

**COST-SHARING AND REIMBURSEMENT AGREEMENT BETWEEN
THE EAST BAY COMMUNITY ENERGY AUTHORITY,
CITY OF SAN JOSÉ, ADMINISTRATOR OF SAN JOSÉ CLEAN ENERGY,
FOR PROFESSIONAL CONSULTANT SERVICES**

This COST-SHARING AND REIMBURSEMENT AGREEMENT (“Agreement”) is made and entered into on May 21, 2022, by and between the East Bay Community Energy Authority (“EBCE”), City of San José, Administrator of San José Clean Energy (“SJCE”), for the cost-sharing and reimbursement of costs in connection with (1) performance of professional services for joint development, review, and negotiation of long-term (>10 year) renewable energy contracts to fulfill each organization’s energy goals; and (2) additional professional services as may be desired in the future. In this Agreement, EBCE and SJCE are referred to individually as “Party” and collectively as “the Parties.”

RECITALS

- A. EBCE is a joint powers authority, and SJCE is program administered by the Community Energy Department of the City of San José.
- B. Staff at EBCE and SJCE have worked and will work together to develop scopes of work for consultant and legal services to be obtained from Request for Proposal (“RFP”).
- C. Consultant services be will obtained pursuant to written professional services contracts (“Contract” or “Contracts”). The initial scope of work requires the selected consultants to assist the Parties to evaluate offers for long-term (ten years or longer) renewable and/or storage agreements, and support post-RFO negotiations (together, “Services”).
- D. Staff at EBCE, and SJCE may work together to develop scopes of work for additional professional services (“Additional Services”) and desire to establish a master agreement for this purpose.
- E. EBCE and SJCE have agreed to share the costs of the consultants who are selected and whose Services/Additional Services will benefit the Parties as provided in this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, EBCE and SJCE mutually agree to the following:

- 1. Recitals. The Recitals stated above are true and correct and are incorporated by this reference into this Agreement.
- 2. Addenda and Contracts. Each set of Services and Additional Services secured pursuant to this Agreement shall be described in a scope of work set forth in an addendum to this Agreement (“Addendum” or, pluralized, “Addenda”). Each Addendum must identify, and be signed by, each of the Parties and describe the cost-sharing arrangement among the Parties. The Services or Additional Services called for in an Addendum shall be obtained

pursuant to a written professional services contract (“Contract”) between the Responsible Party (defined below) and the selected consultant. Each Contract must include the relevant scope of work, a termination-without-cause provision, and a not-to-exceed dollar amount. With regard to any Contract for which SJCE is the Responsible Party, SJCE, at its sole discretion, will negotiate the inclusion of the following: (1) a provision indicating that obligations under the Contract are special limited obligations of SJCE payable solely from the Designated Fund (defined as the San Jose Energy Operating Fund established pursuant to City of San Jose Municipal Code, Title 4, Part 63, Section 4.80.4050 *et seq.*) (“Designated Fund”), and (2) if the term of a Contract is more than one year, a provision indicating that the term of the agreement is subject to appropriation of funds by the City Council of the City of San José, in its sole discretion. Any Addendum or Contract may be amended as mutually agreed by the Parties, including pursuant to Section 5(c)(i) below.

3. Responsible Party and Non-Responsible Parties. The Party administering the RFP or Procurement Procedures for any Contract will be the “Responsible Party,” and the other Party for that Contract will be the “Non-Responsible Party.” The “Responsible Party” for each Contract will be determined by unanimous consent of the Parties. This determination will be stated in the Addendum for that Contract.

4. Responsibilities of the Parties.

a. The Responsible Party for a Contract will do all of the following:

- i. Prepare the scope of work for the Services and/or Additional Services to be secured pursuant to the Contract. The Parties will mutually agree on the scope of work to be secured pursuant to the Contract. Jointly select with the Non-Responsible Party the consultant to provide the Services and/or Additional Services.
- ii. Unless, a Contract is already in place, enter into a Contract with the jointly selected consultant upon the completion of an RFP or Procurement Process for the Contract. If a new Contract is required, the Parties will mutually agree to terms of the Contract.
- iii. Make timely payments to the selected consultant under the terms of the Contract and administer and manage the Contract.
- iv. Send timely invoices to the Non-Responsible Party listing the payments made to the selected consultant pursuant to the Contract.
- v. Directly supervise the professional services provided by the selected consultant.

b. The Non-Responsible Party for a Contract will do all of the following:

- i. If relevant, assist the Responsible Party in reviewing and evaluating the proposals received by the Responsible Party in response to the RFP or Procurement Process.
- ii. Jointly select with the Responsible Party the consultant to perform the Services and/or Additional Services.
- iii. Mutually agree, with the Responsible Party, to the scope of work.
- iv. If relevant, mutually agree, with the Responsible Party, to the terms of the Contract.
- v. Reimburse, on the basis set forth in the relevant Addendum, the Responsible Party for the payments made by the Responsible Party to the selected consultant pursuant to the Contract. The Non-Responsible Party must pay its share within 30 days of receiving each invoice from the Responsible Party.
- vi. Work cooperatively with the Responsible Party in the Responsible Party's (1) administration and management of the Contract and (2) supervision of the professional services provided by the consultant.

5. Term and Termination.

- a. *Term.* The term of this Agreement will commence on the date first written above and, absent earlier termination pursuant to the provisions below, terminate on December 31, 2025. With regard to SJCE only, the funding in any year may be contingent on future appropriation by the City Council of the City of San José, in its sole discretion. If the funding required to pay for any services for the next fiscal year has not been appropriated by June 30 of any year, this Agreement will automatically terminate for SJCE, effective June 30.
- b. *Termination with or without cause.* Any Party may choose to terminate this Agreement in its entirety, or solely with respect to a particular Addendum, with or without cause upon 30 days' written notice. If the termination is for cause (i.e., default by another Party ("Defaulting Party") of a material term of this Agreement), the terminating Party will give the Defaulting Party a reasonable period of time to cure the default, which in no case shall be less than 15 days.
- c. *Effect of termination/payments owed.* Termination of this Agreement in its entirety, or of this Agreement with respect to a particular Addendum, obligates the terminating Party or Parties to make any outstanding payments owed to the Responsible Party or Non-Responsible Party as follows:
 - i. In the event a Party gives notice of termination of this Agreement with respect to a particular Addendum, the remaining Party listed in that Addendum will promptly decide whether to (1) terminate the Addendum

and corresponding Contract; (2) amend the Addendum and Contract to reduce the scope of work and the cost; or (3) continue with the Addendum and Contract as originally drafted and scoped, but reallocating the terminating Party's remaining cost responsibility to the remaining Party. The remaining Party will make reasonable efforts to terminate or amend the Addendum and corresponding Contract to reduce the scope of work and/or cost; provided, however, that if it is unable to do so, the terminating Party will remain obligated to pay its shared cost obligation pursuant to the original Addendum; and provided further that, with regard to SJCE only, obligations under this Agreement are special limited obligations of SJCE payable solely from the Designated Fund, and shall not be a charge upon the revenues or general fund of the City of San José or upon any non-SJCE moneys or other property of the City of San José or its Community Energy Department.

- ii. In addition to (i) above, in the event a Non-Responsible Party terminates this Agreement with respect to a particular Addendum, such Non-Responsible Party will reimburse the Responsible Party for the Non-Responsible Party's share of any unpaid consultant fees, incurred prior to the effective date of termination, that the Responsible Party is obligated to pay under the Addendum. The Non-Responsible Party will make such reimbursement within 30 days of the effective date of the termination.
- iii. Sections 5(c)(i) and (ii) apply to the termination of this Agreement with respect to a single Addendum or multiple Addenda.
- iv. If a termination is for cause, any amounts owed under this Section 5(c) and in dispute will be subject to an informal meet and confer between the Parties, to be conducted no later than within 15 days of the effective date of the notice of termination. In the event such informal meet and confer does not successfully resolve the dispute, the Parties may pursue any remedies available to them under law.

6. Hold Harmless and Indemnification. The indemnification obligations of the Parties shall be as follows:

- a. EBCE shall defend, hold harmless and indemnify SJCE and its directors, officers, agents and employees from any and all claims for injuries or damage to persons and/or property which arise out of the terms and conditions of this Agreement and which result from the negligent acts or omissions or other wrongful conduct of EBCE, its directors, officers, agents and/or employees.
- b. SJCE shall defend, save harmless, and indemnify EBCE and its directors, officers, agents, and employees, from any and all claims for injuries or damage to persons and/or property which arise out of the terms and conditions of this Agreement and which result from the negligent acts or omissions or other wrongful conduct of

SJCE, its directors, officers, agents and/or employees.

- c. In the event of concurrent negligence of EBCE and SJCE, or of their directors, officers, agents, or employees, then the liability for any and all claims for injuries or damage to persons and/or property which arise out of terms and conditions of this Agreement shall be apportioned according to the California theory of comparative negligence.
 - d. Unless the Parties to a Contract provide otherwise in the Addendum for that Contract, the duty of any Party to defend, save harmless, and indemnify shall extend only to, and in no circumstance exceed, the share of funds owed by that Party for the specific Contract(s) out of which such duty arises. With regard to SJCE only, such duty to defend, save harmless, and indemnify extends only to, and in no circumstance will exceed, the Designated Fund for SJCE.
 - e. These provisions shall survive expiration or termination of this Agreement.
7. Amendment and Waiver. Except for any Addenda added pursuant to Section 2, no change or modification of this Agreement shall be valid unless the same is in writing and signed by all Parties, and no verbal understanding or agreement not incorporated herein shall be binding on any Party hereto.
 8. Governing Law. This Agreement shall be construed and governed by the laws of the State of California, and any suit or action initiated by any Party shall be brought in the Superior Court for the County of Santa Clara, California, or the United States District Court for the Northern District of California.
 9. Time of Essence. Time is of the essence for every provision hereof in which time is a factor.
 10. Benefit of Parties. The terms of this Agreement shall be binding and inure to the benefit of the Parties hereto and their successors and assigns. No Party shall assign this Agreement or any portion thereof to a third party without the prior written consent of all of the other Parties. Any such assignment without prior written consent by one Party shall give any or all of the other Parties the right to automatically and immediately terminate this Agreement without penalty or advance notice. Such termination shall be effective only as to the terminating Party or Parties.
 11. Entire Agreement of the Parties. Except for any Addenda added pursuant to Section 2, this Agreement supersedes any and all agreements, either oral or written, between the Parties with respect to the subject matter of this Agreement and contains all of the representations, covenants, and agreements between the Parties with respect to the subject matter of this Agreement.
 12. Independent Counsel. Each Party has had the opportunity to consult with its own attorney with respect to this Agreement, and in the event that any language contained herein is construed to be vague or ambiguous, this Agreement shall not be strictly construed against any Party.

13. Notice. Notice given under or regarding this Agreement shall be deemed given upon delivery into the United States Mail if delivery is by postage paid certified mail (return receipt requested), or reputable overnight commercial delivery service. Notice shall be sent to the respective Party at the address indicated below or to any other address as a Party may designate from time to time by a notice given in accordance with this paragraph.

If to EBCE: Nick Chaset, CEO
East Bay Community Energy
1999 Harrison Street, Suite 800
Oakland, CA 94612
nchaset@ebce.org

If to SJCE: Lori Mitchell, Director
cc: Luisa Elkins, Senior Deputy City Attorney
San Jose Clean Energy
88 South 4th Street, Suite 130
San José, CA 95112
Lori.Mitchell@sanjoseca.gov
Luisa.Elkins@sanjoseca.gov

14. Invalid Provision. The invalidity or unenforceability of any particular provision of this Agreement shall not affect the other provisions hereof, and this Agreement shall be construed in all respects as if such invalid or unenforceable provision were omitted.
15. Headings and Captions. The headings and captions used in this Agreement are for convenience only and shall in no way define, limit, or describe the scope or intent of the Agreement or any part thereof.
16. Counterparts. This Agreement may be executed in counterpart originals, each of which is deemed to be an original for all purposes.

IN WITNESS WHEREOF, the Parties have executed this Agreement below on the date first written above.

East Bay Community Energy

DocuSigned by:
By: Marie Fontenot
205FAF1AF9DE4A7...
Name: Marie Fontenot
Title: Sr. Director of Power Resources

City of San José, Administrator of San José Clean Energy

By: Sarah Zarate
*Email: sarah.zarate@sanjoseca.gov
Name: Sarah Zarate
Title: Director, City Manager's Office

Approved as to form:

By: Luisa Elkins
Name: Luisa Elkins
Title: Senior Deputy City Attorney

City of San José Contract/Agreement Transmittal Form

Route Order

Attached / Completed

Electronically Signed

- TO: City Attorney
 City Manager
 City Clerk **OR** Return to
 Dept. (circle one)

- Insurance Certificates / Waivers Electronically Signed: Yes
Business Tax Certificate Audit Trail Attached (if applicable)
 Contacted Clerk re: Form 700 Scanned Signature Authorization
 Supplemental Memorandums (if applicable): Select One

Type of Document: New Contract

Type of Contract: Other

REQUIRED INFORMATION FOR ALL CONTRACTS:

Existing GILES # 667639-000

Contractor: East Bay Community Energy Authority

Address: 1999 Harrison Street, Suite 800, Oakland, CA 94612

Phone: _____

Email: nchaset@ebce.org

Contract Description: Cost Share and Reimbursement Agreement between East Bay Community Energy Authority and San Jose Clean Energy for the cost-sharing and reimbursement of costs in connection with long-term renewable energy contracts.

Term Start Date: Upon Execution Term End Date: December 31, 2025 Extension: Select one

Method of Procurement: N/A RFB, RFP or RFQ No.: _____ Date Conducted: _____

Agenda Date (if applicable): _____ Agenda Item No.: _____

Resolution No.: _____ Ordinance No.: _____

Original Contract Amount: _____ Amount of Increase/Decrease: _____

Option #: of Option Amount: _____ NTE/Updated Contract Amount: _____

Fund/Appropriation: 501/0782

Form 700 Required (Selection mandatory for processing): N/A Revenue Agreement: No

Tax Certificate No.: _____ Expiration Date: _____

Department: Community Energy

Department Contact: Angela Sato-Anderson x44869 Customer (Finance Only): _____

Notes:

Department Director Signature: Lori Mitchell /s/ _____ Date

Office of the City Manager Signature: _____ Date