

# **ATTACHMENT C: CAC REGIONAL PROGRAM INTERGOVERNMENTAL AGREEMENT**

**DRAFT FOR REVIEW, December 18, 2019**

## **INTERGOVERNMENTAL AGREEMENT**

**Between**

**Multnomah County, Washington County, Metro, and Port of Portland**

**And**

**City of Portland Bureau of Revenue and Financial Services – Procurement Services**

**For**

**Development and Administration of the Regional Clean Air Construction Program**

This Intergovernmental Agreement (“Agreement”), dated this **XX** day of **XXXXX** 2020, is made and entered into by and between the City of Portland (the “City”), through City of Portland Bureau of Revenue and Financial Services – Procurement Services (“Procurement Services”) and Multnomah County, Washington County, Metro, and Port of Portland, collectively referred to as “the Parties.”

## **RECITALS**

1. In the Portland Metro area, the air is unhealthy to breathe because of the presence of ultra-fine particulate matter (PM) from older dirty diesel engines. In 2017 a group of staff representatives from the City of Portland, Multnomah County, Metro, Port of Portland, Washington County and Clackamas County (“Founding CAC Collaborative Group”) began collaborating on a regional Clean Air Construction Standard (“CAC Standard”) that requires the use of cleaner (as in reduced diesel PM emissions) nonroad equipment and on-road construction vehicles for public agency construction projects. To create certainty and consistency for contractors subject to the requirements, the Founding CAC Collaborative Group agreed that each agency would adopt the same CAC requirements and compliance timeline.
2. In addition, the Founding CAC Collaborative Group agreed a single regional Clean Air Construction Program (“CAC Regional Program”) that supports all participating agencies in administering compliance with the CAC Standard is the best implementation approach for the regional CAC Standard. Since the City has the largest volume and variety of construction projects on an annual basis within the Founding CAC Collaborative Group, the City is serving as the lead agency for the CAC Regional Program.
3. The Parties desire to enter into an agreement that will establish the terms and conditions by which the Parties will engage and reimburse the City for staff and services related to developing and administering a CAC Regional Program on behalf of all the Parties.

## **AGREEMENT**

### **1. ROLES AND RESPONSIBILITIES**

The City and the Parties agree to be responsive and perform the following roles and responsibilities in a timely manner. This Agreement does not preclude either the City or the Parties from contributing additional support for Clean Air Construction programming through in-kind or other financial contributions, whether specific to their own agency or for the CAC Regional Program.

**a. City of Portland**

The City will:

- i. Recruit, hire, and maintain a full-time City employee who will be dedicated to serving as the CAC Regional Program Coordinator for the duration of this Agreement, at a minimum.
- ii. Serve as the CAC Regional Program administrator and fulfill related administrative responsibilities such as, but not limited to:
  - a. Primary point-of-contact for CAC Regional Program inquiries
  - b. Administer shared technology platforms specific to the CAC Regional Program
  - c. Solicit and manage third-party consulting (or other) services related to supporting the CAC Regional Program
  - d. Develop and distribute CAC Regional Program communications
  - e. Organize and facilitate CAC Regional Program meetings
  - f. Develop program budget in coordination with the Clean Air Construction Intergovernmental Oversight Committee ("CAC Committee")
  - g. Develop and track CAC Regional Program performance metrics
  - h. Develop and distribute CAC Regional Program financial and performance reports
- iii. Develop, host, and maintain a CAC Regional Program website.
- iv. Coordinate CAC Regional Program compliance activities among the Parties in a manner that minimizes duplicative compliance tasks among contractors subject to the CAC Standard.
- v. Integrate the CAC Standard into City solicitation and contract documents as applicable.
- vi. Provide training to internal agency staff such that applicable staff are aware of the CAC Standard and can effectively facilitate agency implementation of the CAC requirements. Applicable staff may include procurement staff and construction project managers.
- vii. Include CAC references in applicable contractor communications and outreach events to help build awareness among the contractor community.
- viii. Commit agency funds in its applicable fiscal year budget to fulfill its cost share of the CAC Regional Program per this Agreement (see Section 3).
- ix. Conduct on-site compliance checks each fiscal year. On-site compliance checks may be conducted by a third-party consultant or agency staff so long as the compliance check requirements are in line with what is agreed upon by the CAC Committee.
- x. Carry out liquidated damages or other consequences or remedy requirements for violations of the CAC requirements per the agency's applicable rules.

**b. The Parties**

Each agency will:

- i. Adopt the Clean Air Construction Standard requirements as agreed upon by the Founding CAC Collaborative Group such that they become enforceable contract requirements, as applicable, for that agency. In order to reduce confusion among the contractor community, each agency shall adhere to the original Diesel Engine

Requirements Phase-In Schedule no matter when their agency adopts the Clean Air Construction Standard.

- ii. Integrate the CAC Standard into their solicitation and contract documents as applicable.
- iii. Provide training to internal agency staff such that applicable staff are aware of the CAC Standard and can effectively facilitate agency implementation of the CAC requirements. Applicable staff may include procurement staff and construction project managers.
- iv. Commit one staff person to serve on the CAC Committee (see Section 2) and provide that staff person the necessary resources to fulfill their role and responsibilities as part of the CAC Committee.
- v. In general, coordinate with the CAC Regional Program Coordinator on CAC-related communications and outreach to the contractor community and the public.
- vi. Include CAC references in applicable contractor communications and outreach events to help build awareness among the contractor community.
- vii. Provide the CAC Regional Program Coordinator with necessary construction project and related information as needed to populate the regional CAC online registration and compliance system.
- viii. Provide the CAC Regional Program Coordinator with applicable compliance information, such as, but not limited to, list of prioritized projects/contractors for compliance checks.
- ix. Commit agency funds in their applicable fiscal year budgets to fulfill their cost share of the CAC Regional Program per this Agreement (see Section 3).
- x. Conduct on-site compliance checks each fiscal year. On-site compliance checks may be conducted by a third-party consultant or agency staff so long as the compliance check requirements are in line with what is agreed upon by the CAC Committee and that compliance check results are shared with the CAC Regional Program Coordinator.
- xi. Carry out liquidated damages or other consequences or remedy requirements for violations of the CAC requirements per the agency's applicable rules.

**c. Decision Making and Oversight**

In its role as the CAC Regional Program administrator, the City may make routine, day-to-day program decisions. Any decisions that affect core elements of the Clean Air Construction Standard, the CAC Regional Program budget, or alter CAC Regional Program elements previously-agreed upon by the Parties through the Founding CAC Collaborative Group or CAC Committee shall first be authorized by the CAC Committee (see Section 2).

**2. CLEAN AIR CONSTRUCTION INTERGOVERNMENTAL OVERSIGHT COMMITTEE (CAC COMMITTEE)**

Upon the effective date of this Agreement, a Clean Air Construction Intergovernmental Oversight Committee ("CAC Committee") will be formed by the Parties. The CAC Committee will be comprised of one representative from each participating agency ("CAC Committee Agency Representative"). Additional agency staff may participate as needed to fulfill needed subject matter expertise, but only one designated agency representative may vote on any required collective committee decisions. The CAC Committee will meet no less than bi-monthly (or as otherwise determined by the CAC Committee) to keep up to date on program activities and provide guidance to the CAC Regional Program Coordinator.

**a. CAC Committee Responsibilities**

The CAC Committee will be responsible for the following:

- i. Provide collective guidance to the CAC Regional Program Coordinator regarding program activities.
- ii. Decide on any key program elements (new or updating existing) that affect the program at a regional level (e.g. not just one agency), such as, but not limited to: CAC requirements, compliance expectations, registration fees, overarching program communications, and compliance system design and protocols.
- iii. On an annual basis, approve a CAC Regional Program budget.
- iv. Recommend and approve allocation of any CAC Regional Program one-time surplus or Rainy Day Program Funds (see Section 3).
- v. Verify/Approve non-budgeted expenses that are subject to the 5% Contingency Set-Aside (see Section 3).
- vi. Propose amendments, as needed, to this Agreement.

**b. Public Meeting Requirements**

Based on the CAC Committee responsibilities identified in Section 2.a, the CAC Committee is considered a governing body and thus subject to public meetings requirements.

**c. Committee Member Good Standing**

To be in good standing and to maintain CAC Committee voting eligibility, each agency representative to the CAC Committee is responsible for:

- i. Attending at least 80% of CAC Committee meetings on an annual basis.
- ii. Serving as a liaison between the CAC Regional Program Coordinator and the agency. This includes providing necessary agency-specific information, such as upcoming construction projects that need to be entered into the CAC online registration system, facilitating the agency's funding contribution per this Agreement, and other agency-specific program related logistics.
- iii. Serving as the agency's primary point of contact for internal agency CAC inquiries and external agency-specific CAC inquiries.

**d. Committee Decision Making**

Only designated CAC Committee Agency Representatives in good standing may vote on any CAC Committee collective decision items. Quorum shall consist of at least 70% of CAC Committee Agency Representatives in good standing. Once quorum is achieved, decisions by the CAC Committee shall be considered passed if there are no "nay" votes. Members may abstain from a vote and the item may pass so long as other non-abstaining representatives cast a "yea" vote. Per Section 2.b, all CAC Committee meetings and decision making shall follow public meeting requirements.

**3. CAC REGIONAL PROGRAM COST SHARE MODEL**

The Parties agree to pay the City funds for administrating the CAC Regional Program. Each agency's share of the program costs, including the City's share, will be calculated according to the following.

**a. Definitions**

- Agency Annual Budget – total adopted budget of an agency's most recent fiscal year
- Agency Scale Percentage – Agency Annual Budget divided by sum of all the Parties Agency Annual Budgets.

- Base Fee - 25% of projected Program Budget rounded to nearest thousand divided by number of participating agencies  

$$[0.25 * \text{Program Budget Total (rounded to nearest thousand)}] / [\text{\# of participating agencies}]$$
- Fiscal Year – July 1 through June 30.
- Program Budget – Annual Clean Air Construction Regional Program budget
- Registration Revenue – revenue from equipment registration fees collected by the CAC Regional Program
- Sliding-Scale Fee - projected Program Budget minus sum of all the Parties Base Fees, multiplied by Agency Scale Percentage  

$$[\text{Program Budget} - \Sigma \text{Base Fees}] * [\text{Agency Scale Percentage}]$$

**b. Cost Share Calculation**

Agency's Annual Cost Share = [Base Fee] + [Sliding Scale Fee]

**c. Annual Program Surplus**

If the CAC Regional Program's annual costs plus revenues results in surplus funds at the end of the fiscal year, that surplus will be managed according to the following:

- i. Up to \$30,000.00 will be carried over to the subsequent fiscal year for the purposes of a "CAC Rainy Day Program Fund" to cover unanticipated program expenses. At the end of the duration of this Agreement, any remaining amount in the CAC Rainy Day Program Fund will be distributed to agencies participating in the CAC Regional Program at the time the Program ends, proportional to their fiscal contributions paid into the Program over the duration of the Program.
- ii. Any remaining amount in excess of \$30,000.00 ("Program Surplus") will be carried over to the subsequent fiscal year and allocated through the budget process for one-time activities during that fiscal year that support the CAC Regional Program, such as, but not limited to, technical assistance, training, education, etc.

The CAC Committee will be responsible for recommending and approving Program Surplus or Rainy Day Program Fund expenditures (see Section 2).

**d. 5% Contingency Set-Aside for Unexpected Expenses**

The City and the Parties shall budget 5% of their Agency's Annual Cost Share for the purposes of a Contingency Set-Aside. This Contingency Set-Aside will be held by each agency and reserved for use in the event the CAC Regional Program experiences a justified cost in excess of the forecasted budget and any accumulated Rainy Day Program Funds. Justified costs may include, but are not limited to, emergency or otherwise unforeseen CAC Regional Program costs. The CAC Committee shall verify/approve that the costs are justified before the City can request reimbursement from the Parties from their Contingency Set-Asides. The additional, non-budgeted cost will be divided by the participating agencies using their current Agency Scale Percentage.

**e. Program Budget Development and Cost Share Declaration**

- i. By February 1 the CAC Committee will agree to an adopted CAC Program budget for the upcoming fiscal year. The adopted CAC Program budget will then be used to calculate the City and the Parties' CAC Regional Program cost share per this section and used to populate Attachment A: CAC Regional Program Annual Cost Share Declaration. Each year, this Agreement will be amended with an updated Attachment A reflecting any

changes in the CAC Regional Program annual cost share amounts due to budget changes or participant changes.

- ii. By November 30 the CAC Committee shall have a final draft of the proposed CAC Program budget for the upcoming fiscal year. This final draft shall be used to vet any significant changes to the proposed CAC Program budget among each agency's applicable budget and management staff.

**f. Changes in the Number of CAC Regional Program Agency Participants**

Should an agency want to be added to or removed from the CAC Regional Program, this Agreement shall be amended at the same time as preparing the amendment for the upcoming fiscal year's CAC Regional Program Cost Share Declaration to add/remove that agency. The foundation of the cost share model shall not change, but only be adjusted to reflect the addition/removal of the applicable agency. An agency may unilaterally decide to terminate its participation in the CAC Regional Program, but shall do so within the following parameters:

- i. The applicable CAC Committee Agency Representative shall notify the CAC Regional Program Coordinator in writing of its decision to terminate its participation;
- ii. The notice to terminate shall be provided no later than December 31 for agency termination applicable to the following fiscal year. This timeframe is the only opportunity to opt out. Failure to provide timely written notice will result in the opting out agency to pay the agency's annual CAC Regional Program cost share payment for the following fiscal year.
- iii. The applicable agency shall maintain its CAC Regional Program commitments in accordance with this Agreement through the remainder of the fiscal year during which the notice is provided.
- iv. By July 31 of the fiscal year following the opting out agency's notice, the City will pay the opting out agency that agency's share of any CAC Rainy Day Program Fund balance, as defined in Section 3.c. The agency's share of the CAC Rainy Day Program Fund will be determined in accordance to their fiscal contributions paid into the Program over the duration of that agency's participation in the Program.

**4. PAYMENT / PAYMENT PROCEDURE**

- a. For the CAC Regional Program annual budget: During July of the applicable fiscal year, the City will issue invoices to each of the Parties for their share of the CAC Regional Program costs according to Attachment A. Each of the Parties shall pay the City within 30 days of receiving the invoice.
- b. For unexpected expenses subject to the 5% Contingency Set-Aside: the City will issue invoices as soon as possible after the cost is incurred and subsequently verified/approved by the CAC Committee. Each of the Parties shall pay the City within 30 days of receiving the invoice.
- c. In the event that any of the Parties fail to pay the City within 60 days of receiving the invoice, the CAC Regional Program Coordinator shall notify the CAC Committee and hold a meeting to discuss an appropriate Program response. In the event that the CAC Committee cannot agree on a feasible Program response, the City may make a unilateral decision to reduce Program activities or other related expenses in order to operate the Program within available funds.

## **5. EFFECTIVE DATE AND DURATION**

This Agreement shall become effective on the date upon which all Parties have signed the Agreement and shall expire on June 30, 2027. This Agreement may be extended upon mutual written agreement.

## **6. COMPLIANCE WITH LAWS**

In connection with its activities under this Agreement, the Parties shall comply with all applicable federal, state and local laws and regulations.

## **7. INDEMNIFICATION**

- a. Subject to the conditions and limitations of the Oregon Constitution and the Oregon Tort Claims Act (ORS 30.260 through 30.300), each Party shall indemnify the other, within the limits of and subject to the restrictions in the Tort Claims Act, against any liability arising from its respective acts or omissions under this Agreement (including the acts and omissions of its respective officers, employees and agents acting within the scope of their employment). Notwithstanding the previous sentence, neither Party shall be required to indemnify the other for any liability arising out of the acts or omissions of the other party (including the acts or omissions of the other Party's officers, employees or agents acting within the scope of their employment).

## **8. PROGRAM RECORDS, AND RECORDS REQUESTS**

- a. The City shall be the custodian of all CAC Regional Program records and documents after the Effective Date of this Agreement.
- b. Any public records request or media request pertaining to the CAC Regional Program after the Effective Date of this Agreement shall be handled by the City. All Parties shall cooperate with and jointly assist the City in responding to public or media queries related to the CAC Regional Program.
- c. The City shall maintain all fiscal records relating to this Agreement in accordance with generally accepted accounting principles. In addition, The City shall maintain any other records pertinent to this Agreement in such a manner as to clearly document the City's performance. The City acknowledges and agrees that the Parties shall have access to such fiscal records and other books, electronic records, documents, papers, and writings that are pertinent to this Agreement to perform examinations and audits. The City also acknowledges and agrees that the City shall retain such documents for a period of three years after termination or expiration of this Agreement, or such longer period as may be required by applicable law. In the event of any audit, controversy or litigation arising out of or related to this Agreement, the City shall retain such documents until the conclusion thereof. Copies of applicable records shall be made available to Parties upon written request.

## **9. CONFLICT RESOLUTION**

If a conflict arises regarding any conditions of this Agreement, the Parties agree to exercise good faith in expeditiously resolving said conflict.

**10. AMENDMENTS**

This Agreement may only be amended by a written agreement signed by all Parties. Amendments shall occur no more than once per year and timing shall align with the development of the required annual update to Attachment A.

**11. MERGER, NON-WAIVER**

This Agreement and attached exhibits constitute the entire agreement between the parties on the subject matter hereof. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. No waiver, consent, modification or change of terms of this Agreement shall bind any party unless in writing and signed by all parties. Such waiver, consent, modification or change, if made, shall be effective only in the specific instance and for the specific purpose given. The failure of any party to enforce any provision of this Agreement shall not constitute a waiver by that party of that or any other provision.



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**Between**  
**Multnomah County, Washington County, Metro, and Port of Portland**  
**And**  
**City of Portland Bureau of Revenue and Financial Services – Procurement Services**  
**For**  
**Development and Administration of the Regional Clean Air Construction Program**

**ATTACHMENT A: CAC Regional Program Annual Cost Share Declaration**

For Fiscal Year 2020-2021 the Parties agree to pay the City according to the following for their share in funding the CAC Regional Program. The following does not include the required 5% Contingency Set-Aside for Unexpected Expenses, nor agency funds for conducting the required on-site compliance checks. The Parties shall include in their CAC budget allocation the following CAC Regional Program cost share, the 5% Contingency Set-Aside for Unexpected Expenses, and funds for conducting the required on-site compliance checks.

<b>Agency Name</b>	<b>CAC Regional Program Cost Share to be Paid to City</b>
Multnomah County	\$53,000.00
Port of Portland	\$49,000.00
Washington County	\$42,000.00
Metro	\$40,000.00

For Fiscal Year 2020-2021, the City's share in funding the CAC Regional Program is: \$120,000.00.