

## Sample Cost Recovery Agreement

### **ADVANCE FUNDING AGREEMENT BETWEEN [PROPOSER] AND THE TRANSPORTATION AGENCY FOR MONTEREY COUNTY FOR NEGOTIATION AND REVIEW SERVICES FOR THE [PROPOSAL]**

**THIS ADVANCE FUNDING AGREEMENT** (this "Agreement") is entered into as of \_\_\_\_\_, 20\_\_ (the "Execution Date") by and between the Transportation Agency for Monterey County ("TAMC") and \_\_\_\_\_, a \_\_\_\_\_ company ("Proposer"), with regard to Proposer's unsolicited proposal generally to \_\_\_\_\_ dated \_\_\_\_\_, 20\_\_ (the "Proposal"). The Proposer and TAMC may each be referred to herein as a "Party" or collectively as the "Parties".

#### **RECITALS**

WHEREAS, the Proposer has submitted a proposal to do the following: \_\_\_\_\_ (hereinafter, the "Proposal"); and

WHEREAS, TAMC has indicated a desire to further explore and/or negotiate an agreement regarding the Proposal, even though the Proposal is not within the currently adopted budget or overall work program; and

WHEREAS, the intent of this Agreement is to provide funding to TAMC for certain reasonable and necessary costs of TAMC staff and consultants in providing services for the timely review, processing, and administration during the negotiating of the Proposal; and

WHEREAS, a fundamental premise of this Agreement is that nothing is to be construed as a representation, promise, or commitment on the part of TAMC to give special treatment to, or exercise its discretion favorably with regard to the Proposal, in exchange for Proposer's obligation to advance costs incurred during the negotiation process;

**NOW, THEREFORE, IN CONSIDERATION OF THE MUTUAL PROMISES CONTAINED IN THIS AGREEMENT, TAMC AND PROPOSER AGREE AS FOLLOWS:**

1. **Funding Obligation**

1.01. Proposer agrees to advance funds to TAMC in the time and manner, and subject to the conditions, set forth in this Agreement, for Administrative Costs (as described below) incurred on and after \_\_\_\_\_, 20\_\_, and reasonably related to carrying out the responsibilities of the negotiation process.

Administrative Costs include but are not limited to all costs reasonably incurred by TAMC (including costs of consultants pertaining thereto, pursuant to Section 1.02) in undertaking Negotiation Services ("Services"), which include but are not limited to:

- i. Project coordination with the Proposer and their consultants, and other relevant parties;

- ii. Internal coordination between and among TAMC and its consultants engaged to provide staff support services facilitating the negotiation process;
- iii. Coordination with other interested agencies/departments including local, state and federal governmental entities and special districts; and
- iv. Review and evaluation of project plans, reports and financial documents as submitted by the Proposer as part of the negotiation process. Preparation of memos, agendas, staff reports and other materials as necessary for public meetings, including, but not limited to: the TAMC Executive Committee, TAMC Board of Directors.

1.02 TAMC shall provide Proposer a copy of any proposed consultant agreement prior to entry, for review and comment.

## 2. Payment of Funds

Upon approval of this Agreement and execution hereof by the authorized representatives of the Parties, the Proposer will deposit \_\_\_\_\_ Dollars (\$\_\_\_\_\_) into a special fund to be established and maintained by TAMC, and to be known as the “\_\_\_\_\_ Negotiation Services Fund.” TAMC is authorized to disburse amounts from said fund, from time to time, to pay for incidental costs and expenses incurred by TAMC and their consultants in connection with the Services for the Proposal. In the event that the balance in said fund is drawn down to an amount of less than \$\_\_\_\_\_, TAMC may notify the Proposer of such fact, and the Proposer shall provide TAMC with an additional deposit of \$\_\_\_\_\_ to assure the continued availability of funds for the payment of such Services. Provided, however, that once the initial deposit of \$\_\_\_\_\_ has been expended, any further expenditures under this Agreement shall be borne equally between Proposer and TAMC, such that TAMC shall be responsible for payment of one-half of any costs incurred under this Agreement beyond the initial deposit, up to the amount of \$\_\_\_\_\_. In consideration of the agreements expressed herein on the potential sharing of costs, TAMC may retain any unexpended funds from the initial deposit. In the event that additional deposits are necessary beyond the initial deposit, any unexpended amounts of such additional deposits shall be returned to Proposer, consistent with Section 7 (Termination).

## 3. Review of Costs

3.01. TAMC recognizes that Proposer has an interest in ensuring that costs incurred by TAMC pursuant to this Agreement are reasonable. Accordingly, TAMC shall monitor the incurring of Negotiation Services costs, including the work of consultants, with the objective of avoiding unnecessary or duplicative costs of staff or consultants, and providing for cost effective performance under consultant contracts. Further, the Parties shall conduct their respective negotiations in a manner that does not place undue burdens on any other Party, which might otherwise require the use of outside consultants due to time constraints or workload burdens.

- 3.02. At the request of any Party to this Agreement, and in any event not less than quarterly during a Fiscal Year, TAMC, in consultation with the Proposer, shall review the costs incurred and anticipated costs to be incurred within such Fiscal Year.
- 3.03. Proposer recognizes that ability to carry out the activities referenced in Section 1 on the part of TAMC is contingent on timely provision of funds as provided for in this Agreement.
- 3.04. The Parties agree that the costs to be reimbursed by Proposer pursuant to this Agreement shall not exceed \_\_\_\_\_ Dollars (\$\_\_\_\_\_) without amendment of this Agreement (hereinafter, the "Cost Cap"). Provided however, that Proposer expressly acknowledges that TAMC has no obligation to continue to negotiate modifications in the event that the Cost Cap is reached without the prior approval of an amendment to this Agreement.

#### 4. Procedures

- 4.01. Submission and Payment of TAMC Invoices. Within forty-five (45) days of the end of each calendar quarter in a Fiscal Year ("Quarterly Billing Period") TAMC shall prepare and provide the Proposer with a notice of the amount billed ("Billing Notice") for such Quarterly Billing Period which sets forth the expenses of TAMC for reimbursable costs (including costs of consultants) incurred in such Quarterly Billing Period. The Billing Notice shall set forth the amounts claimed and paid from the deposit set forth in Section 2.01, together with such supporting documentation as the Proposer may reasonably request. The Billing Notice shall include staff expenses and the costs of consultants, the costs of which may be billed separately (without limiting TAMC's ability to redact billings as appropriate pursuant to the attorney client and attorney work product privileges). TAMC shall submit the Billing Notice to the Proposer by the forty-fifth (45th) day following the end of each Quarterly Billing Period. Proposer shall review the Billing Notice and identify any disputed amounts, pursuant to Section 4.02
- 4.02. Payment Dispute. If Proposer takes exception to any amount identified in a Billing Notice under this Agreement, Proposer shall, within twenty (20) days after Proposer has received the Billing Notice in dispute, deliver to TAMC a written notice of protest explaining the basis for the dispute. The Parties shall promptly meet to review the dispute and resolve it on a mutually acceptable basis. No court action may be taken on such dispute until the Parties have met and attempted in good faith to resolve the dispute for not less than 30 days. Upon the resolution of the dispute, the amount, if any, which was determined to be erroneously charged against the deposit shall be replaced by the TAMC, as appropriate. If the amount(s) disputed by Proposer are unresolved for longer than 30 days, and if the disputed amount is found to be proper, Proposer shall pay interest on the disputed amount at the lesser rate of 5% per annum or the maximum rate permitted by law, from the date of Proposer's notice of disputed amount to the date of resolution, to TAMC. The existence of a dispute over any portion of a Billing Notice does not relieve Proposer of its obligation to increase deposits, as set forth in Section 2.01.

5. No Promise or Representation

Proposer and TAMC agree that nothing in this Agreement is to be construed as a representation, promise, or commitment on the part of TAMC to give special treatment to, or exercise its discretion favorably for, the Proposal or Proposer.

6. Term

This Agreement shall be effective from the Effective Date of this Agreement through \_\_\_\_\_, 20\_\_\_, unless extended by mutual consent of the Parties.

7. Termination

Either Party may terminate this Agreement before the expiration of the Term by providing not less than five (5) business days' notice, in order to minimize the incurring of additional costs. In the event of termination under this Section 7, TAMC shall be entitled to charge all costs incurred up to the effective date of termination, subject to Section 4.02, and Proposer shall not request refund of any funds remaining in the deposit for a period of 90 days, so as to allow the invoicing and payment of all outstanding charges due under this Agreement, as well as pay for any work performed by outside consultants through the effective date of termination. In the event of termination by Proposer, TAMC is released of any obligations created by this Agreement.

8. Indemnification

The Proposer shall defend, indemnify, and hold harmless TAMC from and against any and all claims, liabilities, or losses in any action brought by any third party challenging the validity of this Agreement or the authority of TAMC to enter into this Agreement. This indemnification shall survive termination of this Agreement.

9. Assignment

The Proposer shall not assign, sell, mortgage, hypothecate or otherwise transfer its obligations under this Agreement except as part of a financial transaction or transfer to a transferee or assignee as permitted under or as otherwise approved in writing by TAMC. This Agreement and the rights, privileges, duties, and obligations of the Parties hereunder shall be binding upon and inure to the benefit of the parties hereto and their respective, successors and permitted assigns.

10. Amendment

This Agreement may be amended or modified only by an instrument in writing signed by all the Parties hereto.

11. Waiver

With the exception of the time to dispute any Billing Notice, as set forth in Section 4.02, the failure of a Party hereto at any time or times to require performance of any provision hereof shall in no manner affect its right at a later time to enforce the same. No waiver by a Party of any condition or of any breach of any term contained in this Agreement shall be effective unless in writing and signed by the Parties hereto, and no waiver in any one or more instances shall be deemed to be a further or continuing waiver of any

such condition or breach in any other instance or a waiver of any other condition or breach of any other term.

12. Governing Law

This Agreement shall be construed, interpreted and governed by the laws of the State of California, without regard to conflicts of law principles.

13. Negotiated Agreement

The Parties acknowledge that each Party has reviewed and revised this Agreement and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting Party shall not be employed in the interpretation of the Agreement.

14. Relationship of Parties

This Agreement establishes only a funding and reimbursement arrangement between the Parties, and nothing in this Agreement establishes a partnership or joint venture among the Parties.

15. Notices

Notice to the Parties in connection with this Advanced Funding Agreement shall be given personally, by email or by first class, certified, or registered mail, or by an express mail delivery service addressed as follows (except as any Party may otherwise direct in writing to the other Parties):

TO TAMC:

Debra L. Hale, Executive Director  
Transportation Agency for Monterey County  
55-B Plaza Circle  
Salinas, CA 93901  
[debbie@tamcmonterey.org](mailto:debbie@tamcmonterey.org)

TO PROPOSER:

Notice shall be deemed effective at the time of personal delivery, five days after the notice is deposited in the United States registered or certified mail, properly addressed, with postage prepaid, or on the day of delivery if notice is sent by express mail delivery service.

16. Entire Agreement

This Agreement constitutes the entire agreement between Proposer and TAMC respecting the advancement and reimbursement of funds for Negotiation Services and shall supersede all prior negotiations, representations or agreements, either written or oral, among the Parties with respect to this issue. TAMC and Proposer each represent that neither has relied on any promise, inducement, representation, or other statement made in connection with this Agreement that is not expressly contained herein.

IN WITNESS WHEREOF, TAMC and Proposer have executed this advance funding Agreement as of the day and year written below.

TAMC

[PROPOSER]

By: \_\_\_\_\_  
Debra L. Hale  
Executive Director

By: \_\_\_\_\_  
Name:  
Title:

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Name:  
Title:

Dated: \_\_\_\_\_

INSTRUCTIONS: If Consultant is a corporation (including limited liability and nonprofit corporations), the full legal name of the corporation shall be set forth together with the signatures of two specified officers. If Consultant is a partnership, the name of the partnership shall be set forth together with the signature of a partner with authority to execute this Agreement on behalf of the partnership. If Consultant is contracting in an individual capacity, the individual shall set forth the name of his or her business, if any, and shall personally sign the Agreement.

\*\*\*\*\*

Approved as to form:

\_\_\_\_\_  
TAMC Counsel

Dated: \_\_\_\_\_

