Staff Report Item 11

TO: East Bay Community Energy Board of Directors  
FROM: Nick Chaset, Chief Executive Officer  
SUBJECT: Joint CCA Cost-Sharing and Reimbursement Agreement and ACES (Action Item)  
DATE: May 15, 2019

________________________________________________________________________

Recommendation

Approve a resolution authorizing the CEO to execute an agreement between EBCE and four CCA programs (Peninsula Clean Energy, Silicon Valley Clean Energy, City of San Jose Clean Energy, and Monterey Bay Community Power, collectively the “Joint CCAs”) to share costs of certain consultant services.

Background

The Joint CCAs negotiated a cost sharing agreement that would allow the parties to share the costs of certain consultant agreements for services benefiting all of the parties. The cost sharing agreement does not itself commit the EBCE to any particular contract or expenditure, but provides a structure for future cost sharing and reimbursement. Joint CCA cost-sharing will be pursued where the Joint CCAs can benefit from the economies of scale of shared procurement and contracting.

The Joint CCAs are already negotiating the first consultant agreement that would be shared under this agreement. That contract will be for Resource Adequacy (RA) compliance services with ACES. The Joint CCAs are subject to the same CPUC requirements with regard to RA and procuring this service jointly will benefit each of the parties. will allow the Joint CCAs to share costs of future contracts as well.

The cost sharing agreement was negotiated and reviewed by all of the Joint CCAs’ respective legal counsel and requires the approval of each of the CCA’s boards. Any subsequent cost-sharing agreements exceeding the CEO’s signing authority will require the approval of the Board.

Conclusion

The Joint CCA Cost Sharing and Reimbursement Agreement will allow the Joint CCAs to jointly procure services and to obtain services at greater economies of scale and a potentially lower cost.
Attachments:
  A. Resolution Authorizing the CEO to execute an agreement between EBCE and four CCA programs; and
  B. Agreement between EBCE and four CCA programs
A RESOLUTION OF THE BOARD OF DIRECTORS OF THE EAST BAY COMMUNITY ENERGY AUTHORITY APPROVING A COST SHARING AND REIMBURSEMENT AGREEMENT WITH PENINSULA CLEAN ENERGY AUTHORITY, CITY OF SAN JOSE CLEAN ENERGY, SILICON VALLEY CLEAN ENERGY AUTHORITY, AND MONTEREY BAY COMMUNITY POWER AUTHORITY

WHEREAS, the East Bay Community Energy Authority ("EBCE") was formed pursuant to a Joint Powers Agreement to study, promote, develop, conduct, operate, and manage energy programs in Alameda County as a community choice aggregation agency ("CCA"); and

WHEREAS, Peninsula Clean Energy Authority, Silicon Valley Clean Energy Authority, City of San Jose Clean Energy, and Monterey Bay Community Power Authority also operate CCA programs in their respective jurisdictions; and

WHEREAS, the EBCE wishes to enter into an agreement with these CCA programs to jointly procure and contract for consulting services in order to obtain services at greater economies of scale and a potentially lower cost for EBCE; and

WHEREAS, the Joint CCA Cost Sharing and Reimbursement Agreement provides a framework for cost-sharing between the CCAs in the future.

NOW, THEREFORE, THE BOARD OF DIRECTORS OF THE EAST BAY COMMUNITY ENERGY AUTHORITY, DOES HEREBY RESOLVE AS FOLLOWS:

SECTION 1. The material terms of the Cost-Sharing and Reimbursement Agreement, attached and incorporated herein, are hereby approved.

SECTION 2. The CEO is hereby authorized to execute the Agreement in substantially the form attached, with any non-substantive clarifying or clerical changes proposed by the CEO and approved by General Counsel.

ADOPTED AND APPROVED this 15 day of May, 2019.

Scott Haggerty, Chair

ATTEST:

Stephanie Cabrera, Clerk of the Board
COST-SHARING AND REIMBURSEMENT AGREEMENT BETWEEN

THE PENINSULA CLEAN ENERGY AUTHORITY,
THE SILICON VALLEY CLEAN ENERGY AUTHORITY,
CITY OF SAN JOSÉ, ADMINISTRATOR OF SAN JOSÉ CLEAN ENERGY,
THE EAST BAY COMMUNITY ENERGY AUTHORITY,
AND MONTEREY BAY COMMUNITY POWER AUTHORITY

FOR PROFESSIONAL CONSULTANT SERVICES

This COST-SHARING AND REIMBURSEMENT AGREEMENT (“Agreement”) is made and entered into on ______________, 2019, by and between the Peninsula Clean Energy Authority (“PCE”), the Silicon Valley Clean Energy Authority (“SVCE”), City of San José, Administrator of San José Clean Energy (“SJCE”), the East Bay Community Energy Authority (“EBCE”), and the Monterey Bay Community Power Authority (“MBCP”), for the cost-sharing and reimbursement of costs in connection with the performance of professional services for the (1) due diligence prior to the RFP process(es); (2) joint review and purchase of electric capacity for Resource Adequacy purposes; (3) development of regulatory compliance-related services for Resource Adequacy purposes; and (4) development of specifications for joint data-management services. In this Agreement, PCE, SVCE, SJCE, EBCE, and MBCP are referred to individually as “Party” and collectively as “the Parties.”

RECITALS

A. PCE, SVCE, EBCE, and MBCP are joint powers authorities, and SJCE is a department of the City of San José, organized for the purpose of conducting community choice aggregation programs and other energy-related climate change programs.

B. Staff at PCE, SVCE, SJCE, EBCE, and MBCP have worked and will work together to develop scopes of work for consultant services to be obtained from Request for Proposal (“RFP”) processes and pursuant to written professional services contracts (“Contract” or “Contracts”). The initial scopes of work will require the selected consultants to: (1) conduct due diligence prior to the RFP process(es); (2) jointly review options to purchase electric capacity for Resource Adequacy purposes; (3) provide regulatory compliance-related services for Resource Adequacy; and/or (4) develop specifications for joint data-management services.

C. Staff at PCE, SVCE, SJCE, EBCE, and MBCP may work together to develop scopes of work for additional consultant services (“Additional Services”) and desire to establish a master agreement for this purpose.

D. PCE, SVCE, SJCE, EBCE, and MBCP 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, PCE, SVCE, SJCE, EBCE, and MBCP 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 that will be participating in the cost-sharing arrangement for that scope of work (“Participating Parties”), as well as identify the Responsible Party (defined below) and describe the cost-sharing arrangement among the Participating 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 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 Participating Parties, including pursuant to Section 5(c)(i) below.

3. **Responsible Party and Non-Responsible Parties.** The Party administering the RFP process for any Contract will be the “Responsible Party,” and the remaining Participating Parties for that Contract will be the “Non-Responsible Parties.” The “Responsible Party” for each Contract will be determined by unanimous consent of the Participating Parties for that Contract. 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.
      ii. Issue and administer the RFP for the selected consultant.
      iii. Jointly select with the Non-Responsible Party/Parties the consultant to provide the Services and/or Additional Services described in the RFP.
      iv. Enter into a Contract with the jointly selected consultant upon the completion of the RFP process for the Contract. The Participating Parties will mutually agree to terms of the Contract; provided, however, that the Contract must contain the provisions enumerated in Section 2 above.
v. Make timely payments to the selected consultant under the terms of the Contract and administer and manage the Contract.

vi. Send timely invoices to the Non-Responsible Party/Parties listing the payments made to the selected consultant pursuant to the Contract.

vii. Directly supervise the professional services provided by the selected consultant.

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

i. Jointly assist the Responsible Party in reviewing and evaluating the proposals received by the Responsible Party in response to the RFP.

ii. Jointly select with the Responsible Party the consultant to perform the Services and/or Additional Services described in the RFP.

iii. Mutually agree, with the Responsible Party, to the terms of the Contract; provided, however, that the Contract must contain the provisions enumerated in Section 2 above.

iv. Reimburse, on an equal-share basis, the Responsible Party for the payments made by the Responsible Party to the selected consultant pursuant to the Contract. For example, if four Non-Responsible Parties choose to participate in a Contract (five Participating Parties total), each Non-Responsible Party will pay the Responsible Party twenty percent (20%) of the cost of the payments made by the Responsible Party. Each Non-Responsible Party must pay its share within 30 days of receiving each invoice from the Responsible Party.

v. 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, 2022. 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 for which the Party is a Participating Party, 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 Parties as follows:

i. In the event a Party gives notice of termination of this Agreement with respect to a particular Addendum, the remaining Participating Parties 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 among the remaining Participating Parties. The remaining Participating Parties 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 they are 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 Participating 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. PCE shall defend, hold harmless and indemnify SVCE, SJCE, EBCE, and MBCP, and their 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 PCE, its directors, officers, agents and/or employees.

   b. SVCE shall defend, save harmless, and indemnify PCE, SJCE, EBCE, and MBCP, and their 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 SVCE, its directors, officers, agents and/or employees.

   c. SJCE shall defend, save harmless, and indemnify PCE, SVCE, EBCE, and MBCP, and their 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.

   d. EBCE shall defend, save harmless, and indemnify PCE, SVCE, SJCE, and MBCP, and their 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.

   e. MBCP shall defend, save harmless, and indemnify PCE, SVCE, SJCE, and EBCE, and their 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 MBCP, its directors, officers, agents and/or employees.

   f. In the event of concurrent negligence of two or more of PCE, SVCE, SJCE, EBCE, and/or MBCP, 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.

   g. Unless the Participating 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.

h. 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 San Mateo, 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 PCE:  Jan Pepper, CEO
Peninsula Clean Energy
2075 Woodside Road
Redwood City, California 94061
jpepper@peninsulacleanenergy.com

If to SVCE: Girish Balachandran, CEO
Silicon Valley Clean Energy
333 W. El Camino Real, Suite 290
Sunnyvale, CA 94087
girish@svcleanenergy.org

If to SJCE: Lori Mitchell, Director
c: Luisa Elkins, Senior Deputy City Attorney
San Jose Clean Energy
200 E. Santa Clara St., 14th Floor
San José, CA 95113
Lori.Mitchell@sanjoseca.gov
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If to EBCE: Nick Chaset, CEO
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If to MBCP: Tom Habashi, CEO
Monterey Bay Community Power Authority
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Monterey, CA 93940
thabashi@mbcommunitypower.org

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.

Peninsula Clean Energy Authority

Date: ________________

By: ___________________________

Silicon Valley Clean Energy Authority

Date: ________________

By: ___________________________

City of San José, Administrator of San José Clean Energy

Date: ________________

By: ___________________________

East Bay Clean Energy Authority

Date: ________________

By: ___________________________

Monterey Bay Community Power Authority

Date: ________________

By: ___________________________