

PROFESSIONAL SERVICES AGREEMENT FOR UTILITY COST AUDIT

THIS AGREEMENT is made and entered into this 17 day of May, 2004 (“Effective Date”), by and between the CITY OF COSTA MESA, a municipal corporation (“City”), and Utility Cost Management, LLC “Consultant”.

WITNESSETH:

- A. WHEREAS, City proposes to have Consultant perform the services described herein below; and
- B. WHEREAS, Consultant represents that it has that degree of specialized expertise contemplated within California Government Code, Section 37103, and holds all necessary licenses to practice and perform the services herein contemplated; and
- C. WHEREAS, City and Consultant desire to contract for specific services in connection with the project described below (the “Project”) and desire to set forth their rights, duties and liabilities in connection with the services to be performed; and
- D. WHEREAS, no official or employee of City has a financial interest, within the provisions of California Government Code, Sections 1090-1092, in the subject matter of this Agreement.

NOW, THEREFORE, for and in consideration of the mutual covenants and conditions contained herein, the parties hereby agree as follows:

1.0. SERVICES PROVIDED BY CONSULTANT

1.1. Scope of Services. Consultant shall provide the professional services described in the Proposal (the “Proposal”) attached hereto as Exhibit “A” and incorporated herein by reference.

1.2. This Agreement applies to all garbage, gas and electricity accounts (and any related utility user taxes, other taxes, assessments, surcharges or fees) with respect to which City:

- (a) is receiving utility service as of the Effective Date (as defined below),
- (b) has received utility service within three years prior to the Effective Date,
- (c) receives utility service within one year after the Effective Date, or
- (d) has provided Consultant with a copy of the utility bill.

The garbage, gas and electric accounts described in this paragraph are hereinafter referred to as “Utility Accounts”

1.3. Professional Practices. All professional services to be provided by Consultant pursuant to this Agreement shall be provided by personnel experienced in their respective fields and in a manner consistent with the standards of care, diligence and skill ordinarily exercised by professional consultants in similar fields and circumstances in accordance with sound professional practices. Consultant also warrants that it is familiar with all laws that may affect its performance of this Agreement and shall advise City of any changes in any laws that may affect Consultant's performance of this Agreement.

1.4. Warranty. Consultant warrants that it shall perform the services required by this Agreement in compliance with all applicable Federal and California employment laws including, but not limited to, those laws related to minimum hours and wages; occupational health and safety; fair employment and employment practices; workers' compensation insurance and safety in employment; and all other Federal, State and local laws and ordinances applicable to the services required under this Agreement. Consultant shall indemnify and hold harmless City from and against all claims, demands, payments, suits, actions, proceedings, and judgments of every nature and description including attorneys' fees and costs, presented, brought, or recovered against City for, or on account of any liability under any of the above-mentioned laws, which may be incurred by reason of Consultant's performance under this Agreement.

1.5. Non-discrimination. In performing this Agreement, Consultant shall not engage in, nor permit its agents to engage in, discrimination in employment of persons because of their race, religion, color, national origin, ancestry, age, physical handicap, medical condition, marital status, sexual gender or sexual orientation, except as permitted pursuant to Section 12940 of the Government Code. Violation of this provision may result in the imposition of penalties referred to in Labor Code, Section 1735.

1.6. City to Provide Consultant With Utility Bills. On or promptly after City's execution of this Agreement, City will provide Consultant with a copy of at least one month's utility bills for all of City's Utility Accounts.

1.7. Steps to Obtain Refunds or Savings. Consultant is authorized by City to take steps to obtain the refunds, credits or Future Savings identified in the Findings Letter, as defined below. Such steps may include, but are not limited to, communicating, negotiating and dealing with utility providers (or, in the case of utility user taxes or other governmental charges, the appropriate government entity), and seeking relief from the California Public Utilities Commission in a complaint proceeding or other proceeding.

1.8. Consultant's Findings Letter. Consultant will use its best efforts to identify the basis for any refunds, credits or Future Savings (as defined below) on City's Utility Accounts. Consultant will send a "Findings Letter" to City that generally sets forth the basis for any refunds, credits or Future Savings identified by Consultant. Consultant may, from time to time, supplement or amend its Findings Letter, and such supplement or amendment will be deemed to have occurred on the date the original Findings Letter was sent to City.

1.9. Delegation and Assignment. This is a personal service contract, and the duties set forth herein shall not be delegated or assigned to any person or entity without the prior written consent of City. Consultant may engage a subcontractor(s) as permitted by law and may employ other personnel to perform services contemplated by this Agreement at Consultant's sole cost and expense.

1.10. Use of Attorneys for Obtain Refunds, Credits and Future Savings. City may elect to utilize legal professionals or other persons to obtain any refund, credit or Future Savings identified by Consultant in the Findings Letter. However, such an election shall be at City's sole expense, and City will remain obligated to pay Consultant pursuant to this Agreement (without reduction of any kind) for any refund, credit, or Future Savings that is obtained by such legal professionals or other persons.

2.0. COMPENSATION AND BILLING

2.1. Compensation. Consultant shall be paid in accordance with the terms set forth below.

- (a) If the City receives a refund or credit that was identified in the Consultant's Finding Letter, then the City will pay the Consultant 50% of the amount refunded or credited. The amount of the refund or credit for this purpose will include all amounts refunded or credited (including any portion attributable to interest) for any overcharges that were incurred by the City prior to the date that the overcharges no longer appeared on the City's utility bill. Under no circumstances will the Consultant be paid until after the City receives their refunds or savings.
- (b) If the City obtains Future Savings that were identified in the Consultant's Finding Letter, then the City will pay the Consultant 50% of such Future Savings that accrue during an 18 Month Savings Period. "Future Savings" is the amount by which City's charges on its utility accounts are reduced as a result of a change in the billing rate, calculation, method or procedure. Future Savings will be calculated as the difference between the amount the City was billed on its Utility Accounts during the 18 Months Savings Period, and the amount that it would have been billed on its Utility Accounts during the 18 Months Savings Period if there had been no change in its billing rate, calculation, method and procedure. The 18 Months Savings Period begins on the date that the change in the billing rate, calculation, method or procedure is first reflected on the City's utility bill, and ends 18 Months thereafter. Consultant will submit invoices periodically to the City for payment based on the Future Savings as they accrue. The invoices will verify (1) that Future Savings have actually been realized by the City, and (2) the amount of such Future Savings. The compensation under this subparagraph will not include compensation for Future Savings that are: (1) the result of a reduction in the amount of utility usage by the City, or (2) the result of the City's utilization of a different utility supplier that provides lower cost utility service.

- (c) The City is not obligated to pay Consultant for any refund, credit or Future Savings received by the City for which the City had submitted to the utility provider a written claim prior to the date of the Consultant's Finding Letter. However, the City is obligated to pay the Consultant whether or not the City knew of the basis for the refund, credit or Future Savings prior to the date of Consultant's Finding Letter, and whether or not the City's receipts of the refund, credit or Future Savings was the result of steps taken by the Consultant.

- (d) By providing a copy of any utility bill to Consultant, City is thereby agreeing that the Utility Account represented by such bill will be governed by this Agreement, regardless of whether or not City is the Utility Customer with respect to such Utility Account. For purposes of this Agreement, the Utility Customer is the entity that (i) is named on the Utility Account as reflected by the utility bill, (ii) receives the utility service on the Utility Account, (iii) pays for or is liable for the charges on the Utility Account, or (iv) is the owner of the property at which the utility service is provided on the Utility Account. If City is not the Utility Customer for a Utility Account then, with respect to that Utility Account, City represents that it is signing this Agreement in its capacity as agent for the Utility Customer, and as such is authorized to legally bind the Utility Customer to the terms of this Agreement. City further agrees that the terms of this Agreement will be equally binding on both City and Customer, that all references in this Agreement to "City" will also be deemed to be references to the Utility Customer, and that City and the Utility Customer will be jointly and severally liable for payment of Consultant's compensation under this Agreement.

2.2. Additional Services. Consultant shall not receive compensation for any services provided outside the scope of services specified in the Proposal unless the City or the Project Manager for this Project, prior to Consultant performing the additional services, approves such additional services in writing. It is specifically understood that oral requests and/or approvals of such additional services or additional compensation shall be barred and are unenforceable.

2.3. Method of Billing. Consultant may submit invoices to City's Project Manager for approval on a progress basis, but no more often than monthly. Said invoice shall be based on actual refund or credit, which were identified in Consultant's Finding Letter, received by the City. City shall pay Consultant's invoice within forty-five (45) days from the date City receives said invoice. Each invoice shall describe the manner in which the charge has been calculated consistent with this Agreement. Any additional services approved and performed pursuant to this Agreement shall be designated as "Additional Services" and shall identify the number of the authorized change order, where applicable, on all invoices.

2.4. Records and Audits. Records of Consultant's services relating to this Agreement shall be maintained in accordance with generally recognized accounting principles and shall be made available to City or its Project Manager for inspection and/or audit at mutually convenient times for a period of three (3) years from the Effective Date.

3.0. TIME OF PERFORMANCE

3.1. Commencement and Completion of Work. The professional services to be performed pursuant to this Agreement shall commence within five (5) days from the Effective Date of this Agreement. Said services shall be performed diligently and in good faith to ensure that they are completed as soon as reasonably possible. Failure to commence work in a timely manner and/or diligently pursue work to completion may be grounds for termination of this Agreement.

3.2. Excusable Delays. Neither party shall be responsible for delays or lack of performance resulting from acts beyond the reasonable control of the party or parties. Such acts shall include, but not be limited to, acts of God, fire, strikes, material shortages, compliance with laws or regulations, riots, acts of war, or any other conditions beyond the reasonable control of a party.

4.0. TERM AND TERMINATION

4.1. This Agreement will remain in effect seven (7) days after either party faxes a written notice of termination to the other party. Upon such termination, Consultant will cease all work on behalf of City. However, if termination occurs after Consultant has sent its Findings Letter to City, then City will remain obligated to pay Consultant, pursuant to this Agreement, for any refunds, credits or Future Savings that were identified in the Findings Letter and that are thereafter obtained by City. Consultant may continue to obtain and review City's utility billing and other information following termination in order to periodically verify whether City's has obtained a refund, credit or Future Savings that was identified in the Findings Letter.

5.0. INSURANCE

5.1. Minimum Scope and Limits of Insurance. Consultant shall obtain and maintain during the life of this Agreement all of the following insurance coverages:

- (a) Comprehensive general liability, including premises-operations, products/completed operations, broad form property damage, blanket contractual liability, independent contractors, personal injury with a policy limit of not less than One Million Dollars (\$1,000,000.00), combined single limits, per occurrence and aggregate.
- (b) Automobile liability for owned vehicles, hired, and non-owned vehicles, with a policy limit of not less than One Million Dollars (\$1,000,000.00), combined single limits, per occurrence and aggregate.
- (c) Workers' compensation insurance as required by the State of California.

5.2. Endorsements. The comprehensive general liability insurance policy shall contain or be endorsed to contain the following provisions:

- (a) Additional insureds: "The City of Costa Mesa and its elected and appointed boards, officers, agents, and employees are additional insureds with respect to this subject project and contract with City."
- (b) Notice: "Said policy shall not terminate, nor shall it be cancelled, nor the coverage reduced, until thirty (30) days after written notice is given to City."
- (c) Other insurance: "Any other insurance maintained by the City of Costa Mesa shall be excess and not contributing with the insurance provided by this policy."

5.3. Certificates of Insurance: Consultant shall provide to City certificates of insurance showing the insurance coverages and required endorsements described above, in a form and content approved by City, prior to performing any services under this Agreement.

5.4. Non-limiting: Nothing in this Section shall be construed as limiting in any way, the indemnification provision contained in this Agreement, or the extent to which Consultant may be held responsible for payments of damages to persons or property.

6.0. GENERAL PROVISIONS

6.1. Entire Agreement: This Agreement constitutes the entire Agreement between the parties with respect to any matter referenced herein and supersedes any and all other prior writings and oral negotiations. This Agreement may be modified only in writing, and signed by the parties in interest at the time of such modification. The terms of this Agreement shall prevail over any inconsistent provision in any other contract document appurtenant hereto, including exhibits to this Agreement.

6.2. City acknowledges and agrees that Consultant has made no express or implied representation or warranty that it will be successful in obtaining any refunds, credits, or Future Savings on City's Utility Accounts. City hereby waives, releases and forfeits any current or future claim against Consultant that is based upon or relates to any failure by Consultant to identify or obtain refunds, credits, or Future Savings to which City may be entitled, or that is based upon or relates to any services or advice provided by Consultant. In this regard, City expressly waives application of Civil Code §1542, which provides: "A general release does not extend to claims which a creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

6.3. Representatives. The City Manager or his designee shall be the representative of City for purposes of this Agreement and may issue all consents, approvals, directives and agreements on behalf of the City, called for by this Agreement, except as otherwise expressly provided in this Agreement.

Consultant hereby designates Paul Kerkorian as its representative for purposes of this Agreement, and such representative shall be authorized to issue all consents, approvals, directives and agreements on behalf of Consultant called for by this Agreement, except as otherwise expressly provided in this Agreement.

6.4. Project Managers. City shall designate a Project Manager to work directly with Consultant in the performance of this Agreement.

Consultant hereby designates Chris Wiehl as Project Manager, and such Project Manager shall represent it and be its agent in all consultations with City during the term of this Agreement. Consultant or its Project Manager shall attend and assist in all coordination meetings called by City.

6.5 Notices: Any notices, documents, correspondence or other communications concerning this Agreement or the work hereunder may be provided by personal delivery, facsimile or mail and shall be addressed as set forth below. Such communication shall be deemed served or delivered: a) at the time of delivery if such communication is sent by personal delivery; b) at the time of transmission if such communication is sent by facsimile; and c) 48 hours after deposit in the U.S. Mail as reflected by the official U.S. postmark if such communication is sent through regular United States mail.

IF TO CONSULTANT:

Utility Costs Management LLC
726 Barstow, Suite 108
Fresno, CA 93704

Attn: Mr. Chris Wiehl

IF TO CITY:

City of Costa Mesa
77 Fair Drive
Costa Mesa, CA 92626
Fax: (714) 754-5040

Attn: Mr. Marc Puckett

6.5. Drug-free Workplace Policy. Consultant shall provide a drug-free workplace by complying with all provisions set forth in City's Council Policy 100-5, attached hereto as Exhibit "B" and incorporated herein by reference. Consultant's failure to conform to the requirements set forth in Council Policy 100-5 shall constitute a material breach of this Agreement and shall be cause for immediate termination of this Agreement by City.

6.6. Attorneys' Fees: In the event that litigation is brought by any party in connection with this Agreement, the prevailing party shall be entitled to recover from the opposing party all costs and expenses, including reasonable attorneys' fees, incurred by the prevailing party in the exercise of any of its rights or remedies hereunder or the enforcement of any of the terms, conditions, or provisions hereof.

6.7. Governing Law: This Agreement shall be governed by and construed under the laws of the State of California without giving effect to that body of laws pertaining to conflict of laws. In the event of any legal action to enforce or interpret this Agreement, the parties hereto agree that the sole and exclusive venue shall be a court of competent jurisdiction located in Orange County, California.

6.8. Assignment: Consultant shall not voluntarily or by operation of law assign, transfer, sublet or encumber all or any part of Consultant's interest in this Agreement without City's prior written consent. Any attempted assignment, transfer, subletting or encumbrance shall be void and shall constitute a breach of this Agreement and cause for termination of this Agreement. Regardless of City's consent, no subletting or assignment shall release Consultant of Consultant's obligation to perform all other obligations to be performed by Consultant hereunder for the term of this Agreement.

6.9. Indemnification and Hold Harmless: Consultant shall protect, defend, indemnify and hold harmless City and its elected and appointed officials, officers, and employees from any and all claims, liabilities, expenses, including attorney fees, damage to property or injuries to or death of any person or persons or damages of any nature including, but not by way of limitation, all civil claims or workers' compensation claims arising out of or in any way connected with the intentional or negligent acts, error or omissions of Consultant, its employees, agents or subcontractors in the performance of this Agreement.

6.10. Independent Contractor: Consultant is and shall be acting at all times as an independent contractor and not as an employee of City. Consultant shall secure, at his expense, and be responsible for any and all payment of Income Tax, Social Security, State Disability Insurance Compensation, Unemployment Compensation, and other payroll deductions for Consultant and its officers, agents, and employees, and all business licenses, if any are required, in connection with the services to be performed hereunder.

6.11. Ownership of Documents: All findings, reports, documents, information and data including, but not limited to, computer tapes or discs, files and tapes furnished or prepared by Consultant or any of its subcontractors in the course of performance of this Agreement, shall be and remain the sole property of City. Consultant agrees that any such documents or information shall not be made available to any individual or organization without the prior consent of City, except as necessary to carry out the tasks contemplated by this Agreement. Any use of such documents for other projects not contemplated by this Agreement, and any use of incomplete documents, shall be at the sole risk of City and without liability or legal exposure to Consultant. City shall indemnify and hold harmless Consultant from all claims, damages, losses, and expenses, including attorneys' fees, arising out of or resulting from City's use of such documents for other projects not contemplated by this Agreement or use of incomplete documents furnished by Consultant. Consultant shall deliver to City any findings, reports, documents, information,

data, in any form, including but not limited to, computer tapes, discs, files audio tapes or any other Project related items as requested by City or its authorized representative, at no additional cost to the City.

6.12 Public Records Act Disclosure: Consultant has been advised and is aware that all reports, documents, information and data including, but not limited to, computer tapes, discs or files furnished or prepared by Consultant, or any of its subcontractors, and provided to City may be subject to public disclosure as required by the California Public Records Act (California Government Code Section 6250 et. seq.). Exceptions to public disclosure may be those documents or information that qualify as trade secrets, as that term is defined in the California Government Code Section 6254.7, and of which Consultant informs City of such trade secret. The City will endeavor to maintain as confidential all information obtained by it that is designated as a trade secret. The City shall not, in any way, be liable or responsible for the disclosure of any trade secret including, without limitation, those records so marked if disclosure is deemed to be required by law or by order of the Court.

6.13. Responsibility for Errors. Consultant shall be responsible for its work and results under this Agreement. Consultant, when requested, shall furnish clarification and/or explanation as may be required by the City's representative, regarding any services rendered under this Agreement at no additional cost to City. In the event that an error or omission attributable to Consultant occurs, then Consultant shall, at no cost to City, provide all necessary design drawings, estimates and other Consultant professional services necessary to rectify and correct the matter to the sole satisfaction of City and to participate in any meeting required with regard to the correction.

6.14. Prohibited Employment: Consultant will not employ any regular employee of City while this Agreement is in effect.

6.15. Order of Precedence: In the event of an inconsistency in this Agreement and any of the attached Exhibits, the terms set forth in this Agreement shall prevail. If, and to the extent this Agreement incorporates by reference any provision of the Proposal, such provision shall be deemed a part of this Agreement. Nevertheless, if there is any conflict among the terms and conditions of this Agreement and those of any such provision or provisions so incorporated by reference, this Agreement shall govern over the Proposal.

6.16. Costs: Each party shall bear its own costs and fees incurred in the preparation and negotiation of this Agreement and in the performance of its obligations hereunder except as expressly provided herein.

6.17. No Third Party Beneficiary Rights: This Agreement is entered into for the sole benefit of City and Consultant and no other parties are intended to be direct or incidental beneficiaries of this Agreement and no third party shall have any right in, under or to this Agreement.

6.18. Headings: Paragraphs and subparagraph headings contained in this Agreement are included solely for convenience and are not intended to modify, explain or to be a full or accurate description of the content thereof and shall not in any way affect the meaning or interpretation of this Agreement.

6.19. Construction: The parties have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises with respect to this Agreement, this Agreement shall be construed as if drafted jointly by the parties and in accordance with its fair meaning. There shall be no presumption or burden of proof favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement.

6.20. Amendments: Only a writing executed by the parties hereto or their respective successors and assigns may amend this Agreement.

6.21. Waiver: The delay or failure of either party at any time to require performance or compliance by the other of any of its obligations or agreements shall in no way be deemed a waiver of those rights to require such performance or compliance. No waiver of any provision of this Agreement shall be effective unless in writing and signed by a duly authorized representative of the party against whom enforcement of a waiver is sought. The waiver of any right or remedy in respect to any occurrence or event shall not be deemed a waiver of any right or remedy in respect to any other occurrence or event, nor shall any waiver constitute a continuing waiver.

6.22. Severability: If any provision of this Agreement is determined by a court of competent jurisdiction to be unenforceable in any circumstance, such determination shall not affect the validity or enforceability of the remaining terms and provisions hereof or of the offending provision in any other circumstance. Notwithstanding the foregoing, if the value of this Agreement, based upon the substantial benefit of the bargain for any party is materially impaired, which determination as made by the presiding court or arbitrator of competent jurisdiction shall be binding, then both parties agree to substitute such provision(s) through good faith negotiations.

6.23. Counterparts: This Agreement may be executed in one or more counterparts, each of which shall be deemed an original. All counterparts shall be construed together and shall constitute one agreement.

6.24. Corporate Authority: The persons executing this Agreement on behalf of the parties hereto warrant that they are duly authorized to execute this Agreement on behalf of said parties and that by doing so, the parties hereto are formally bound to the provisions of this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by and through their respective authorized officers, as of the date first above written.

CITY OF COSTA MESA,
A municipal corporation

CONSULTANT

Mayor of the City of Costa Mesa

Name and Title

Social Security or Taxpayer ID Number

ATTEST:

Deputy City Clerk and ex-officio Clerk
of the City of Costa Mesa

APPROVED AS TO FORM:

APPROVED AS TO CONTENT:

City Attorney

Project Manager