

**TOWN OF
APPLE VALLEY, CALIFORNIA**

AGENDA MATTER

Subject Item:

AWARD OF PROFESSIONAL SERVICES AGREEMENT FOR CONSTRUCTION MANAGEMENT SERVICES TO EBERHARDT CONSTRUCTION, INC., FOR THE TOWN HALL EXPANSION AND ANIMAL CONTROL FACILITY.

Summary Statement:

At the April 8, 2008 Council Meeting, the actions taken by the Town Council directed staff was to negotiate a Professional Services Contract with Swinerton Management and Consulting for the Town Hall Expansion Facility and Animal Control Facility and bring back such agreement to the Town Council for review and approval. The Council further authorized staff to negotiate a Professional Services agreement with the #2-rated respondent, Eberhardt Construction, in the event staff was unable to reach agreement with Swinerton.

During the course of negotiations with Swinerton, using the multi-prime method of delivery, the price proposed increased by \$468,010 even though the number of buildings to be managed was reduced from three to two and the time on-site reduced from 24-months to 15-months (Exhibit "A"). As a result of this increase, staff requested Eberhardt Construction to submit it's multi-prime proposal so a proper apples-to-apples comparison could be conducted. Once this process was completed, staff determined that Eberhardt was able to reduce its original proposal by \$183,000.00 (Exhibit "B"). As a result, and in conformance with the original action taken by the Town Council at its April 8th meeting, staff was able to reach agreement with Eberhardt Construction and has submitted a form motion for Council consideration as identified in the Recommended Action below. Staff recommends adoption of the form motion as contained herein.

Recommended Action:

That the Town Council authorize staff to award a Professional Services Agreement to Eberhardt Construction for Construction Management services for the Town Hall Expansion and Animal Control Facility and authorize appropriate staff to execute the Agreement attached to this report.

Proposed by: Director of Economic & Community Development **Item Number** _____

T. M. Approval: _____ **Budgeted Item** Yes No N/A



TOWN OF APPLE VALLEY
CITY HALL EXPANSION & ANIMAL SHELTER PROJECTS
4/30/2008

DESCRIPTION	AGENCY C.M.				MULTIPLE PRIME C.M.			
	Original Proposal (29 mon.)		Revised Proposal (15 mon)		Original Proposal (15 mon.)		Revised Proposal (15 mon)	
	Total Hrs	Total Cost	Total Hrs	Total Cost	Total Hrs	Total Cost	Total Hrs	Total Cost
PRECONSTRUCTION SERVICES	400	70,000	320	56,000	730	107,070	730	107,070
STAFF COSTS								
Senior Project Manager	1080	189,000	580	98,000	960	168,000	960	168,000
Project Manager	4152	602,040	2595	376,275	2400	348,000	2400	348,000
Superintendent	N/A	-	N/A	-	2240	369,600	2240	369,600
Superintendent	N/A	-	N/A	-	2240	369,600	2240	246,400
Administrative Assistant	4152	269,880	2595	168,675	2400	156,000	2400	156,000
TOTAL STAFF COSTS		1,060,920		642,950		1,411,200		1,288,000
	Per Month	Total Cost	Per Month	Total Cost	Per Month	Total Cost	Per Month	Total Cost
REIMBURSABLES								
Printing Copies	-	-	-	-	1,000	15,000	1,000	15,000
Trailer	800	19,200	800	12,000	1,600	24,000	1,600	24,000
Trailer Set-up	inc.	inc.	inc.	inc.	-	6,200	-	6,200
Site Controls	-	-	-	-	1,600	24,000	1,600	24,000
Site Controls Set-up	-	-	-	-	-	14,800	-	14,800
Computer	450	10,800	450	6,750	900	13,500	-	-
Phones	225	5,400	225	3,375	450	6,750	-	-
Schedule	-	-	-	-	450	5,850	-	-
Utilities	500	12,000	500	7,500	1,500	22,500	1,500	22,500
Utilities Set-up	-	-	-	-	-	13,500	-	13,500
Truck	-	-	-	-	1,100	16,500	-	-
Office Equipment	300	7,200	300	4,500	340	5,100	340	5,100
Office Equipment Set-up	-	-	-	-	-	6,660	-	6,660
Equipment Rental	-	-	-	-	1,100	15,400	1,100	15,400
Safety Equipment	-	-	-	-	620	9,300	620	9,300
Protection	-	-	-	-	560	8,400	560	8,400
Postage / Shipping	-	-	-	-	300	4,500	300	4,500
Dumpsters	-	-	-	-	500	23,000	500	23,000
Security	-	-	-	-	2,000	26,000	2,000	26,000
Clean-up	-	-	-	-	2,000	26,000	2,000	26,000
Office Supplies	225	5,400	225	3,375	400	6,000	400	6,000
Drinking Water	-	-	-	-	300	4,500	300	4,500
Miscellaneous	-	-	-	-	600	9,000	600	9,000
TOTAL REIMBURSABLES:		60,000		37,500		306,460		263,860
TOTAL BASE SERVICES:		1,190,920		736,450		1,824,730		1,658,930
ADDITIONAL SERVICES								
Cost Estimating	N/A	-	572	83,500	572	83,500	572	83,500
Green Consulting	N/A	-	1024	223,660	1024	223,660	1024	223,660
TOTAL ADD. SERVICES:		0		307,160		307,160		307,160
TOTAL BASE SERVICES:		1,190,920		1,043,610		2,131,890		1,966,090

Eberhardt Construction, Inc.

General Contractor

License No. 723703

February 11, 2008

Mr. Claude Stewart
Building Official
Town of Apple Valley
14955 Dale Evans Parkway
Apple Valley, CA 92307

Re: Construction Management Fee Schedule

Dear Claude,

Eberhardt Construction, Inc. is pleased to submit our Construction Management Fee Schedule for your review and consideration for the proposed Apple Valley Town Hall Expansion, the Public Works/Corporate Yard facility and a new Animal Shelter with related facilities.

Since an initial construction schedule for each of these projects has not yet been generated, we have outlined our fee structure and provided a sample breakdown of those fees for each of the proposed projects.

We sincerely thank you for your consideration of our proposal. If you should have any questions, please call Dan Eberhardt at (760) 242-0161.

Sincerely,



Daniel Eberhardt
President
Eberhardt Construction, Inc.



19031 HWY 18, Suite 250
Apple Valley, CA 92307

(760) 242-0161
FAX: (760) 242-0380
e-mail: eci@charter.net

Construction Management Fee Schedule

Eberhardt Construction, Inc.'s Construction Management Fees are based upon the set construction budget amount of \$26,000,000 that encompasses all three projects, with the entire project duration time projected to span approximately two years. Our proposal fee is all inclusive, with no separate or additional fees for change orders and general conditions. Our Construction Management fee will be six percent of the total construction cost.

The Construction Management fees will be divided among each of the three projects and broken out into two parts for each project: the Preconstruction Phase and the Course of Construction Phase. The Preconstruction Phase is 35% of our fee and the Course of Construction fee is 65% of our fee. The Course of Construction fee is further broken down into incremental payments based upon the duration of each project.

Following is an example fee schedule for each project using one year as a benchmark for project duration.

Apple Valley Town Hall Expansion – \$11 million

- a.) Preconstruction Phase $\$11,000,000.00 \times .06 \times .35 = \$231,000.00$
- b.) Course of Construction Phase $\$11,000,000.00 \times .06 \times .65 = \$429,000.00$
 $\$429,000.00 / 12 = \$35,750.00$

Public Works Facilities - \$7 million

- a.) Preconstruction Phase $\$7,000,000.00 \times .06 \times .35 = \$147,000.00$
- b.) Course of Construction Phase $\$7,000,000.00 \times .06 \times .65 = \$273,000.00$
 $\$273,000.00 / 12 = \$22,750.00$

Animal Control – \$8 million

- a.) Preconstruction Phase $\$8,000,000.00 \times .06 \times .35 = \$168,000.00$
- b.) Course of Construction Phase $\$8,000,000.00 \times .06 \times .65 = \$312,000.00$
 $\$312,000.00 / 12 = \$26,000.00$

1,560,000

Eberhardt Construction, Inc.

General Contractor

License No. 723703

April 24, 2008

Mr. Claude Stewart
Building Official
Town of Apple Valley
14955 Dale Evans Parkway
Apple Valley, CA 92307

Re: Clarification and Amendment to February 11, 2008 Construction Management Fee Schedule – Apple Valley Town Hall Expansion and Kennel Facility

Dear Claude,

Let this letter serve to both clarify and amend our February 11, 2008 Construction Management Fee Schedule. Per our most recent conversations it is our understanding that the Town of Apple Valley has decided to proceed with the Town Hall Expansion and the Animal Control Facility and will not be proceeding with the Public Works Facility at this time. Also, the Town has decided to proceed with the two projects on a "Multiple Prime" basis. With these considerations in mind we offer the following:

1. Provide all of the services set forth in the attached "Proposed Services" labeled Exhibit "A".
2. The Construction Management Fee Schedule shall be as follows:

- a. Preconstruction Services based upon a duration of 6 months.

Principal – 80 hrs/mo. X 6 mo. X \$120.00/hr = \$57,600.00
Administrative – 120 hrs/mo. x 6 mo. X \$60.00/hr = \$43,200.00

Subtotal Preconstruction Services \$108,000.00

- b. Course of Construction

A monthly rate of \$16,000.00/mo. for the Town Hall Facility and \$14,000.00/mo. for the Kennel Facility will apply. This fee includes all services described in Exhibit A under Course of Construction and also now includes the cost for all General Condition items set forth below:

19031 HWY 18, Suite 250
Apple Valley, CA 92307

(760) 242-0161
FAX: (760) 242-0380
e-mail: eci@charter.net

Claude, we have endeavored to keep our costs as competitive as possible and have structured these fees so there will be no "open ended" costs. Please keep in mind that all of our costs will remain local to our community.

Please do not include these items in your comments.

Sincerely,



- Salary plus benefits for full time superintendent
- Vehicle expense for superintendent
- Jobsite office trailer with fax/copier, etc.
- Temporary telephone/fax line for management staff
- Temporary electric/telephone setup and monthly fees
- Required site fencing
- Temporary labor fees for general cleanup and safety which are not included within the multiple prime contract scopes of work
- Temporary toilet /hand wash facilities as required
- Jobsite drinking water

Based upon an 18 month construction schedule for the Town Hall Facility and a 9 month construction schedule for the Kennel Facility, the Course of Construction management fees would be as follows:

Town Hall:	18 mo. x \$16,000.00 =	\$288,000.00
Kennel:	9 mo. x \$14,000.00 =	\$126,000.00
Subtotal Course of Construction		<u>\$414,000.00</u>

In addition to the above, an Overhead Fee of 1 ½% and a Profit Fee of 3% based on actual overall project costs must be included. This fee is capped at \$855,000.00 and may be reduced to a minimum of \$750,000.00 assuming the two project costs are less than 19 million dollars.

Maximum Overhead and Profit \$855,000.00

Total project costs based on an 18 month construction schedule for the Town Hall Facility and a 9 month construction schedule for the Kennel Facility and a worst case scenario of overall construction costs meeting or exceeding the projected 19 million dollar amount are as follows:

Preconstruction Fees:	\$ 108,000.00
Course of Construction Costs:	\$ 414,000.00
Overhead @ 1 ½ %:	\$ 285,000.00
Profit @ 3%:	\$ 570,000.00
Total Construction Management Costs	<u>\$ 1,377,000.00</u>

3. Bid Process

During the bid process, Eberhardt Construction, Inc. would perform the following:

- a.) Field and respond to general bid questions not requiring the attention of the Architect or his consultants.
- b.) Process and record contractor RFI's in an expeditious manner routing questions to the Architect, and then provide the follow-up of tracking and recording responses in a timely manner.
- c.) Coordinate and issue Addenda to bidding contractors in response to the generated RFI's.
- d.) Conduct the bid-day public opening of Contractor bids, the recording thereof, noting any qualifications and checking for completeness for responsible bid submission.
- e.) Issuance of any post-bid list information as requested by participating bidders.

4. Preconstruction Services

Post-bid activities performed by Eberhardt Construction, Inc. would be conducted in a detailed and thorough manner to ensure an absolute and fair award of contract to the apparent successful low bidder. These activities would include:

- a.) Thorough analysis of bid breakdowns, listed subcontractors, bid bond, insurance certificates, completeness of all bid documents, etc.
- b.) Assist in the execution of the Owner/Contractor Agreement.
- c.) Conduct pre-construction meetings outlining proper approved methods and formats for pay requests, change order requests, submittals, as-builts and Owner's manuals.
- d.) Review staging areas and General Condition requirements, proper protection of stored materials and equipment, and safety practices.

5. Course of Construction

During the Course of Construction, Eberhardt Construction, Inc. will provide the following services.

- a.) Keep and maintain a daily log of on-site subcontractors and job progress, noting any problems or delays and their cause.
- b.) Daily on-site inspections of materials and workmanship will be conducted to check for plan and specification compliance.
- c.) Provide weekly written reports to the Owner outlining site observations and progress, noting quality of materials and workmanship and compliance with the Contract Documents.

- d.) Review the Contractor's proposed construction schedule for scheduled activities and target dates, to ensure that they meet or exceed the Owner's requirements. We would offer input and suggestions on how to expedite activities and/or dates if we can see there is an opportunity to do so.
- e.) Conduct weekly meetings between the Contractor, Owner, Architect and any other necessary parties. Record, maintain and distribute weekly meeting minutes.
- f.) Expedite and monitor the submittal process for timeliness and completeness, and once the Architect has approved a submittal, we would check the actual materials put in place to confirm that they are the approved materials.
- g.) Review change order requests for validity and associated costs prior to submittal to the Architect and Owner for approval.
- h.) Review the Contractor's Pay Request and verify that each billed item is in line with the actual materials and labor that is in place.
- i.) Procure copies of all contractor and subcontractor conditional progress, conditional final, unconditional progress and unconditional final lien releases for Owner possession prior to payment to Contractor.
- j.) Assist the Owner and Architect in finding solutions to situations arising out of normal construction activities or otherwise unforeseen events during the course of construction.
- k.) Observe and enforce normal safety practices, and confirm that weekly safety meetings are conducted.
- l.) Act as a liaison between adjacent property owners and the Town of Apple Valley, assisting in determining resolutions to concerns that may arise during construction.
- m.) Ensure that proper erosion control measures are enlisted and that safe traffic and pedestrian control practices are in place.
- n.) Coordinate and conduct a job walk at project completion for punch-list items, assembling, recording and distributing the list to interested parties. Inspect and follow-up on punch-list item progress and completion to the satisfaction of Owner acceptance and sign-off.
- o.) Assist in the assembly of an Owner Operations and Warranty Manual for issuance to the Owner.
- p.) Ensure Contractor as-builts are complete and submitted to the Owner prior to final payment.
- q.) Organize and conduct an instructional final walk-thru to transfer keys, Owner Operations and Warranty Manual, As-builts, etc. and to convey proper operations and use of equipment.

PROFESSIONAL SERVICES AGREEMENT

THIS AGREEMENT is made and entered into this 13th day of may, 2008, by and between THE TOWN OF APPLE VALLEY, a Municipal Corporation (hereinafter referred to as "TOWN") and Eberhardt Construction Inc., (hereinafter referred to as "CONSULTANT").

WHEREAS, Town, desires to retain Consultant for the purpose of providing Construction Management Services for a new Town Hall Facility, 3,500 square foot office/maintenance building and Animal Control Facility pursuant to a Request for Proposals/Request for Qualifications (RFP/RFQ) issued by Town; and

WHEREAS, Consultant has represented to Town that Consultant has the knowledge, skills, resources and experience that qualify Consultant to provide said services for the Town, including related and accompanying studies, reports and all other matters described herein and any attachments hereto, including, but not limited to, the matters described in Request for Proposals/Request for Qualifications and Consultant's response to such RFP/RFQ (including but not limited to the Scope of Services and Schedule of Performance), contained in Exhibit A, attached hereto and incorporated herein by this reference; and

WHEREAS, based upon the representations of Consultant, Town desires to retain the services of Consultant which shall at all times faithfully, competently and to the best of its ability, experience, and talent, perform all tasks described herein in consideration for payment to Consultant of the fees herein described, contained in Exhibit B attached hereto and incorporated herein by this reference and in consideration of the further covenants, conditions and provisions hereinafter set forth: and,

NOW, THEREFORE, Town and Consultant mutually agree as follows:

1. The Town hereby retains Consultant to provide the services herein described, and Consultant hereby agrees to perform and be responsible for the performance of the professional services as set forth in the scope of services in Exhibit A, attached hereto.

2. Payment to Consultant by the Town of the fees described in Exhibit "A" for the work described in the scope of services shall be billed monthly for services and work completed. The Town will pay Consultant a fee not to exceed a maximum of one million three hundred seventy-seven thousand, dollars (\$1,377,000,000). Payment requested for work not within the scope of this Agreement will not be honored or paid unless such extra work and payment is authorized in writing by the Director of Economic and Community Development (hereinafter referred to as "Director"), subject to the provisions of Paragraph 6, hereof. Increases or decreases in task requirements, changes in product format or detail, or new task requirements shall be approved in advance in writing by the Director. The Town, through the Director, reserves the right to direct any changes in the order of performance of any of the task requirements referenced or set forth in the proposal and/or Scope of Services; and where deemed to be in the best interests of the Town, the Director may direct termination of the performance of any task, or any portion thereof; in the event of such termination, Consultant shall be paid only for the work performed prior to the effective date of said termination. The provision in this paragraph shall not be construed to authorize the Director to approve payments for extra work which result in exceeding the total sum authorized by this contract without the prior approval of the Town Council.

3. Consultant shall invoice the Town monthly in accordance with a work and payment schedule, approved in advance by the Director. Said invoices shall include the work performed by task, rate, and a task progress status report in a form and with such additional information satisfactory to said Director. Payments to consultant for approved work and accepted submitted products shall not be unreasonably withheld and under no circumstance shall be delayed for work performed beyond 60 days from receipt of invoices without prior notification to Consultant of the reasons for withheld payments.

4. The Town has an interest in the qualifications of and capabilities of the person and entities who will fulfill the duties and obligations imposed upon Consultant by this Agreement. No assignment of this Agreement or of any rights hereunder, and no delegation of any performance or obligation of performance hereunder shall be made, either in whole or in part, by Consultant without the prior written consent of the Town. Consultant has or will provide all personnel required to perform services under this Agreement

5. Upon completion of each phase of work, Consultant shall submit to the Town a status report on the services performed thus far.

6. Town may request Consultant to perform additional services not contemplated by the Scope of Services. Prior to the commencement of such additional services, the exact nature of such services and the cost to the Town thereof shall be set forth in a written agreement signed by the parties hereto.

7. Consultant shall complete the Scope of Services so as to allow for completion of the entire project. Consultant acknowledges, and the parties specifically agree, that time is of the essence in the performance of the services required to be performed under this Agreement.

8. At the completion or termination of this Agreement, all data, studies, and any other information, work products, memoranda, documents or writings, created or generated in connection with the performance of this Agreement belong to and shall be delivered to the Town for its keeping, by delivery of same to the Director. Consultant may retain copies of these materials for its use or purposes.

9. Consultant will perform the services set out in this Agreement, or will cause performance of said services to occur as contemplated herein in accordance with the generally accepted standards for performing similar professional services within the State. Town has relied on Consultant's representations for quality and professional work as an inducement to enter into this Agreement.

10. The Consultant's failure to comply with the provisions of this Agreement shall constitute a default. In the event that Consultant is in default for cause under the terms of this Agreement, Town shall have no obligation or duty to continue compensating Consultant for any work performed after the date of default and can terminate this Agreement immediately by written notice to the Consultant. If such failure by the Consultant to make progress in the performance of work hereunder arises out of causes beyond the Consultant's control, and without fault or negligence of the Consultant, it shall not be considered a default.

If the Town Manager or his designee determines that the Consultant is in default in the performance of any of the terms or conditions of this Agreement, the Town Manager shall cause

to be served upon the Consultant a written notice of the default. The Consultant shall have ten (10) days after service upon it of said notice in which to cure the default by rendering a satisfactory performance. In the event that the Consultant fails to cure its default within such period of time, the Town shall have the right, notwithstanding any other provision of this Agreement to terminate this Agreement without further notice and without prejudice to any other remedy to which it may be entitled at law, in equity or under this Agreement.

11. The failure of the Town to insist upon the strict performance of any of the provisions of this Agreement, or failure to exercise any other right, option or remedy hereby reserved or as permitted by law, shall not be construed as a waiver for the future of any such provisions, right, option, or remedy, or as a waiver of any subsequent breach thereof.

12. The Town may at any time, for any reason, with or without cause, suspend or terminate this Agreement, or any portion hereof, by serving upon the consultant at least ten (10) days prior written notice. Upon receipt of said notice, the Consultant shall immediately cease all work under this Agreement, unless the notice provides otherwise. If the Town suspends or terminates a portion of this Agreement such suspension or termination shall not make void or invalidate the remainder of this Agreement.

In the event this Agreement is terminated pursuant to this Section, the Town shall pay to Consultant the actual value of the work performed up to the time of termination,
. Upon termination of the Agreement pursuant to this Section, the Consultant will submit an invoice to the Town.

13. Consultant shall maintain adequate records of services provided in sufficient detail to permit an evaluation of services. All such records shall be maintained in accordance with generally accepted accounting principles and shall be clearly identified and readily accessible. Consultant shall provide free access to the representatives of Town or its designees at reasonable times to such books and records; shall give Town the right to examine and audit said books and records; shall permit Town to make transcripts therefrom as necessary; and shall allow inspection of all work, data, documents, proceedings, and activities related to this Agreement. Such records, together with supporting documents, shall be maintained for a period of three (3) years after receipt of final payment.

14. Upon completion of, or in the event of termination or suspension of this Agreement, all original documents, designs, drawings, maps, models, computer files, surveys, notes, and other documents prepared in the course of providing the services to be performed pursuant to this Agreement shall become the sole property of the Town and may be used, reused, or otherwise disposed of by the Town without the permission of the Consultant. With respect to computer files, Consultant shall make available to the Town, at the Consultant's office and upon reasonable written request by the Town, the necessary computer software and hardware for purposes of accessing, compiling, transferring, and printing computer files.

15. Consultant is and shall at all times remain as to the Town a wholly independent Consultant. The personnel performing the services under this Agreement on behalf of Consultant shall at all times be under Consultant's exclusive direction and control. Neither Town nor any of its officers, employees, or agents shall have control over the conduct of Consultant or any of Consultant's officers, employees, or agents, except as set forth in this Agreement. Consultant shall not at any time or in any manner represent that it or any of its officers, employees, or agents are in any manner officers, employees, of the Town. Consultant

shall not incur or have the power to incur any debt, obligation, or liability whatever against Town, or bind Town in any manner.

16. No employee benefits shall be available to Consultant in connection with the performance of this Agreement. Except for the fees paid to Consultant as provided in the Agreement, Town shall not pay salaries, wages, or other compensation to Consultant for performing services hereunder for Town. Town shall not be liable for compensation or indemnification to Consultant for injury or sickness arising out of performing services hereunder.

17. Any notices which either party may desire to give to the other party under this Agreement must be in writing and may be given either by (i) personal service, (ii) delivery by a reputable document delivery service, such as, but not limited to, Federal Express, which provides a receipt showing date and time of delivery, or (iii) mailing in the United States Mail, certified mail, postage prepaid, return receipt requested, addressed to the address of the party as set forth below or at any other address as that party may later designate by notice:

Director of Economic and Community Development
Town of Apple Valley
14955 Dale Evans Parkway
Apple Valley, CA 92307

Notice to Consultant shall be sufficient if sent to:

Dan Eberhardt
Eberhardt Construction Inc.
19031 Hwy 18 Suite 250
Apple Valley, CA 92307

Each party hereto may change the address at which it receives written notice by so notifying the other party in writing.

18. The Director, or representative, shall represent the Town in all matters pertaining to the administration of this Agreement, including without limitation, attending all necessary meetings and conferences, and review and approval of all products submitted by Consultant, but not including the authority to enlarge the scope of work or increase the compensation due Consultant; although Consultant shall be responsible for coordination of all necessary meetings and conferences, and will coordinate all public information and participation activities.

19. No information, including photographs, public announcements or confirmation of same, or any part of the subject matter of this Agreement or any phase of any program hereunder shall be made public without prior approval of the Director.

20. It is agreed and understood that Consultant will not be engaged in private work projects in the project work area while Consultant is employed by the Town. The "project work area" for purposes of this paragraph includes the area of the proposed project and the surrounding vicinity which may be significantly impacted by the proposed work hereunder. In any event, Consultant shall not engage in any private work which would constitute a conflict of interest with respect to the services performed under this Agreement.

21. Consultant shall defend (with attorneys approved by Town), hold harmless and indemnify the Town, its officers, employees and agents against liability (whether bodily injury, including death, and/or property damage and/or any other losses, claims, damages, actions or judgments) including attorney's fees and costs arising or alleged to arise out of the wrongful, negligent, reckless acts, omission of or willful misconduct of Consultant or its officers, agents, employees, subcontractors or representatives in the performance of this Agreement.

22. As a condition precedent to the effectiveness of this Agreement, and in partial performance of Consultant's obligations hereunder, Consultant, at its expense, shall deliver to Town for approval, certificates or policies of insurance as required in Exhibit "B", attached hereto.

The Town shall also be named as an additional insured under said policy or policies of liability insurance, which insurance shall be primary and not contributing with any other liability insurance available to the Town. Consultant and its insurance carrier shall be required to inform the Town in writing of any change, expiration, cancellation or renewal of any insurance policy or policies within 30 days prior to the effective date thereof, and where applicable, an appropriate rider or addition shall be made to said policy relating thereto acceptable to the Town; and if any insurance required herein is cancelled or reduced in coverage, Consultant shall promptly provide replacement coverage acceptable to the Town.

23. Should any section or any part of this Agreement be rendered void, invalid or unenforceable by any court of law, any such final determination shall not render void, invalid or unenforceable any other sections or portions of this Agreement unless the Town determines in writing that its purpose cannot be accomplished by the remaining provisions not so invalidated.

24. This Agreement has been made and entered into in the State of California, and the laws of the State of California shall govern the validity and interpretation hereof and the performance hereunder.

25. This Agreement contains the entire understanding of the parties, and there are no further or other Agreements or understandings, written or oral, in effect between the parties hereto relating to the subject matter hereof, and any prior understanding or Agreement of the parties shall not be binding unless set forth herein, and, except to the extent expressly provided for herein, no amendments of this Agreement may be made without the written agreement signed by both parties hereto.

26. Should litigation or arbitration occur between the parties hereto relating to the provisions of this Agreement, all reasonable litigation or arbitration expenses and costs, including reasonable attorney's fees incurred by the prevailing party shall be paid by the non-prevailing party to the prevailing party.

27. Consultant represents that it has all personnel required in performing the services under this Agreement. All such personnel shall be fully qualified, and, where applicable, shall be licensed or otherwise authorized under State and local law to perform such services. The Consultant shall keep itself informed of State and Federal laws and regulations which in any manner affect those employed by it or in any way affect the performance of its service pursuant to the Agreement. The Consultant shall at all times observe and comply with all such laws and regulations. The Town and its officers and employees, shall not be liable at law or equity occasioned by failure of the Consultant to comply with this Section.

28. Consultant shall not be liable for delays in the performance of this Agreement caused solely by acts of God or similar events beyond the control of Consultant, unless said events could have been foreseen or said delay or any portion thereof could have been avoided.

29. Consultant shall not discriminate against any employee or applicant for employment because of race, religion, color, sex, age or national origin. Consultant shall take appropriate action to ensure that applicants are employed and that employees are treated during their employment without regard to their race, religion, color, sex, age or national origin. Such action shall include, but not be limited to, employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. Consultant shall comply with all applicable Federal laws and Executive Orders and relevant orders of the Secretary of Labor, with all State and local laws and affirmative action compliance programs and other applicable rules and regulations of all government and administrative agencies relating to any and all performance under this Agreement.

30. Consultant declares and warrants that no undue influence or pressure is used against or in concert with any officer or employee of the Town in connection with the award, terms or implementation of this Agreement, including any method of coercion, confidential financial arrangement, or financial inducement. No officer or employee of the Town will receive compensation, directly or indirectly, from Consultant, or from any officer, employee or agent of Consultant, in connection with the award of this Agreement or any work to be conducted as a result of this Agreement. Violation of this Section shall be a material breach of this Agreement entitling the Town to any and all remedies at law or in equity.

31. No member, officer, or employee of Town, or their designees or agents, and no public official who exercises authority over or responsibilities with respect to the Project during his/her tenure or for one year thereafter, shall have any interest, direct or indirect, in any agreement or sub-agreement, or the proceeds thereof, for work to be performed in connection with the Project performed under this Agreement.

32. All information gained by Consultant in performance of this Agreement shall be considered confidential and shall not be released by Consultant without Town's prior written authorization. Consultant, its officers, employees, agents, or sub-consultants, shall not without written authorization from the Town Manager or unless requested by the Town Attorney, voluntarily provide declarations, letters of support, testimony at depositions, response to interrogatories, or other information concerning the work performed under this Agreement or relating to any project or property located within the Town. Response to a subpoena or court order shall not be considered "voluntary" provided Consultant gives Town notice of such court order or subpoena.

33. Consultant shall promptly notify Town should Consultant, its officers, employees, agents, or sub-consultants be served with any summons, complaint, subpoena, notice of deposition, request for documents, interrogatories, request for admissions, or other discovery request, court order, or subpoena from any person or party regarding this Agreement and the work performed thereunder or with respect to any project or property located within the Town. Town retains the right, but has no obligation, to represent Consultant and/or be present at any deposition, hearing, or similar proceeding. Consultant agrees to cooperate fully with Town and to provide the opportunity to review any response to discovery requests provided by Consultant. However, Town's right to review any such response does not imply or mean the right by Town to control, direct, or rewrite said response.

34. The Consultant shall not assign the performance of this Agreement, nor any part thereof, nor any monies due hereunder, without prior written consent of the Town. Because of the personal nature of the services to be rendered pursuant to this Agreement, only Eberhardt Construction Inc., shall perform the services described in this Agreement.

Eberhardt Construction Inc., may use assistants, under its direct supervision, to perform some of the services under this Agreement. Consultant shall provide Town fourteen (14) days' notice prior to the departure of any employee subcontractor from Consultant's employ assigned to this agreement as of its Effective Date. Should he/she leave Consultant's employ, the Town shall have the option to immediately terminate this Agreement, within three (3) days of the close of said notice period. Upon termination of this Agreement, Consultant's sole compensation shall be payment for actual services performed up to, and including, the date of termination or as may be otherwise agreed to in writing between the Town and the Consultant.

35. This Agreement binds Consultant, and its successors and assigns, although this paragraph shall not be construed as permitting any assignment, subletting or transfer of any interest, rights or obligations of Consultant under this Agreement without the prior written consent of the Town. This Agreement contains the entire understanding between the parties relating to the obligations of the parties described in this Agreement. All prior or contemporaneous agreements, understandings, representations, and statements, oral or written, are merged into this Agreement and shall be of no further force or effect. Each party is entering into this Agreement based solely upon the representations set forth herein and upon each party's own independent investigation of any and all facts such party deems material.

36. The person or persons executing the Agreement on behalf of Consultant warrants and represents that he/she has the authority to execute this Agreement on behalf of the Consultant and has the authority to bind Consultant to the performance of its obligations hereunder.

IN WITNESS WHEREOF, the parties have executed this Agreement at Apple Valley, California, effective the day and year first above written.

TOWN OF APPLE VALLEY, CALIFORNIA

BY: _____
Honorable Tim Jasper, Mayor

ATTEST:

Mrs. La Vonda M. Pearson Town Clerk

APPROVED AS TO FORM:

Mr. Neal Singer, Town Attorney

APPROVED AS TO CONTENT:

Mr. Jim Cox, Interm Town Manager

CONSULTANT
Eberhardt Construction Inc.

Dan Eberhardt, Owner