnitees (defined in Section 14) from and against all Claims (defined in Section 14) resulting from or arising in connection with entry to the Property by OSIsoft or OSIsoft's agents, employees, consultants, contractors or subcontractors.

City may require OSIsoft to execute a right of entry agreement satisfactory to City prior to entry into the conduit. OSIsoft's inspection, examination, survey and review of the Property shall be at OSIsoft's sole expense, but OSIsoft shall not be required to pay for, or reimburse the City, for time spent on such activities. OSIsoft shall provide City with copies of all OSIsoft Studies, including without limitation reports and test results within ten (10) days following completion of such reports and testing, whether or not such reports and test results are completed prior to or after the expiration or earlier termination of this Agreement. The City agrees to keep all such reports and testing confidential. After any necessary inspection, examination, survey or review OSIsoft shall repair, restore and return the Property to its condition immediately preceding OSIsoft's entry therein at OSIsoft's sole expense, unless otherwise directed by City. OSIsoft shall at all times keep the Property free and clear of all liens and encumbrances affecting title to the Property. OSIsoft's indemnification obligations, obligations to the OSIsoft Studies, and obligations to discharge liens that attach to the Property as set forth in this Section 5 shall survive the expiration or earlier termination of this Agreement.

6. City Responsible for its Own Expenses. City will be responsible for its costs (staff, attorney and consultant time) and expenses to assist OSIsoft with access to or surveys of the Property, and to conduct any studies including without limitation any marketing, financial feasibility, and design studies it deems necessary to assist it with the analysis of OSIsoft's proposal and the Project. However, OSIsoft shall be responsible for any environmental studies required by the California Environmental Quality Act (CEQA), including an Environmental Impact Report should one become necessary, that is required for the approval of the License or other agreement.

7. OSIsoft's Pro Forma. Prior to execution of the License contemplated by this Agreement, OSIsoft shall provide City with a pro forma that confirms the financial feasibility of the proposed Project.

8. Expenses. Except as otherwise expressly provided herein, OSIsoft shall pay all of its own costs and expenses incurred in connection with this Agreement and the activities contemplated hereby.

9. Confidentiality; Dissemination of Information. During the Term, each Party shall obtain the consent of the other Party prior to issuing or permitting any of its officers, employees or agents to issue any press release or other information to the press with respect to this Agreement; provided however, no Party shall be prohibited from supplying any information to its representatives, agents, attorneys, advisors, financing sources and others to the extent necessary to accomplish the activities contemplated hereby so long as such representatives, agents, attorneys, advisors, financing sources and others are made aware of the terms of this Section. Further, the Parties shall not release or disclose the contents of any study or report prepared for the Project without the written consent of the other Party. Nothing contained in this Agreement shall prevent either Party at any time from furnishing any required information to any governmental entity or authority pursuant to a legal requirement or from complying with its legal or contractual obligations.

10. Execution of Disposition and Development Agreement. If the Parties successfully negotiate a License, City Manager shall promptly recommend approval of the License to the City Council. The City shall have no legal obligation to grant any approvals or authorizations for the Project until the License has been approved by the City Council.

11. Termination. This Agreement may be terminated at any time by mutual consent of the Parties. City shall have the right to terminate this Agreement upon its good faith determination that OSIsoft is not proceeding diligently and in good faith to carry out its obligations pursuant to this Agreement. City shall exercise such right by providing at least ten (10) days' advance written notice to OSIsoft which notice shall describe the nature of OSIsoft's default hereunder. Notwithstanding the foregoing, if OSIsoft commences to cure such default within such 10-day period and diligently prosecutes such cure to completion within the earliest feasible time but not later than thirty (30) days following the date of the notice, this Agreement shall remain in effect. OSIsoft shall have the right to terminate this Agreement, effective upon 10 days' written notice to City, if the results of its investigation into the feasibility of the Project are unsatisfactory or if OSIsoft is unable to obtain other necessary approvals, rights or interests. Neither Party shall have the right to seek an award of damages as a result of the termination of this Agreement pursuant to this Section.

12. Effect of Termination. Upon termination as provided herein, or upon the expiration of the Term and any extensions thereof without the Parties having successfully negotiated a License, this Agreement shall forthwith be void, and there shall be no further liability or obligation on the part of either of the Parties or their respective officers, employees, agents or other representatives; provided however, the provisions of Section 8 (Expenses), Section 9 (Confidentiality), Section 14 (Hold Harmless) and Section 18 (No Brokers) shall survive such termination. Provided further, that upon termination or expiration of this Agreement OSIsoft shall deliver to City, within 15 days of termination or expiration, copies of all of OSIsoft's Studies not previously provided to City.

13. Notices. Except as otherwise specified in this Agreement, all notices to be sent pursuant to this Agreement shall be made in writing, and sent to the Parties at their respective addresses specified below or to such other address as a Party may designate by

written notice delivered to the other parties in accordance with this Section. All such notices shall be sent by:

- (i) personal delivery, in which case notice is effective upon delivery;
- (ii) certified or registered mail, return receipt requested, in which case notice shall be deemed delivered on receipt if delivery is confirmed by a return receipt;
- (iii) nationally recognized overnight courier, with charges prepaid or charged to the sender's account, in which case notice is effective on delivery if delivery is confirmed by the delivery service;
- (iv) facsimile transmission, in which case notice shall be deemed delivered upon transmittal, provided that (a) a duplicate copy of the notice is promptly delivered by first-class or certified mail or by overnight delivery, or (b) a transmission report is generated reflecting the accurate transmission thereof. Any notice given by facsimile shall be considered to have been received on the next business day if it is received after 5:00 p.m. recipient's time or on a nonbusiness day.

**City:** City of San Leandro  
City Hall  
835 E. 14<sup>th</sup> Street  
San Leandro, CA 94577  
Telephone: 510.577.3354  
Facsimile: 510.577.3340  
Attn: City Manager

**OSIsoft:** OSI Soft, Inc.  
  
Facsimile: ( )  
Attn:

14. Indemnification. OSIsoft hereby covenants, on behalf of itself and its permitted successors and assigns, to indemnify, hold harmless and defend the City and its respective elected and appointed officials, officers, agents, representatives and employees (all of the foregoing, "**Indemnitees**") from and against all liability, loss, cost, claim, demand, action, suit, legal or administrative proceeding, penalty, deficiency, fine, damage and expense (including, without limitation, reasonable attorney's fees and costs of litigation) (all of the foregoing, collectively hereinafter "**Claims**") arising out of or in connection with this Agreement; provided however, OSIsoft shall have no indemnification obligation with respect to the gross negligence or willful misconduct of any Indemnitee. OSIsoft's indemnification obligations set forth in this Section 14 shall survive the expiration or earlier termination of this Agreement.

15. Severability. If any term or provision of this Agreement or the application thereof shall, to any extent, be held to be invalid or unenforceable, such term or provision shall be ineffective to the extent of such invalidity or unenforceability without invalidating or rendering unenforceable the remaining terms and provisions of this Agreement or the application of such terms and provisions to circumstances other than those as to which it is held invalid or unenforceable unless an essential purpose of this Agreement would be defeated by loss of the invalid or unenforceable provision.

16. Entire Agreement; Amendments In Writing; Counterparts. This Agreement contains the entire understanding of the Parties with respect to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings, oral and written, between the Parties with respect to such subject matter. This Agreement may be amended only by a written instrument executed by the Parties or their successors in interest. This Agreement may be executed in multiple counterparts, each of which shall be an original and all of which together shall constitute one agreement.

17. Successors and Assigns; No Third-Party Beneficiaries. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns; provided however, that neither Party shall transfer or assign any of such Party's rights hereunder by operation of law or otherwise without the prior written consent of the other Party, and any such transfer or assignment without such consent shall be void. Subject to the immediately preceding sentence, this Agreement is not intended to benefit, and shall not run to the benefit of or be enforceable by, any other person or entity other than the Parties and their permitted successors and assigns.

18. Brokers. Each Party warrants and represents to the other that no brokers have been retained or consulted in connection with this transaction other than as disclosed in writing to the other Party. Each Party agrees to defend, indemnify and hold harmless the other Party from any claims, expenses, costs or liabilities arising in connection with a breach of this warranty and representation. The terms of this Section shall survive the expiration or earlier termination of this Agreement.

19. Captions. The captions of the sections and articles of this Agreement are for convenience only and are not intended to affect the interpretation or construction of the provisions hereof.

20. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California.

**SIGNATURES ON FOLLOWING PAGE.**



IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first written above.

**City of San Leandro**

By: \_\_\_\_\_

Name: \_\_\_\_\_  
City Manager

APPROVED AS TO FORM:

By: \_\_\_\_\_  
City Attorney

ATTEST:

By: \_\_\_\_\_  
City Clerk .

**OSI Soft, Inc.**

a \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: [Managing Member]

# EXHIBIT A

