Title: Approval of Art Center Renovation Agreements

Subject: Approval of a Construction Funding Agreement in an Amount Up to $2 Million between the City of Palo Alto and the Palo Alto Art Center Foundation For Upgrades to the Palo Alto Art Center Renovation Project (PF-07000, Art Center Electrical and Mechanical Upgrades); Approval of Amendment No. Three to Contract No. C08126592 between the City of Palo Alto and the Palo Alto Art Center Foundation to extend the term of the agreement and increase the scope of work to Permit Reimbursement in an Amount Not to Exceed $142,432

From: City Manager

Lead Department: Community Services

Recommendation
Staff recommends that Council:

1. Approve and authorize the City Manager or designee to execute a construction funding agreement between the City of Palo Alto and the Palo Alto Art Center Foundation in substantially the form of Attachment A that establishes the financial responsibilities of both parties as related to capital improvements of the Palo Alto Art Center.

2. Approve and authorize the City Manager or designee to execute Amendment No. Three to Contract No. C08126592 with the Palo Alto Art Center Foundation in substantially the same form as Attachment B to extend the term of the agreement from March 31, 2010 to June 1, 2011 and to increase the scope of work to include design for Deferred Maintenance Improvements and bid services in an amount not to exceed $142,432.

Background
The Palo Alto Art Center Foundation (Foundation) has played an integral role in the support and operation of the Palo Alto Art Center (PAAC) since its inception in 1973. On October 4, 2010, this longstanding relationship was reinforced through the adoption of a public/private partnership agreement (CMR:350:10).

This construction funding agreement represents more than a decade worth of work, discussion, and Council action toward the goal of a renovated Palo Alto Art Center facility. Beginning with a January 19, 1999 letter to the Council, the Foundation confirmed its intent to initiate discussions on the subject of a public/private partnership to renovate and expand the Palo Alto Art Center in order to leverage the City’s deferred maintenance funds.
The 28,000 square foot Art Center facility and its building infrastructure and systems have not been significantly upgraded since the facility was constructed in 1951 as Palo Alto’s City Hall. The only major repairs made to the facility have been seismic improvements in 1987. In 1999, the Palo Alto Art Center Foundation began to address the need for renovations proactively by focusing on two programmatic concerns and facility challenges: 1) the need for upgrades to the gallery spaces of the Art Center to support the popular exhibition program, and 2) the need for additional children’s art classrooms and program space to meet the demand in the community. In March, 1999, the Palo Alto City Council approved a proposal from the Palo Alto Art Center Foundation to explore the development of a public/private partnership that would make possible a capital campaign to expand and renovate the Art Center.

Master Planning Process
In March 2000, the Foundation received $50,000 from the David and Lucile Packard Foundation and the Non-Profit Facilities Fund to conduct a facility master planning process that was matched by $50,000 from the City. The resulting Palo Alto Art Center Programming Report was completed in 2001 (CMR:438:01) by architect David Robinson. This programming report detailed the use of Art Center spaces as defined by current program needs and outlined an improvement plan addressing the Art Center’s most critical facility requirements.

In August 2001, a Joint Site Planning Committee was convened with the goal of developing a site design that would allow the Main Library and the Art Center to expand while addressing the limitations and opportunities offered by the site, neighborhood considerations, and the desires of community stakeholders. In September 2001, the Art Center Foundation received a second $50,000 grant request from the David and Lucile Packard Foundation that was matched by the City (CMR:226:02). Using these funds, the Foundation contracted with the Mark Cavagnero Associates in association with SWA Group to develop the joint site plan. The resulting Site Planning Study for the Palo Alto Main Library and Art Center was completed on February 8, 2002. A Public Draft EIR of the site was prepared for the City of Palo Alto by Thomas Reid Associates and completed on April 17, 2002.

In 2002, Mark Cavagnero Associates continued work on the master plan and conceptual design for the Palo Alto Art Center and site. All plans, reports, and surveys were reviewed and approved by City boards and commissions. The plan was completed on June 14, 2002 and approved by Council. A Memorandum of Understanding was approved unanimously by Council at its July 15, 2002 meeting (CMR:340:02), describing the City’s commitment to contribute $5M to fund a fund set up through a public/private partnership over five years. This MOU was intended to go into effect upon successful passage of a library bond measure in November, 2002. However, the bond measure was ultimately unsuccessful.

In the spring of 2003, the Foundation Board unanimously voted to commit to the implementation of the master plan for the Art Center. Supported by a $10,000 grant from the Non-Profit Finance Fund, the Foundation worked with fundraising and organizational development consultants to prepare for the possibility of a future capital campaign.
In 2005, the Foundation contracted with Mark Cavagnero Associates to develop a phased approach to complete the master plan. The first phase of building renovations included creation of a Children’s Wing, improvements to the existing gallery space, and the replacement of mechanical and electrical systems. Based on cost estimates developed by Mack 5, the Infrastructure Management Plan allocation for the Art Center Electrical & Mechanical Upgrade (Capital Improvement Program Project PF-07000) was readjusted.

**Foundation’s Capital Campaign and Letter of Intent**

In 2006, the Foundation Board gave final approval to move forward with a capital campaign to raise funds for the Foundation portion of the project. In June 2006, the Foundation contracted with Netzel Associates to conduct a capital development feasibility study. Netzel presented its report to the Foundation Board on October 16 and the Board voted to accept Netzel’s recommendation to move forward with the capital campaign for the Art Center renovation. The Foundation Board then hired Netzel as its capital campaign counsel. At its December 13, 2006 meeting, the Foundation Board voted to conduct a 26-month capital campaign to raise the necessary funds.

On April 10, 2006, a colleague’s memo was approved by the City Council directing City staff to work with the Art Center Foundation in drafting a Memorandum of Understanding to expand and renovate the Art Center as a public/private partnership, committing $1.74M from the City’s Infrastructure Improvement program.

On July 9, 2007, the Foundation formally approached the City to create a public/private partnership for the renovation of the Art Center with a Letter of Intent that was approved by Council (CMR:288:07). This Letter outlined mutually acceptable terms and conditions for the collaboration between the City and the Foundation for construction of improvements and alterations to the Art Center.

In September 2007, the Foundation entered into an agreement with Mark Cavagnero Associates to: design the project through schematic design and design development, submit preliminary estimates of construction costs based on schematic design, prepare construction documents, and assist in the awarding and preparation of contracts for construction.

**Design Agreement**

In March 2008, the Council approved a Design Agreement with the Foundation, in the amount of $290,000, allowing for the City’s payment to the Foundation of the City’s portion of the schematic design, design development, construction documents, bid, and construction phases of the project (CMR:107:08). The City’s financial responsibility, as specified in Capital Improvement Project PF-07000 (Art Center Electrical and Mechanical Upgrades), is to replace original mechanical and electrical equipment and systems to meet current occupancy need, provide code compliance, and optimize operation and energy efficiency.

On December 15, 2008, Council approved Amendment No. One to Contract Number C08126592 with the Foundation in the amount of $78,580 for the Planning and Design Phase for the Renovation and Capital Improvements to the Palo Alto Art Center, Capital Improvement Program Project PF-07000. Amendment No. One addressed scope increases to the design
development phase due to new green building requirements, accessibility and seismic code requirements, hazardous materials testing and removal, and determination of the extent of required electrical system upgrades (CMR:465:08).

On March 16, 2009, Council approved Amendment No. Two to Contract Number C08126592 with the Foundation in the amount of $6,249 for a Total Not to Exceed Amount of $374,829 for the Development of Construction Documents for the Renovation and Capital Improvements to the Palo Alto Art Center, Capital Improvement Program Project PF-07000 (CMR:168:09). This Amendment requested an increase of $6,249 along with the reallocation of $72,500 previously designated for bid and construction phase services to be applied to additional services funding for completion of the construction document phase only. This brought the total City expense through the construction documents phase to $374,829. These costs were related to the increased project scope identified during the design development phase. Amendment No. Two also changed the scope of the agreement between the City of Palo Alto and the Foundation to include design services only, and exclude any payment for bid and construction phase services. In addition, the Amendment extended the term of the agreement from March 31, 2009 to March 31, 2010 to allow time for the completion of construction documents.

At the time the Design Agreement between the City and the Foundation was initiated, the Foundation intended to manage the project through all phases of design and construction. The City’s portion of the consultant fees for all phases of the project included schematic design, design development, construction documents, bid and construction administration and was awarded with that agreement. During design development, the City’s portion of the project scope became a larger percentage of the overall project, and more technically involved. As a result of this change, the Foundation’s and City’s staffs recommended that, and received Council approval for, the City managing the bid and construction phases (CMR:168:09). Subsequently, City staff determined that it would be more prudent and efficient for the Foundation to maintain its agreement with the architects for the bid documentation—this would ensure that the project could continue in a timely manner, preventing unnecessary delays. The City would then initiate its own agreement with the architect for the construction administration phase of the project.

**Construction Funding Agreement**

Implicit in these decades-long actions and communications has been the development of a Construction Funding Agreement whereby the Foundation will contribute a sizable amount of money to fund a large portion of the renovations and upgrades. The terms of the Foundation’s funding and the duties and obligations of the parties during the bid and construction phases are set forth in this Construction Funding Agreement (Attachment A).

Similar agreements have been developed for the Friends of Heritage Park for the design, construction and installation of playground facilities and other improvements at Heritage Park and for the Friends of Lytton Plaza Park for the design, construction, and installation of improvements at Lytton Plaza. This agreement differs from these agreements in that the City will manage the bid and construction of the project. A precedent to this agreement can be found in the agreement between the City of Palo Alto and the Palo Alto Library Foundation and the Friends of the Palo Alto Library for funding the Palo Alto Children’s Library Improvements and Expansion Project (CMR:142:04).
Discussion

Art Center Facility Improvements:

The City and the Foundation acknowledge each other’s needs to make various building improvements to the Art Center facility and recognize the financial and logistical benefits to coordinate and execute these building improvements together under one project. The City’s scope of work includes mechanical, electrical, and accessibility upgrades to the facility, while the Foundation’s scope of work includes the creation of a Children’s Wing and an upgrade of the exhibition galleries. While the scope of City-sponsored work differs from the Foundation-sponsored work, both Parties agree that it will be more efficient, cost-effective, and less disruptive to the community to have the work completed concurrently.

In addition to the abovementioned electrical, mechanical and Children’s Wing improvements, the City will also now add deferred-maintenance items to the project such as a new roof, new gutters, new downspouts, seismic upgrade to roofing envelope, exterior painting, new carpets, additional interior painting, termite treatment and dry rot repairs, new window safety glazing, and exterior lighting improvements. While these items will increase the design and construction fees, they will result in an overall cost-savings by including them as part of a larger project and by making these repairs now, when the construction climate is favorable. It will also eliminate future construction disruption to the Art Center. The additional design costs for deferred maintenance related items are marginal enough that it can be absorbed into the original CIP project, PF-07000. The roof, which is the most costly of the deferred maintenance items, had been scheduled for replacement in FY2013-2014, shortly after completion of the Art Center rehabilitation project. Funding for the roof will be moved from CIP PF-14001 ($200,000) into PF-07000. The original funding for the roof replacement was underestimated. Roofing replacement is now estimated at $320,000. The balance of the roof replacement and funding for other, non-roofing items, would be paid from the Infrastructure Reserve. Staff plans to return to Council at the time of construction to request that these additional funds be transferred into the project, if needed. The unfunded cost is estimated at $560,000, which includes a seismic upgrade to the roof that was not originally included in the CIP PF-14001, Roofing Replacement. The seismic work is desirable in order to provide better protection for the building and its occupants and will be easier to accomplish now that the roofing is part of a larger project. In addition, the City will be adding a 1% for public art as part of the overall Art Center renovation project. The current package will be used for permitting in order to expedite timing, with the deferred maintenance items being added to the package as revisions.

Temporary Main Library:

The Art Center auditorium was identified as the preferred location for a temporary library during the renovation of the adjacent Main Library (CMR:435:10). The auditorium was not part of the Art Center improvement project, but will have improved lighting, carpeting and other amenities added as part of the temporary library work. Combining the library’s auditorium upgrade with the rest of the Art Center project will result in a better price for the auditorium work and will not involve the disruption of shutting off the auditorium for temporary library conversion work shortly after opening the new Art Center. Having the same electricians, painters and other trades
for both the auditorium and the Art Center work will result in a better work product and require less staff oversight than managing two separate contractors.

In order to keep pace with the Art Center construction schedule, design contingency funds from the Main Library will be used to pay for the initial design of the temporary Main Library. Staff will return at a later date with a contract amendment with Group 4 Architecture to secure additional funding for the auditorium work so that the Main Library contingency fund can be reimbursed.

**Construction Funding Agreement**

The Construction Funding Agreement (Attachment A) facilitates the Foundation’s funding of a significant portion of the capital costs for the project and outlines the administrative, reporting, and financial requirements of both parties. The Construction Funding Agreement between the City and the Foundation provides that the City will pay 73.1% of the construction costs and the Foundation will pay 26.9%, modified in several ways. First, the Foundation share shall not exceed $2,000,000. Second, any change orders (additional, unforeseen work) exceeding $25,000 shall be paid by the party whose project portion to which the change order relates, with the overriding qualification that the Foundation share not exceed $2,000,000. As outlined in this Agreement, the City will manage the construction project. Construction management services have also been added to the cost-sharing agreement due to staffing shortfalls related to the Measure N Library and Community Center bond project workload. The City’s portion of the funding for the renovation was approved in the 2006-07 budget (Capital Improvement Program Budget, Art Center Electrical and Mechanical Upgrades, PF-07000) and currently has $3,856,000 of funding appropriated. The Foundation has successfully raised $1,250,000 and has a business plan to raise the additional funds required for the Foundation’s portion of the Project by the completion of construction. The Foundation currently has $2,000,000 on hand in capital and other funds.

In order to ensure successful communications throughout construction, this agreement requires the Foundation to establish an Administrator to coordinate all matters related to the agreement. As the project manager, the City will provide quarterly reports to the Foundation’s Administrator outlining the work performed and the amounts paid by the City to contractors, consultants, and other third parties in conjunction with the project. As outlined in this agreement, the Foundation will participate with the City in establishing the minimum contractor qualifications for the project.

**Amendment No. Three to Contract No. C08126592:**

This Amendment (Exhibit B) extends the timeline and expands the scope of the Design Agreement between the Foundation and the City. Because Amendment No. Two expired in March 2010, extending the agreement terms to June 1, 2011 ensures the contract remains current. Construction documents for the project are currently undergoing plan check as part of the Building Permit issuance process. Scope of the design work needs to be expanded to include
design for the Deferred Maintenance aspects of the project. As outlined in the Agreement, this expense will be incurred by the City. In addition, scope of the design work needs to be expanded to include bid documentation. As outlined in the Agreement, this expense will be split between the City and the Foundation based upon the cost-sharing ratio determined in the Construction Funding Agreement.

**Timeline, Resource Impact, Policy Implications, Environmental Review (If Applicable)**

**Resource Impact:**
Funds for this project are available in the Capital Improvement Program Project PF-07000, Art Center Electrical and Mechanical Upgrades. In addition, $200,000 in funding will be transferred into the project from PF-14001, Roofing Replacement, as part of the mid-year budget process. Staff may return to council at the time of the award of the construction contract in order to cover any increased costs due to the inclusion of deferred maintenance items into the project.

**Policy Implications:**
This agreement is consistent with and furthers the intention of Comprehensive Plan Policy C-1: Encourage the creation of partnerships within the Mid-Peninsula or the greater Bay Area to seek effective solutions to shared problems and community service needs and Program B-3: On an ongoing basis, evaluate opportunities for City involvement in public/private partnerships including public investment in infrastructure and other improvements, siting of public art, and modification of land use regulations and other development controls and L-61: Promote the use of community and cultural centers, libraries, local schools, parks, and other community facilities as gathering spaces. Ensure that they are inviting and safe places that can deliver a variety of community services during both daytime and evening hours.

Adding deferred maintenance to the project is consistent with the City’s goal to reduce the infrastructure backlog. Deferred maintenance items from the Art Center will be removed from the City’s backlog list by the Infrastructure Task Force.

**Timeline:**
Staff relocation to the Lucie Stern Center basement and other locations throughout the City is expected to occur in the Spring of 2011, followed shortly thereafter by the removal of any hazardous materials. Construction on the major renovations, including the temporary library in the auditorium, is expected to begin in the summer of 2011 and be completed in the summer of 2012. Construction on the Main Library is expected to begin at the end of 2012, shortly after the opening of the new Mitchell Park Library and Community Center.

**Environmental Review:**
The proposed project is subject to environmental review under provisions of the California Environmental Quality Act (CEQA). An Environmental Impact Report was adopted June 24, 2002 for the Newell/Embarcadero Civic Facilities Expansion Program, which includes this proposed project.

ATTACHMENTS:
• Attachment A Art Center Construction Funding Agreement (DOC)
• Attachment B Amendment No 3 to Contract with Art Center Foundation (DOC)

Prepared By: Karen Kienzle, Manager Art Center

Department Head: Greg Betts, Director, Community Services

City Manager Approval: James Keene, City Manager
CONSTRUCTION FUNDING AGREEMENT BETWEEN THE CITY OF PALO ALTO AND THE PALO ALTO ART CENTER FOUNDATION FOR UPGRADES TO THE PALO ALTO ART CENTER RENOVATION PROJECT

THIS AGREEMENT ("Agreement") dated, ______, 2011 (the "Effective Date"), is entered into by and between the CITY OF PALO ALTO, a California chartered municipal corporation (the "City") and the PALO ALTO ART CENTER FOUNDATION, a corporation organized under the Nonprofit Public Benefit Corporation Law of the State of California (the "Foundation") (individually, a "Party" and, collectively, the "Parties"), in reference to the following facts and circumstances:

RECITALS

A. CITY owns and operates the Palo Alto Art Center, an approximately 28,000-square foot building and surrounding premises, located at 1313 Newell Road, Palo Alto, California (collectively, the "Facility").

B. The Parties have had a long history of collaboration and partnership. The Foundation has played an integral role in the support and operation of the Palo Alto Art Center since its inception in 1973. The most recent expression of partnership is contained in the Public/Private Partnership Agreement approved by the City Council on October 4, 2010.

C. The Parties mutually desire to make improvements and upgrades to the Facility with the City managing the construction project and the Foundation funding a significant portion of the Work.

D. The CITY has identified needed infrastructure upgrades and renovations for the Facility including seismic upgrades; plumbing, electrical, and mechanical upgrades; improved facilities for persons with disabilities; deferred maintenance; lighting; and interior painting work (the "City-Sponsored Work"). In addition, the Foundation has identified certain improvements that would further enhance the community benefit of the Facility. This work includes renovation of the sculpture garden; modification of classrooms, kitchen and hallway to create a children’s wing; installation of specialty equipment and millwork; construction of a children’s entry courtyard, parking and outdoor classroom; lighting upgrades in galleries, lobby and meeting room; and floor finishes in various locations (collectively “Foundation-Sponsored Upgrades”). The Parties agree that it will be more cost effective and less disruptive to the community if this additional work is performed in conjunction with the City-Sponsored infrastructure work. The City-Sponsored Work proposed by the City and the Foundation-Sponsored Upgrades described in this paragraph shall be collectively identified in this Agreement as the “Project” and summarized in Exhibit A. A more detailed description of the City-Sponsored Work and Foundation-Sponsored Upgrades is contained in Exhibit F. The work to be performed and the materials to be incorporated into the Facility are referred to as the “Work.”
E. Capital Improvement Program Project, Art Center Electrical and Mechanical Upgrades, PF-07000, was approved with the 2006-07 budget and currently has $3,856,000 of funding appropriated. The infrastructure elements contained in the approved CIP are included in the Project.

F. FOUNDATION has successfully raised One Million Two Hundred Fifty Thousand Dollars ($1,250,000) and has pledge receivables and unrestricted cash sufficient to pay the additional $750,000 required for the Foundation’s portion of the Project by April 2012.

G. Pursuant to an agreement dated on or about September 27, 2007, as amended, the Foundation retained Mark Cavagnero Associates (“MCA”) to prepare, among other things, detailed construction drawings for the Project (the “Design Contract”). A copy of the Design Contract (including all amendments thereto) is attached as Exhibit B. In accordance with an agreement between City and Foundation dated March 10, 2008, the City funded a portion of the design work (the “Design Cost Sharing Agreement”);

H. In accordance with Chapter 2.30 of the Palo Alto Municipal Code, the City plans to publicly bid the Project;

I. CITY and FOUNDATION desire to enter into this Agreement to set forth the terms and conditions for funding and management of the construction phase of the Project.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing recitals and the following covenants, terms, conditions and provisions, the Parties agree:

SECTION 1. RECITALS

1.1. Incorporation. The above recitals are hereby incorporated into this Agreement.

SECTION 2. TERM

2.1 Duration. This Agreement shall commence on the Effective Date and shall continue until the later of (1) the completion of the construction of the Project or (2) December 1, 2012, unless terminated earlier pursuant to Section 5 (“Termination”).

2.2 Project Schedule. The Parties agree that the Project will proceed in accordance with the schedule of milestones set forth in Exhibit D attached to this Agreement (the “Project Schedule”). The City promptly shall notify the Foundation of any delays in meeting the Project Schedule.

SECTION 3. RESPONSIBILITIES OF FOUNDATION

3.1 Assignment of Design Contract. The Parties anticipate that the Foundation shall continue to retain MCA to perform services under the existing Design Contract following the
execution of this Agreement. Such services would expand the existing scope of work for which the Foundation has retained MCA (i.e., completion of the construction drawings) to include the preparation of bid documentation and related services (the “Additional MCA Bid Services”) and revisions to the construction drawings to cover work that the City shall perform related to deferred maintenance of the Facility (the “Additional MCA Deferred Maintenance Services”). The Additional MCA Bid Services and the Additional MCA Deferred Maintenance Services are referred to collectively as the “Additional MCA Services.” The Parties anticipate that the City will reimburse the Foundation for the full cost of the Additional MCA Deferred Maintenance Services. The Parties will share the costs of the Additional MCA Bid Services in proportion to the Foundation’s Percentage Share and the City’s Percentage Share set forth in Section 6 of this Agreement. Upon not less than 10 days written request by the City, FOUNDATION shall assign to the City its rights to all existing plans and specifications prepared by MCA and all warranty rights and claims that it may have against MCA under the Design Contract (the “Assigned Rights”). The assignment of the Design Contract shall be in the form of Exhibit E to this Agreement. Notwithstanding such assignment, the Foundation shall continue to have the right and opportunity to participate in meetings and other communications between the City and MCA staff regarding the Project and to provide input to the City. If this Agreement is terminated in accordance with Section 5, then the City shall assign all of its rights under the Design Contract back to the Foundation.

3.2. Construction Contribution. Subject to the terms and conditions in this Agreement, FOUNDATION shall make a contribution (the “Foundation’s Contribution”) to the CITY to fund the construction costs and construction services associated with the Foundation-Sponsored Upgrades (the “Foundation’s Project Costs”) in accordance with the initial Project budget set forth on Exhibit F to this Agreement (the “Initial Project Budget”). The Foundation’s Contribution shall be in an amount not to exceed $2,000,000, and shall be paid to CITY in accordance with the Deposit Schedule set forth in Exhibit C of this Agreement. Project construction costs are all those costs incurred by the CITY in connection with the Project during the construction phase, including, but not limited to: labor, equipment and materials costs associated with demolition and construction; utility permit and inspection fees; specialized inspection and testing services and other specialized consultant services. Construction services are the construction administrative and construction management services described in Section 4.2. Construction costs shall not include the costs of CITY employees assigned to work on the Project. FOUNDATION shall be responsible for the Project construction costs related to the Foundation-Sponsored Upgrades, as set forth in the Initial Project Budget. Notwithstanding anything in this Agreement to the contrary, in no event shall the Foundation’s share of the cost of the Project exceed Two Million Dollars ($2,000,000) (the “Foundation’s Maximum Contribution”). If the Foundation’s Project Costs exceed the Foundation’s Maximum Contribution, the parties reserve the right to amend this Agreement to permit an additional contribution by the Foundation. In addition, if there are delays in completing any of the milestones set forth in the Project Schedule that were targeted to be completed prior to the date that the Foundation is required to pay any installment of the Foundation’s Contribution, then the date for such contribution shall be extended by a like number of days.

3.3. Evidence of Funds Available. No later than forty five (45) calendar days prior to the date set for CITY Council award of a construction contract for the Project, FOUNDATION
shall provide evidence satisfactory to the CITY Manager of the funds the organization has on hand for the Project. The Parties agree that a current bank statement stating the Foundation's funds on hand shall satisfy this requirement.

3.4 Selection of Administrator. FOUNDATION shall designate a person to serve as the organization’s administrator for purposes of this Agreement (“Administrator”). The Administrator shall be the agent of the Foundation and in such capacity shall be responsible for receipt of all notices under this Agreement, causing funds to be deposited with CITY in accordance with the Deposit Schedule, and coordinating on behalf of the Foundation all matters related to this Agreement. Upon request, the Administrator shall have the right to receive copies of all material communications by and among the City, the construction manager, the construction administrator, the contractor and other consultants and contractors retained in connection with the Project. FOUNDATION shall provide CITY in writing within fifteen (15) calendar days of the Effective Date of this Agreement, or such later date as may be agreed to in writing by all the parties, with the name and contact information for the person the organization has designated as the Administrator for purposes of this Agreement. The selection of and authority of the Administrator to act on behalf of the organization shall be evidenced by a corporate resolution or other official documentation of an action of the Board of Directors, a copy of which shall be provided to the City. The Foundation may elect to replace the Administrator by giving written notice to the City at least ten (10) days before the effective date of such replacement. Such notice shall state the name and contact information of the replacement Administrator.

3.5 Deposit of Funds with CITY. The Administrator shall deposit funds with the City for the construction costs and construction services related to the Foundation-Sponsored Upgrades as set forth in Exhibit C. The deposits shall be made in the form of a wire transfer, cashier's check or other financial instrument acceptable to CITY. CITY shall hold the Foundation’s funds in a segregated interest-bearing account that is not commingled with other funds and shall only use such funds for construction costs associated with Foundation-Sponsored Upgrades as listed above. All interest accruing on such funds shall belong to the Foundation. CITY shall provide the Administrator with quarterly reports of the expenditures of the funds deposited pursuant to this Section as described in Section 4.4 below. Any modification to Exhibit C must be approved by the City Council.

SECTION 4. RESPONSIBILITIES OF CITY

4.1 Project Initiation and Completion. CITY agrees to use commercially reasonable and good faith efforts to initiate construction of the Project by April, 2011 and to complete the Project by April, 2012 in accordance with the Project Schedule. FOUNDATION acknowledges and agrees that the Project schedule may be adversely impacted by delays related to factors outside CITY’s control, including, but not limited to design review, completion of design and construction drawings, changes in scope, and unforeseen conditions discovered while carrying out the Project.

4.2 Construction Services.
4.2.1 Construction Phase Services. City shall contract with Mark Cavagnero Associates (MCA) for construction services during the bid, construction and closeout phases ("Construction Phase Services"). Foundation shall be responsible to pay for its share of such Construction Phase Services based in accordance with the Foundation’s allocated percentage set forth in Section 6. The City will withdraw the FOUNDATION’S share of the Construction Phase Services from the funds on Deposit. The City will pay the City’s share of Construction Phase Services based in accordance with the City’s allocated percentage as set forth in Section 6.

4.2.2 Construction Management Services. City shall contract with a qualified firm to provide construction management services during the bid, construction and closeout phases for the on-going daily management and oversight of the project. The Foundation shall have the right to confer with the City and to provide input on the construction management firm that is selected, and the City shall consider such input in good faith. Foundation shall be responsible to pay for its share of construction management costs based on the percentage allocated to the Foundation in accordance with the allocation percentage set forth in Section 6. The City will withdraw the FOUNDATION’S share of the construction management services from the funds on Deposit. The City will pay the City’s share of construction management costs based in accordance with the City’s allocated percentage as set forth in Section 6.

4.3 Project Construction.

4.3.1 Contractor Qualifications. City shall compile a list of minimum contractor qualifications and bidding requirements and shall submit the list and such requirements to FOUNDATION for review and comment prior to releasing the bid. The City shall grant the Foundation a period of not less than ten (10) days after receipt of such qualifications and requirements during which time the Foundation may review and comment on the bidding qualifications and requirements. City will consider in good faith the Foundation’s requests for changes to the bidding qualifications and requirements, and shall incorporate all reasonable changes requested by the Foundation with respect to such qualifications and requirements.

4.3.2 Bidding; Selection of Bidder; Construction Contract. Following finalization of the bidding qualifications and requirements, CITY shall bid the Project in accordance with the requirements of the Palo Alto Municipal Code. FOUNDATION acknowledges and understands that the CITY is required to solicit bids for Project construction and to award the construction contract to the lowest responsive and responsible bidder. Following the closing of the period during which bids may be submitted, the City shall notify the Administrator of the names of all contractors who have submitted bids and shall provide the Foundation with copies of such bids. Thereafter, at a date and time mutually acceptable to the Parties, the City’s Project Manager and the Administrator shall meet to review the bids. The Administrator shall have the right to be accompanied at the meeting by construction, design or similar
representatives of the Foundation’s choice. The Administrator and such representatives shall have the right to provide input to the City with respect to the bids, including input regarding whether the bids of the bidding contractors satisfy the bidding qualifications and requirements and which of the contractor’s is the lowest responsive and responsible bidder. The City shall consider in good faith the Foundation’s input regarding the bids and shall thereafter decide which contractor will be selected as the lowest responsive and responsible bidder for the Project in accordance with the requirements of the Municipal Code. The City shall award a Construction Contract in substantially the same form as Exhibit G. The Foundation and its officers, directors, and employees shall be named as additional insured parties and indemnitees under the Construction Contract to the same extent as the City is so named. The City shall cause the Contractor to construct the Project in accordance with the approved plans and specifications and the Construction Contract.

4.3.3 Project Changes. As used in this Agreement, the term “change order” shall mean a written instrument, signed by the City and the Contractor, stating their agreement upon all of the following: (i) any change in the scope of work; (ii) the amount of the adjustment, if any, in the guaranteed maximum price (or other compensation to be paid to the Contractor), and (iii) the extent of the adjustment, if any, in the contractual time period set forth in the General Contract for completion of the work. If a change or changes in Project design or construction materials, equipment or methods are required for any reason (as reasonably determined by the City), such changes shall be documented by a written change order, and City shall review and approve (after consultation with the Foundation and receipt of the Foundation’s consent, to the extent required by this Agreement) all change orders for the Project. For all changes related to the Foundation’s scope of the Project, or any changes that will have a material effect on the program functionality or aesthetic appearance of any portion of the City-Sponsored Work, CITY shall provide the Administrator with prior written notice describing the Project change, the reason for the change, and the cost of the change. The notice shall specify the time period in which the Foundation’s input or approval is needed. The City shall use best efforts to provide at least 5 business days for Foundation response. However, the Parties acknowledge that certain change orders of an emergency nature may need immediate action and that, with respect to such changes, the City may give less than 5 business days’ notice to the Foundation. If the change is a cost increase related to the Foundation-Sponsored Work or would have an adverse effect on the program functionality or aesthetic appearance of the Project, CITY shall obtain approval from Administrator prior to authorization of work except as provided in the immediately preceding sentences of this paragraph. The Foundation’s approval right shall only apply to the program functionality and aesthetic aspects of the change order request and such approval shall not be unreasonably withheld. The Foundation shall use best efforts to respond within the time period requested by the City (which time periods shall be consistent with the preceding provisions of this Section 4.3.3) and if the Foundation does not respond within the time period specified in the notice, the City will have the right to act on the change order without Foundation authorization.

In addition, the Foundation shall have the right to propose reasonable changes to the scope of the Foundation-Sponsored Upgrades if the Foundation determines during the course of construction that such changes are necessary or appropriate; the City shall consider such requests in good faith and shall endeavor to implement any such changes.
Subject to the terms and conditions set forth in this Agreement, the Parties’ shall bear the cost of change orders as set forth in Section 6 of this Agreement. If the cost of change orders for Foundation Sponsored Upgrades exceeds 25% of the Foundation’s Project Costs, the parties reserve the right to renegotiate the Foundation’s Maximum Contribution.

The City shall establish and implement a change order control system. The City (either directly or through the Construction Manager) shall recommend necessary or desirable changes to the Work and shall manage the change order process by reviewing the requests for changes, negotiating the Contractor's and subcontractors' proposals, and if it determines that a change order is warranted, submitting recommendations to the Foundation. The City shall keep the Foundation informed of all change order requests, whether initiated by the City or the Contractor, and provide the Foundation with copies of all documentation relating to any change orders upon request.

4.4. Reporting. The City shall establish, implement and keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Agreement and the Construction Contract. Such accounting and control systems shall be consistent with generally accepted accounting principles, consistently applied. Without limiting the foregoing, The CITY shall keep records of all funds advanced by the Administrator pursuant to this Agreement and of all expenditures of such funds. CITY shall submit quarterly reports (or more or less frequently as may be agreed to in writing by the parties) to the Administrator. The reports shall describe the work performed and amounts paid by the CITY to contractors, consultants and other third parties in connection with the construction of the Project during the previous quarter. CITY shall provide the Administrator with a reasonably detailed final report of all Project construction expenditures within sixty (60) days of completion of the Project, as evidenced by recording of a Notice of Completion for the Project, or earlier termination of this Agreement.

4.5 Refunds. If, following completion of the Project, a portion of the amount(s) advanced to CITY by the Administrator remains unexpended and unencumbered, the CITY shall return such amount to the Administrator within thirty (30) days after issuance of the final report pursuant to Section 4.4 above. If the Agreement is terminated as provided in Section 5 below, Foundation shall be entitled to a refund of their unexpended construction cost, plus a proportionate share of the balance of shared expense (calculated as provided in Section 6 below), if any, of the deposits made pursuant to Exhibit C of this Agreement.

4.6 Communications. The City shall keep the Administrator reasonably apprised of the progress of the Project and any significant events regarding the Project, including the bidding process, the drafting and negotiating of the Construction Contract, any requests for change orders, and the construction and close-out of the Project. The Administrator shall be given the opportunity to attend bi-weekly project meetings with the Contractor, Construction Manager and City. The Administrator shall communicate any Project input directly to the City and shall not direct the Contractor or Construction Manager.

4.7 Compliance with Law; Unforeseen Work. The City Sponsored Work includes the deferred maintenance items set forth in Exhibit F. In addition, the City will comply with all applicable federal, state and local laws and City department requirements that are implicated by
the construction of the Project. The City (and not the Foundation) shall be responsible for defects, deferred maintenance, or other problems at the Facility that are discovered during the construction of the Project and that must be addressed for any of the following reasons, all of which shall be part of the City-Sponsored Work: (a) public health and safety or (b) applicable law requires such conditions to be corrected or otherwise addressed, including without limitation any costs and expenses associated with the inspection, testing, abatement, containment, removal, transportation or remediation of hazardous materials that may be discovered during the course of construction of the Project or that otherwise exist at the Facility, and any costs associated with compliance with the Americans With Disability Act; (c) dry rot; and (d) termites or other pests. Nothing in this paragraph shall require the City to perform any work except if such work is required for the reasons set forth in Sections 4.7 (a) [public health and safety] or (b) [required by law] of this Agreement. The City will address and correct any such conditions at the City’s sole cost and expense in a timely manner in coordination with the Project’s construction. For the purposes of this Agreement, the term “hazardous materials” includes any materials that relate to the environment or health and human safety or that otherwise defined as hazardous or toxic under any applicable laws, including but not limited to asbestos and asbestos-containing materials.

4.8 Permit Fees. Except for Utility permit fees, as part of the City-Sponsored Work, the City shall be solely responsible for all permit, inspection and similar fees (including plan check fees, inspection fees, building permit fees and similar fees) relating to the Project, including without limitation those relating to the Foundation-Sponsored Upgrades. In accordance with City Policy and Procedure 1-25 regarding Public/Private partnerships, the respective parties shall be responsible for the utility permit fees attributable to their portion of the Work.

4.9 Other Project Costs. The City shall be responsible for the costs relating to the Commissioning agent, hazardous materials assessment and remediation, moving, testing and inspection fees; however, these costs shall not be included for purposes of calculating the cost share ratio in Section 6.1.

SECTION 5. TERMINATION

5.1 Termination Prior to Award of Construction Contract. FOUNDATION, through the Administrator, may terminate this Agreement with or without cause at any time prior to the City’s execution of the Construction Contract for the Project by delivering to the City ten (10) days advance written notice of election to terminate. The City shall notify the Foundation at least fifteen (15) days prior to its execution of the Construction Contract that it intends to execute the Construction Contract. City through the City Manager may terminate this Agreement with or without cause at any time prior to execution of the Construction Contract for the Project by delivering to the Administrator ten (10) days advance written notice of election to terminate, provided that such termination right only may be exercised in either of the following events: (1) the lowest responsive and responsible bid for construction of the Project exceeds the construction budget established for the Project; or (2) the City Council, in its sole discretion, has determined for any reason that construction of the Project should not proceed.

5.2 Termination After Award of Construction Contract. Following execution of the Construction Contract for the Project, CITY may terminate this Agreement upon ten (10) days
notice to the Administrator for the following, and only the following, reasons: (1) the estimated Project costs, as reasonably determined by the CITY, have increased by more than 15% of the maximum amounts budgeted for the Project by CITY or (2) in the case of a Force Majeure Event that the City reasonably determines will result in a delay in completing the Project of more than 12 months beyond the originally anticipated completion date or cost increases of more than 15% of the maximum amounts budgeted for the Project by CITY. Estimated Project costs shall be determined as the sum of the Construction Contract price, any approved change orders, and any anticipated change orders that are required to complete the Project. “Force Majeure Event” shall have the meaning set forth in Section 10. In case of termination under this Section 5.2, FOUNDATION shall remain responsible for its share of, and CITY may use the funds on deposit to pay for, the Foundation’s share of construction costs, Construction Phase services and Construction Management services incurred through the time of termination.

SECTION 6. CALCULATION OF PROPORTIONATE FUNDING

6.1 The Parties have prepared the Initial Project Budget attached to this Agreement as Exhibit F in an effort to set forth their good faith estimates of the total cost of the Project and the allocation of such costs between the City (i.e., with respect to the City-Sponsored Work) and the Foundation (with respect to the Foundation-Sponsored Upgrades), including a contingency amount of 15% of the anticipated cost of the Work. For purposes of this Agreement and except as may be modified under Section 6.2 or 6.5, City’s Percentage Share is 73.1% and Foundation’s Percentage Share is 26.9% as defined by the ratio in Exhibit H of each party’s summary estimated construction costs including deferred maintenance items as listed in Exhibit F.

6.2 Following receipt of the bids pursuant to Section 4.3, the parties shall work together to make any necessary or appropriate adjustments or revisions to the amounts allocated between the City and the Foundation in the Initial Project Budget and shall negotiate in good faith to agree on such adjustments which may affect the cost sharing ratio described in Section 6.1. If the Parties reach agreement on such allocation, then the revised budget shall supersede the Initial Project Budget and become the “Project Budget,” and, if necessary, the cost share ratio shall be modified. If the parties elect not to modify the allocations or are unable to reach agreement on how to allocate, the cost share ratio set forth in Section 6.1 shall apply. Any change to the cost share ratio shall be reflected in a written amendment to this Agreement. The Foundation shall be solely responsible for the costs included within the scope of the Foundation-Sponsored Upgrades, and the City shall be solely responsible for the costs included within the scope of the City-Sponsored Work.

6.3 Change Orders.

6.3.1 Change Orders Under $25,000. To the extent that any change orders are required in connection with the Project, if the change order is $25,000 or less, the Foundation will pay the Foundation’s Percentage Share and the City will pay the City’s Percentage Share as described in Section 6.1.

6.3.2 Change Orders Over $25,000. If the change order is in excess of $25,000, the Foundation shall bear 100% of the cost of all change orders that relate solely to the Foundation-Sponsored Upgrades, and the City shall bear 100% of the cost of all change
orders that relate solely to the City-Sponsored Work. To the extent that any change order in excess of $25,000 relates in part to the Foundation-Sponsored Upgrades and in part to the City-Sponsored Work, the Parties shall work in good faith to determine an appropriate allocation of the costs of such change order. If the Parties are unable to agree on such allocation, then the Foundation will pay the Foundation’s Percentage Share and the City will pay the City’s Percentage Share as described in Section 6.1.

6.4 The Foundation shall be responsible for the Foundation’s Percentage Share of any shared construction-related costs, including but not limited to construction administrative services set forth in Section 4.2.1 and construction management services in Section 4.2.2. The City shall be responsible for the balance of such shared costs.

6.5 The Parties acknowledge that the actual construction of the Project will be undertaken as a single work of improvement and that during the course of construction it may be difficult to determine whether portions of the Work at any given time relates solely or primarily to the Foundation-Sponsored Upgrades or to the City-Sponsored Work. Accordingly, except with regard to any costs for Work specifically allocated to the City as provided in Section 4.7 (which shall be paid for solely by the City), Section 4.9 (other project costs) and Section 4.3.3 and Section 6.3 with regard to change orders that are specifically allocated to the City or to the Foundation in accordance with those sections, each disbursement of funds made by the City to the Contractor or to pay for any other authorized Project expenses shall be allocated between the City and the Foundation in proportion to the Foundation’s Percentage Share and the City’s Percentage Share, as the case may be, without regard to whether the disbursement in question relates solely or primarily to the Foundation-Sponsored Upgrades or the City-Sponsored Work. If the parties desire to adjust the cost sharing ratio to allocate a lesser percentage to City-Sponsored Work, this Agreement can be so amended upon approval by the City Manager.

6.6 Nothing in this Section 6 or elsewhere in this Agreement shall constitute a commitment by the Foundation to be required to pay or otherwise be responsible for any obligations in excess of the Foundation’s Maximum Contribution.

6.7 Within 90 days after the completion of the Project, the City shall prepare a final accounting of setting forth the total costs of the Project, including all change orders, and the respective contributions of the City and the Foundation. To the extent, if at all, that the actual amount of the Foundation’s share of such costs as determined under this Agreement is less than the funds paid or contributed by the Foundation, the City shall return such excess amount to the Foundation within 30 days after such amount has been determined.

SECTION 7. WAIVER

7.1 The waiver by either Party of any breach or violation of any covenant, term, or condition of this Agreement or of the provisions of the PAMC or other City law, rule or regulation, will not be deemed to be a waiver of any such covenant, term, condition, or provision or of any subsequent breach or violation of the same or any other covenant, term, condition, or provision. The subsequent acceptance by either Party of any consideration which may become due or payable hereunder will not be deemed to be a waiver of any preceding breach or violation by the other Party of any other covenant, term, condition or provision.
SECTION 8. ASSIGNMENT

8.1 The Foundation will not assign, transfer, or convey this Agreement and the Exhibits without the express written approval of the City, and any such assignment, transfer or conveyance without the approval of the City will be void and, in such event, at the City’s option, this Agreement may be terminated upon reasonable notice to the Foundation.

SECTION 9. NONDISCRIMINATION

9.1 As set forth in Palo Alto Municipal Code section 2.30.510, FOUNDATION certifies that in the performance of this Agreement, it shall not discriminate in the employment of any person because of the race, skin color, gender, age, religion, disability, national origin, ancestry, sexual orientation, housing status, marital status, familial status, weight or height of such person. The Foundation acknowledges that it has read and understands the provisions of Section 2.30.510 of the Palo Alto Municipal Code relating to Nondiscrimination Requirements and the penalties for violation thereof, and agrees to meet all requirements of Section 2.30.510 pertaining to nondiscrimination in employment.

SECTION 10. FORCE MAJEURE

10.1 A Party will be temporarily excused from the performance or further performance of any of its covenants or agreements or any terms or conditions that it is obligated to fulfill hereunder and such Party’s nonperformance shall not be deemed an event of default under this Agreement for any period to the extent that such Party is prevented, hindered or delayed for any period of time from performing any of its covenants or agreements, in whole or in part, or any term or condition it is required to perform or satisfy as a result of an act of God, war, civil disturbance, court order, or other cause beyond that Party’s reasonable control. The Parties hereby agree to use reasonable efforts to remedy the effects caused by the occurrence of the event giving rise to a Party’s temporary nonperformance of its covenants or agreements or any terms or conditions that it is obligated to fulfill hereunder. A Party will provide notice promptly to the other Party to the extent that such Party relies on the provisions of this Section to temporarily excuse its failure to perform any of its covenants or agreements or any terms or conditions hereunder and shall state therein the facts giving rise to its inability to perform and what actions that it intends to take to overcome such delay.

SECTION 11. AUDITS; INSPECTION OF RECORDS

11.1 The Foundation will maintain, or caused to be maintained by its accountant or other agent, if any, books and records relating to funding of the Project subject of this Agreement during the Term and for three (3) years thereafter. It will permit the City to inspect, audit and copy, upon thirty (30) days’ prior written notice from the City at any reasonable time during the Term and for three (3) years after the expiration or earlier termination of the Agreement, the Foundation’s books and records pertaining to its obligations imposed by this Agreement. The Foundation will retain such books and records at accessible locations and for at least three (3)
years after the expiration or earlier termination of this Agreement, whichever occurs later. This provision will survive the expiration or earlier termination of this Agreement.

11.2 The City will maintain, or caused to be maintained by its accountant or other agent, if any, books and records relating to funding of the Project subject of this Agreement during the Term and for three (3) years thereafter. It will permit the Foundation to inspect, audit and copy, upon thirty (30) days’ prior written notice from the Foundation, at any reasonable time during the Term and for three (3) years after the expiration or earlier termination of the Agreement, the City’s books and records pertaining to its obligations imposed by this Agreement. The City will retain such books and records at accessible locations and for at least three (3) years after the expiration or earlier termination of this Agreement, whichever occurs later. This provision will survive the expiration or earlier termination of this Agreement.

SECTION 12. INDEPENDENT CONTRACTOR

12.1 In the construction of the Project and the performance of other duties imposed upon it by this Agreement, the Foundation acts at all times as an independent contractor and not as an employee of the City. Nothing in this Agreement will be construed to establish a partnership, joint venture, group, pool, syndicate or agency between the Parties. No provision contained herein will be construed as authorizing or empowering either Party to assume or create any obligation or responsibility whatsoever, express or implied, on behalf, or in the name of, the other Party in any manner, or to make any representation, warranty or commitment on behalf of the other Party. In no event will either Party be liable for (a) any loss incurred by the other Party in the course of its performance hereunder, or (b) any debts, obligations or liabilities of the other Party, whether due or to become due.

SECTION 13. REPRESENTATIONS AND WARRANTIES

13.1 On the Effective Date, each Party represents and warrants to the other Party that: (A) it is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation; (B) the execution, delivery and performance of this Agreement and the Exhibits are within its powers, have been duly authorized by all necessary action and do not violate any of its governing documents, any contracts to which it is a party or any law, rule, regulation, or order; (C) this Agreement and the Exhibits and any other document executed and/or delivered in accordance with this Agreement constitutes its legally valid and binding obligation enforceable against it in accordance with its covenants, terms, conditions and provisions, subject to any laws relating to bankruptcy, insolvency, and reorganization; (D) it has not filed and it is not now contemplating the filing for bankruptcy protection and, to its knowledge, there is not an involuntary proceeding threatened against it which would result in it being or becoming a debtor under any bankruptcy law; (E) there is not pending or, to its knowledge, threatened against it or any of its affiliates any legal proceedings that could materially adversely affect its ability to perform its obligations under this Agreement and the Exhibits; and (F) no event of default or potential event of default with respect to it has occurred and is continuing under this Agreement and no such event or circumstance would occur as a result of its entering into or performing its obligations under this Agreement and the Exhibits.
SECTION 14. NOTICES
All notices, requests and approvals by a Party will be given, in writing, and delivered by personal service, the United States Postal Service, express delivery service, or facsimile transmission, as follows:

TO CITY: City of Palo Alto
City Clerk
P.O. Box 10250250 Hamilton AvenuePalo Alto, CA 94303
With a copy to each of:
City of Palo Alto
P. O. Box 10250
250 Hamilton Avenue
Palo Alto, CA 94303
ATTN: Director, Palo Alto Art Center;
and the Manager, Facilities Maintenance and
Projects

TO FOUNDATION: Palo Alto Art Center Foundation
1313 Newell Road
Palo Alto, CA 94303
ATTN: Teri Vershel, Co-President

SECTION 16. DISPUTE RESOLUTION

16.1 If a dispute arises from or in connection with this Agreement, generally, or any Exhibit, in particular (a “Dispute”), the parties shall each designate a representative to meet and confer to promptly resolve the Dispute.

16.2 Nothing contained in this Agreement will prevent or otherwise restrict either Party from pursuing its equitable rights, including injunctive relief and specific performance, in the event of a material breach by the other Party.

SECTION 17. MISCELLANEOUS

17.1 This Agreement will be governed by and construed in accordance with the laws of California and, as appropriate, the Charter, and the PAMC. The Parties will comply with applicable laws in the exercise of their rights and the performance of their obligations under this Agreement.

17.2 All covenants, terms, conditions and provisions of this Agreement, whether covenants or conditions, will be deemed to be both covenants and conditions.

17.3 This Agreement represents the entire agreement between the Parties and supersedes all prior negotiations, representations and contracts, written or oral, relating to the subject matter of this Agreement. This Agreement may be amended by an instrument, in writing,
signed by the Parties. This Agreement may be executed in any number of counterparts, each of which will be an original, but all of which together will constitute one and the same instrument.

17.4 All exhibits referred to in this Agreement are by such references incorporated in this Agreement and made a part hereof. A reference to this Agreement will include a reference to the applicable exhibit or exhibits hereto. The following exhibits are made a part of this Agreement:

- Exhibit “A” – Description of Foundation and City-Sponsored Work
- Exhibit “B” – Design Contract
- Exhibit “C” – Payment Schedule
- Exhibit “D” – Project Schedule
- Exhibit “E” – Form of Assignment of Rights Under Design Contract
- Exhibit “F” – Initial Project Budget
- Exhibit “G” – Construction Contract
- Exhibit “H” – Cost Share Ratio

17.5 The Parties agree that the normal rule of construction to the effect that any ambiguity is to be resolved against the drafting party will not be employed in the interpretation of this Agreement and the Exhibits or any amendment thereto.

17.6 In the event that an action is brought, the Parties agree that trial of such action will be vested exclusively in the state courts of California or in the United States District Court for the Northern District of California in the County of Santa Clara, State of California.

17.7 If a court of competent jurisdiction finds or rules that any provision of this Agreement, the Exhibits, or any amendment thereto, is void or unenforceable, the unaffected provisions of this Agreement, the Exhibits, or any amendment thereto, will remain in full force and effect.

17.8 The term “day” means a calendar day, unless a “business day” is specified; for the purposes of this Agreement, “business day” means a calendar day but it excludes any “Regular Holiday” or “Other Special Day” referred to in PAMC Section 2.08.100 or any Friday that is considered a ‘9/80’ day, when the City does not require employees, electing to work nine (9) business days in a ten-business-days biweekly period, to work on such days.

17.9 The individuals executing this Agreement represent and warrant that they have the legal capacity and authority to do so on behalf of their respective legal entities.

17.10 The City shall, to the fullest extent permitted by law, indemnify, defend and hold harmless the Foundation and its officers, directors, employees, successors and assigns (collectively, the “Indemnified Parties”) from and against all liabilities, claims, demands, debts, controversies, judgments, awards, fines, damages, costs, losses and expenses, including without limitation attorneys’ fees, disbursements and court costs, and all other consultant and expert fees and costs (collectively, “Claims”) for (a) personal injury, death, or property damage arising from the Project, (b) any claims of lien or stop notices asserted by any contractor, or (c) otherwise relating to or arising from the design or construction of the Project. The duty to defend is independent of and separate from the duty to indemnify and such duty to defend exists regardless
of any ultimate liability of City or any Indemnified Party. Such defense obligation shall arise immediately upon submission of any Claim by any Indemnified Party or written notice of such Claim being provided to City. City’s indemnification obligation hereunder shall survive the expiration or earlier termination of the Agreement until such time as it is determined by final judgment that any Claim against the Indemnified Parties for such matters indemnified hereunder are fully and finally barred as to the Indemnified Parties by the applicable statute of limitations.

17.11. Notwithstanding anything in this Agreement to the contrary, no director, officer, employee or volunteer of the Foundation will have any personal liability under this Agreement.

SECTION 18. NON-APPROPRIATION

18.1. This Agreement is subject to the fiscal provisions of the Charter of the City of Palo Alto and the Palo Alto Municipal Code. This Agreement will terminate without any penalty (a) at the end of any fiscal year in the event that funds are not appropriated for the following fiscal year, or (b) at any time within a fiscal year in the event that funds are only appropriated for a portion of the fiscal year and funds for this Agreement are no longer available. The preceding provisions of this Section 18.1 shall not excuse the City from using funds previously appropriated for the Project. This section shall take precedence in the event of a conflict with any other covenant, term, condition, or provision of this Agreement.
IN WITNESS WHEREOF, the Parties by their duly authorized representatives have executed this Agreement on the Effective Date.

APPROVED AS TO FORM: CITY OF PALO ALTO

______________________________ ___________________________________
Senior Asst. City Attorney City Manager

APPROVED:

______________________________ ___________________________________
Director of Administrative Services President

______________________________ ___________________________________
Director of Community Services Chief Operating Officer

______________________________ ___________________________________
Director of Public Works

Exhibit “A” - Description of Foundation and City-Sponsored Work
Exhibit “B” – Design Contract
Exhibit “C” - Payment Schedule
Exhibit “D” – Project Schedule
Exhibit “E” – Form of Rights Under Assignment of Design Contract
Exhibit “F” – Initial Project Budget
Exhibit “G” – Construction Contract
Exhibit “H” – Cost Share Ratio Calculation
Exhibit A

DESCRIPTION OF FOUNDATION AND CITY-SPONSORED WORK

1. Introduction

The City of Palo Alto is upgrading the Art Center building, located at 1313 Newell Rd, Palo Alto, CA. The City’s scope of work includes replacement or retrofit of building ventilation systems, electrical systems and distribution wiring, fire life safety systems, and accessibility upgrades (as triggered by Title 24 provisions required by the aforementioned upgrades) to the facility, while the Foundation’s scope of work includes the creation of a Children’s Wing and an upgrade of the exhibition galleries. The project also includes installation of energy saving systems/features.

In addition to the abovementioned electrical, mechanical and Children’s Wing improvements, the City will also now add deferred-maintenance items to the project such as a new roof, new gutters, new downspouts, seismic upgrade to roofing envelope, exterior painting, new carpets, additional interior painting, termite treatment and dry rot repairs, new window safety glazing and exterior lighting improvements.

2. Scope of Services

The project scope includes all labor, material and equipment. The following contains a general description of the scope of work included in each element listed below.

Foundations

- Minor cutting and patching for plumbing work included in plumbing section.

Structure

- Roof framing diaphragm strapping and connection strengthening. Termite treatment and dry-rot repairs.

Exterior enclosure

- Removal of existing windows/walls to accommodate new doors, infilling existing window system with spandrel glass and CMU wall infill at various locations. Window safety glazing upgrade to bottom windows in courtyard. Exterior painting.

Roofing

- Roof replacement and seismic upgrade to roofing envelope. New gutters and downspouts.

Interior division

- New interior partitions with gypsum board to both sides, doors, frames and hardware.

Finishes

- New finishes at various locations, including ceramic tile at restrooms, resilient flooring through, carpet, painted walls, painted gypsum board ceilings, and 2x2 concealed spline ceilings at various locations.

Equipment

- Equipment includes prefabricated toilet compartments and accessories, shelving and millwork, cabinets and counter tops, chalkboards and insignia, amenities and convenience items.
<table>
<thead>
<tr>
<th>Vertical transportation</th>
<th>Rework stairs, ramps and railings for ADA compliance.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plumbing</td>
<td>Demolition and re-pipe of waste and water service piping, new sanitary fixtures with associated waste, vent and service piping, domestic cold and hot water piping system.</td>
</tr>
<tr>
<td>HVAC</td>
<td>Demolition of existing ceiling located AC units, condensing unit, boiler with pumps, piping, ductwork and controls, including installation of new AHU and ductwork. New air cooled chiller and CHW piping, new boiler and HHW.</td>
</tr>
<tr>
<td>Fire protection</td>
<td>Repair and replacing of existing sprinkler heads.</td>
</tr>
<tr>
<td>Electrical</td>
<td>Primary underground raceway, utility transformer, secondary underground raceway, electrical service switchboard (NEMA 3R), re-feed existing switchboard, motor connections, receptacles as required, maintain existing receptacle system. New interior lighting.</td>
</tr>
<tr>
<td>Site work</td>
<td>Landscaping, paving, drop off parking and site fencing. Irrigation improvements. New children’s entrance walkway and courtyard. Sculpture garden concrete work to match accessibility ramps.</td>
</tr>
<tr>
<td>Site Utilities</td>
<td>Site lighting, electrical feeders, mechanical, and drainage.</td>
</tr>
<tr>
<td>Telecom</td>
<td>New Telephone/data cabling</td>
</tr>
<tr>
<td>Fire Life Safety</td>
<td>New fire alarm system and security system.</td>
</tr>
<tr>
<td>Abatement</td>
<td>Hazardous Material Abatement</td>
</tr>
<tr>
<td>Building Certification</td>
<td>LEED certification and Commissioning</td>
</tr>
</tbody>
</table>
Exhibit B
DESIGN AGREEMENT AND AMENDMENT ADD SERVICES
[To Be Inserted At Closing]
Exhibit C
PAYMENT SCHEDULE

Foundation shall deposit with City:

75 calendar days prior to scheduled award date of construction contract -- $1,250,000

At Notice of Substantial Completion -- Lesser of $750,000 or balance of Foundation Project Costs

TOTAL: $2,000,000 Maximum
Exhibit D
PROJECT SCHEDULE

**Milestones:**
- Pre-construction Phase (5 months):
  - Begin Prequalification of Contractors
  - Begin move-out of staff/materials
  - Begin hazardous material removal
  - Advertise for construction bids
  - Award of Construction Contract

**Approx. Date:**
- February 2011
- March 2011
- April 2011
- April - May 2011
- June 2011

**Construction Phase (10-12 months):**
- Construction Start
- Construction Completion
- Move-back of staff/materials
- Grand-opening

**Approx. Date:**
- June 2011
- April 2012
- May 2012
- June 2012
ASSIGNMENT OF DESIGN CONTRACT RIGHTS

THIS ASSIGNMENT OF DESIGN CONTRACT RIGHTS ("Assignment") is executed and delivered effective as of ___________, by the PALO ALTO ART CENTER FOUNDATION, a corporation organized under the Nonprofit Public Benefit Corporation Law of the State of California ("Assignor"), for the benefit of the CITY OF PALO ALTO, a California chartered municipal corporation ("Assignee"). All capitalized terms used in this Assignment have the meaning given to such terms in that certain Construction Funding Agreement Between the City of Palo Alto and the Palo Alto Art Center Foundation for Upgrades to the Palo Alto Art Center Renovation Project dated _____________ (the “Agreement”).

For good and valuable consideration, receipt of which is hereby acknowledged, Assignor does hereby assign to Assignee: (1) all plans and specifications prepared by MCA in connection with the Project (the “Plans”), (2) all present and future claims, causes of action and other rights of any nature, whether in contract or in tort, that Assignor may have against MCA in connection with the design of the Project, including without limitation all rights to insurance proceeds with respect to the Design Contract; and (3) to the extent assignable, all warranties and guarantees arising under the Design Contract (collectively, the “Assigned Rights”); provided, however, that Assignor shall have jointly with Assignee the same rights assigned to Assignee pursuant to this Assignment so that Assignor shall not be precluded from prosecuting any claim that Assignor may have against MCA.

Assignor hereby covenants that it will, at any time and from time to time upon written request from Assignee, execute and deliver to Assignee or its successors and/or assigns any new or confirmatory instruments, and do and perform any other acts which Assignee or its successors and/or assigns may request in order to fully transfer possession and control of the Assigned Rights intended to be transferred and assigned hereby.

This Assignment shall be binding upon and inure to the benefit of Assignee and its successors and assigns.

This Assignment may be executed in counterparts, each of which shall be deemed an original, but all of which, taken together, shall constitute one and the same instrument.

THE ASSIGNED RIGHTS ARE TRANSFERRED AND ASSIGNED BY ASSIGNOR ON AN “AS IS, WHERE IS” BASIS, AND WITHOUT ANY WARRANTIES OF WHATSOEVER NATURE, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR ANY PARTICULAR PURPOSE, WARRANTIES CREATED BY ANY AFFIRMATION OF FACT OR PROMISE OR BY ANY DESCRIPTION OF THE RIGHTS TRANSFERRED HEREUNDER, OR BY ANY SAMPLE OR MODEL THEREOF, AND ALL OTHER WARRANTIES WHATSOEVER CONTAINED IN OR CREATED BY THE CALIFORNIA UNIFORM COMMERCIAL CODE. SUCH
ASSIGNMENT AND TRANSFER IS SUBJECT TO ANY AND ALL RIGHTS OF MCA AND ANY OTHER THIRD PARTIES IN AND TO THE ASSIGNED RIGHTS.

IN WITNESS WHEREOF, this Assignment is executed and delivered by the Assignor to the Assignee as of the date first set forth above.

PALO ALTO ART CENTER FOUNDATION

By:____________________________

Name:__________________________

Title:___________________________
Exhibit F
INITIAL PROJECT BUDGET
[To Be Inserted At Closing]
Exhibit G
CONSTRUCTION CONTRACT
[To Be Inserted At Closing]
# Exhibit H
## ART CENTER
### PERCENTAGE SHARE CALCULATION
(Thousands of Dollars)

<table>
<thead>
<tr>
<th></th>
<th>Total Cost</th>
<th>City Portion</th>
<th>Foundation Portion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Phase 1 Construction</td>
<td>$3,785</td>
<td>$2,541</td>
<td>$1,244</td>
</tr>
<tr>
<td>Additive Alternates</td>
<td>118</td>
<td>106</td>
<td>12</td>
</tr>
<tr>
<td>Deferred Maintenance</td>
<td>760</td>
<td>760</td>
<td>0</td>
</tr>
<tr>
<td>Special Testing &amp; Inspections</td>
<td>10</td>
<td>7</td>
<td>3</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>$4,673</strong></td>
<td><strong>$3,414</strong></td>
<td><strong>$1,259</strong></td>
</tr>
</tbody>
</table>

### PERCENTAGE SHARE
- 73.1% (City Portion)
- 26.9% (Foundation Portion)

Note: The costs in this exhibit are taken from the January 25, 2011 Building Permit Set Cost Estimate for Palo Alto Art Center prepared Mack5.
AMENDMENT NO. THREE TO CONTRACT NO. C08126592
BETWEEN THE CITY OF PALO ALTO AND THE PALO ALTO ART CENTER FOUNDATION FOR THE DESIGN OF CAPITAL IMPROVEMENTS RELATING TO THE RENOVATION OF THE PALO ALTO ART CENTER

This Amendment No. Three to Contract No. C08126592 (“Contract”) is entered into _____________, 2011 between the CITY OF PALO ALTO (the “City”) and the PALO ALTO ART CENTER FOUNDATION (the “Foundation”) (individually, a “Party” and, collectively, the “Parties”), in reference to the following facts and circumstances:

RECITALS:

1. On March 10, 2008, the Parties entered into the Design of Capital Improvements Relating to the Renovation of the Palo Alto Art Center agreement (the “Design Agreement”).

2. On December 15, 2008, Council approved Amendment No. One to Contract Number C08126592 with the Foundation in the amount of $78,580 for the Planning and Design Phase for the Renovation and Capital Improvements to the Palo Alto Art Center, Capital Improvement Program Project PF-07000. Amendment No. One addressed scope increases to the design development phase due to new green building requirements, accessibility and seismic code requirements, hazardous materials testing and removal, and determination of the extent of required electrical system upgrades.

3. On March 16, 2009, Council approved Amendment No. Two to Contract Number C08126592 with the Foundation in the amount of $6,249 for a Total Not to Exceed Amount of $374,829 for the Development of Construction Documents for the Renovation and Capital Improvements to the Palo Alto Art Center, Capital Improvement Program Project PF-07000. Amendment No. Two also changed the scope of the agreement between the City of Palo Alto and the Foundation to include design services only, and exclude any payment for bid and construction phase services. In addition, the Amendment extended the term of the agreement from March 31, 2009 to March 31, 2010 to allow time for the completion of construction documents.

4. The parties intend to enter into a Construction Funding Agreement whereby the Foundation will contribute up to $2 Million to fund renovations and upgrades to the Art Center;

5. The Parties wish to amend the Design Agreement to: (1) extend the term of the Agreement from March 31, 2010 to June 1, 2011 to ensure the contract stays current; (2) expand the scope of the design work to include design for deferred maintenance aspects of the project whereby the expense will be incurred by the City; and 3) expand the scope of the design work to include bid documentation that will be split between the City and the Foundation based upon the cost-sharing ratio determined in the concurrent Construction Funding Agreement.
AGREEMENT:

NOW, THEREFORE, in consideration of the terms, conditions, and provisions of this Amendment, the Parties agree, as follows:

SECTION 1. Section 2.1 of the Design Agreement is amended to read, as follows:

“2.1 The term of this Design Agreement (the “Term”) shall commence on the Effective Date and continue through June 1, 2011. If the completion of the design and plan development phase of the Project is delayed for any reason beyond the reasonable control of the Foundation, then subject to the preceding sentence, the Parties may agree, in writing, to extend the Term on a month-to-month basis, in order to permit the Foundation to complete the design and bid documentation phase of the Project.”

SECTION 2. Recital 6 is added to the Design Agreement to read as follows:

“6. The Foundation has entered into an agreement with the Architect to perform the following additional services: (1) preparation of plans for additional deferred maintenance task items as set forth in Exhibit A-1 which is attached and incorporated by reference and (2) completion of construction drawings as set forth in Exhibit A-2.”

SECTION 3. Section 4.2 of the Design Agreement is amended to add the following provisions:

“The City shall reimburse the Foundation for the costs incurred by the Foundation in connection with the deferred maintenance scope described in Recital 6 in an amount not to exceed $79,505 for fees associated with incorporation of the deferred maintenance items into existing construction documents and not to exceed $30,000 for services associated with HRB/ARB review of the additional services.

The City shall also reimburse the Foundation for its proportionate share of the additional services related to completion of construction drawings described in Recital 6 in an amount not to exceed $45,043. For purposes of this Amendment No. 3, the City’s proportionate share of the additional services for completion of construction drawings shall be 73.1% percent.

The City shall pay such costs as invoiced by the Foundation. The Foundation’s invoice shall include documentation in support of each installment payment request. The required documentation will consist of the Architect’s invoices, as submitted to the Foundation for payment, with documentation of all design and plan development services rendered to that point in time, together with the Foundation’s proof of payment of such invoices.”

SECTION 4. Except as they are herein modified, all other provisions of the Design Agreement, including any exhibits and subsequent amendments thereto, shall remain in full force and effect.
IN WITNESS WHEREOF, the Parties hereto have duly executed this Amendment No. 2 on the day and year first written.

APPROVED AS TO FORM:

__________________________
Senior Asst. City Attorney

APPROVED:

__________________________
City Manager

__________________________
Director of Administrative Services

__________________________
Director of Community Services

__________________________
Acting Director of Public Works

CITY OF PALO ALTO

__________________________
Mayor

PALO ALTO ART CENTER FOUNDATION

By:________________________

Name:_______________________

Title:_______________________
Exhibit A-1
Additional Services Agreement for Deferred Maintenance Work

January 17, 2011
To: Bern Beecham
   Chair, Building Committee, Palo Alto Art Center Foundation
From: Paul Loeffler
Re: Palo Alto Art Center – Deferred Maintenance Items
    Additional Services requests from MCA Consultants

Dear Bern,

We submit the following draft proposals for your consideration at the next Board Meeting in our office and consultants in order to incorporate the deferred maintenance items, as requested by the City of Palo Alto, into a separate Permit Revision package and eventually into a confirmed set of Construction Documents, as well as the preparation of required materials plus documentation for submittal to the Historic and Architectural Review Boards. Given that the scope of the HRB/ARB effort is not understood at this time; those numbers will be quoted as a range and can be revised once the requirements of the HRB/ARB submittals are clarified.

Exhibit A-2
Additional Services Agreement for Bid Services

January 26, 2011
To: Bern Beecham
   Chair, Building Committee, Palo Alto Art Center Foundation

6. Redesign to reduce cost (value engineering).
7. Redesign services requested to accommodate particular construction materials, methods or sequences.
8. Services in connection with any public hearing, arbitration or legal proceedings with respect to the project including assisting in preparation for litigation or as a witness or consultant.
9. Services connected with the preparation of documents for alternate bids or for phased or fast-track design and/or construction.
10. Services involving telephone, data, fire alarm and security system and equipment design beyond scope depicted in the bid documents.
11. Services involving owner supplied furniture, fixtures and/or equipment.
12. Hazardous material abatement coordination.
13. Issues arising from inadequate existing services.
14. Work if design and documentation of the project is phased or divided into documentation packages.
15. Services provided between project phases.
16. Site visit/meetings exceeding allowance allocated above.
17. Preparation and circulation of construction meeting notes.
18. Providing services relative to future facilities, systems, and equipment.
19. Providing services to investigate existing conditions.
20. Providing services in connection with the work of a construction manager or separate consultants retained by the Owner.

Revisions and Additions
The fee is based upon the time estimated to complete the services specified in this Proposal during normal working hours. Any revisions or additions to the services described in this Proposal shall be negotiated between the City of Palo Alto and Mark Cavagnero Associates as an additional contract service order, prior to their execution. Additional services shall include, but shall not be limited to, changes in the extent of work, changes in the complexity of any elements of the project, and any changes made after approval has been given in writing for a specific stage of design, documentation, or preparation of work. The Architect shall not commence additional services without prior modification of this contract service order by the City of Palo Alto.

Reimbursable Expenses
Reimbursable expenses are in addition to Compensation for Architectural and Consultant Services and include actual expenditures made by the architect in the interest of the project for the following expenses: travel, reproductions, long distance telephone, fax and special delivery service. Compensation for Reimbursable Expenses shall be a multiple of one and one-tenth (1.1) times the actual amount expended by the architect.

Assumptions and Exclusions
This proposal does not include Consultant work beyond the Bid and Construction Administration scope set out above. In addition, this proposal does not include professional renderings and professional models.

If you have any questions or require additional detail, please do not hesitate to contact us.