

RESOLUTION NO. 2016-86

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MARINA APPROVING THE REIMBURSEMENT AND INDEMNIFICATION AGREEMENT BETWEEN THE CITY OF MARINA AND THE DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT IN THE AMOUNT OF \$196,207, AS OBLIGATION OF COMMUNITY DEVELOPMENT BLOCK GRANT (CDBG) PROGRAMS; AND, AUTHORIZING CITY MANAGER TO EXECUTE DOCUMENT ON BEHALF OF THE CITY SUBJECT TO FINAL REVIEW AND APPROVAL BY CITY

WHEREAS, for years, the City received Community Development Block Grant (CDBG) funds from the Department of Housing and Community Development (HCD) which were part of the Microenterprise Technical Assistance Program. These funds were used to provide assistance to businesses operating out of the Marina Technology Center with the goal of expanding these businesses and creating new job; and,

WHEREAS, last year the Department of Housing and Community Development completed an audit of the grant funds previously allocated to the City of Marina for the Microenterprise Technical Assistance Program. The audit determined that some of the expenditures made by the City of Marina under this program that were previously authorized and approved by HCD, were not eligible costs and must be reimbursed to HCD. The ineligible costs totaled \$196,207; and;

WHEREAS, the City has negotiated repayment of the \$196,207 of ineligible expenses over a three year period. The Repayment Plan Schedule will incorporate three annual payments of approximately \$65,402. The first payment will be made by the City when the Repayment Plan Schedule is executed, with the next two payments remitted on that same date the following two years (**Exhibit "A"**); and;

WHEREAS, should the City Council approve this request, the project cost for FY 16-17 is \$65,402.33; FY 17-18 is \$65,402.33; and, in FY 18-19 \$65,402.34 for a total of \$196,207, which has been budgeted.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Marina does hereby:

1. Approve the Reimbursement and Indemnification Agreement between the City of Marina and the Department of Housing and Community Development in the amount of \$196,207, as obligation for CDBG programs; and, authorizing the City Manager to execute document(s) on behalf of the City subject to final review and approval by the City Attorney.

PASSED AND ADOPTED by the City Council of the City of Marina at a regular meeting duly held on the 21st day of June 2016, by the following vote:

AYES, COUNCIL MEMBERS: Amadeo, Morton, O'Connell, Delgado

NOES, COUNCIL MEMBERS: None

ABSENT, COUNCIL MEMBERS: Brown

ABSTAIN, COUNCIL MEMBERS: None

Bruce C. Delgado, Mayor

ATTEST:

Anita Sharp, Deputy City Clerk

REPAYMENT & INDEMNIFICATION AGREEMENT

This Repayment & Indemnification Agreement ("Agreement") is made and entered into this 16th day of June, 2016 by and between the California Department of Housing and Community Development, a public agency of the State of California ("HCD") and the City of Marina, California, a political subdivision of the State of California ("City"), with reference to the following:

RECITALS

- A. HCD and City entered into that certain Standard Agreement No. 10-STBG-7255 ("Standard Agreement") pursuant to which HCD agreed to grant to the City certain funds pursuant to the Community Development Block Grant program administered by HCD ("Program").
- B. Pursuant to the Standard Agreement, the City is required to use the grant funds only for eligible expenses and costs authorized by the Program.
- C. On or about June 14, 2013, HCD issued that certain CDBG Monitoring Report ("Report") in which it made certain findings and concerns regarding the City's use of grant funds received from HCD under the Standard Agreement. Among other things, the Report indicates that the City was paid the amount of \$334,014, and required the City to determine the total amount of eligible costs and repay HCD if those eligible costs did not equal or exceed \$334,014.
- D. After its review, HCD has determined that the total amount of eligible costs under the Program is only \$137,807, and that \$196,207 are ineligible costs. The City concurs with this determination and agrees that it needs to repay to HCD the full amount of such ineligible costs.
- E. The City has requested that it be allowed to repay the \$196,207 in ineligible costs to HCD on a payment schedule as it currently does not have sufficient funds to repay the entire amount thereof, and HCD has agreed to approve such request, all on the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the foregoing, and for other good and valuable consideration, receipt of which is hereby acknowledged, the parties hereto agree as follows:

1. Recitals. The foregoing Recitals are true and correct and are incorporated herein by this reference.

2. Repayment of Funds. Pursuant to the terms hereof, the City hereby agrees to repay to HCD the sum of One Hundred Ninety-Six Thousand Two Hundred Seven Dollars (\$196,207), representing the amount of ineligible Program costs incurred by the City pursuant to the terms of the Standard Agreement (such amount being the “Reimbursement Amount”). The City shall repay the Reimbursement Amount to HCD over a three (3) year period with annual payments to be made pursuant to the following payment schedule:

<u>Year</u>	<u>Amount Due</u>	<u>Due Date</u>
1	\$65,402.33	Upon Mutual Execution of Agreement
2	\$65,402.33	June 20, 2017
3	\$65,402.34	June 20, 2018

The first annual payment of \$65,402.33 shall be due and payable upon mutual execution of this Agreement, and the receipt of such payment by HCD is a condition precedent to the effectiveness hereof. Each payment to be made by the City shall be in the form of a City check made payable to the Department of Housing and Community Development, State of California, each of which checks must be attached to the CDBG Return of Funds form, which can be located in the Fiscal Forms section of the Program website at: <http://www.hcd.ca.gov/financial-assistance/community-development-block-grant-program/formsreport.html>.

If the City fails to tender the first annual payment to HCD concurrently with the mutual execution of this Agreement, then this Agreement shall be void and of no force or effect, and HCD shall be entitled to pursue all rights and remedies it deems necessary in order to collect the entire Reimbursement Amount from the City.

3. Acknowledgment by City. City hereby acknowledges and agrees as follows: (i) that the various findings and concerns of HCD referenced in the Report with regard to the amount and nature of the \$196,207 in ineligible Program costs are true and correct in all respects, (ii) the calculation of the Reimbursement Amount of \$196,207 is accurate, and such amount is due and payable by the City to HCD without offset or counterclaim of any kind; (iii) by entering into this Agreement, the City is hereby fully and forever waiving any and all rights it may have to contest, dispute, or otherwise challenge the calculation of the Reimbursement Amount, the characterization of the ineligible program costs comprising such Reimbursement Amount, and/or any finding made in the Report related to the foregoing; (iv) the entry into this Agreement by HCD shall in no way affect or limit HCD’s ability to monitor, assess, audit, or enforce compliance with regards to any findings and concerns contained in the Report, or with regard to the City’s performance generally under the terms of the Standard Agreement; (v) monitoring of the City’s compliance under the Standard Agreement shall continue during the term of this Agreement, and HCD must

receive repayment of the entire Reimbursement Amount before a clearance letter will be issued and monitoring closed; and (vi) any failure by City to timely execute and deliver this Agreement, and to perform its obligations hereunder, may negatively impact or potentially eliminate the City's ability to apply for or secure future funding from HCD through the various programs it administers, including with regard to any applications which may have previously been submitted by the City in connection therewith, or to receive continued funding under existing agreements with HCD.

4. Representation by City. City hereby represents and warrants to HCD that at the present time, City does not have sufficient funds available to repay the Reimbursement Amount to HCD in one lump sum, and can only repay such Reimbursement Amount using the annual installment payment plan requested by City and memorialized in Section 2 above. HCD is agreeing to enter into this Agreement expressly in reliance upon this representation and warranty, which constitutes material consideration for this Agreement. In the event such representation and warranty proves to be false or materially misleading, then HCD may, in its discretion, elect to declare such event as a default by City hereunder and may, among other things, accelerate all payments due hereunder. The representation and warranty by City set forth in this Section 4 shall survive the repayment to HCD of the Reimbursement Amount or any earlier termination of this Agreement.

5. Interest. Provided that City timely pays all of its payment obligations referenced in Section 2 above and complies with all terms and conditions of this Agreement, no interest shall accrue on the Reimbursement Amount. However, in the event that City is in default under any of the terms hereof, then HCD may elect to charge interest on the unpaid balance of the Reimbursement Amount. Interest shall be charged at the maximum legal rate of interest permitted under California law (not to exceed ten percent (10%) per annum), shall commence accruing on the date of default by the City, and shall continue to accrue on the unpaid balance of the Reimbursement Amount until the entire amount thereof, together with interest, costs, and attorneys' fees due hereunder, is paid in full.

6. Default. In the event that City fails to timely make an installment payment as required by Section 2 hereof, then HCD shall issue to City a written notice of default pursuant to which City shall have thirty (30) calendar days to cure such default. If City fails to cure the stated default within such thirty (30) day period, then HCD shall declare City in default under this Agreement, all amounts owed by the City hereunder shall be immediately due and payable in full, and HCD shall be entitled to exercise all of its rights and remedies at law, in equity, under this Agreement, or otherwise, including without limitation, seeking specific performance and invoking any remedies afforded under the Program and related state and federal statutes, rules, and regulations. All remedies of HCD hereunder are cumulative, and the exercise of one or more such remedies shall not be deemed an election of remedies and shall not preclude the exercise by HCD of any one or more of its other remedies.

7. Indemnification. City agrees to indemnify, defend, and hold HCD harmless from and against any costs, losses, damages, liabilities, claims, actions, judgments, penalties, sanctions, court costs, and legal or other expenses of every kind and description (including attorneys' fees assessed by the California Department of Justice and/or private counsel), which HCD may incur as a direct or indirect consequence of City's past, present, or future failure to comply with Program requirements and/or the terms of this Agreement. The foregoing indemnity shall include, without limitation, claims, actions, or administrative proceedings which may be now or in the future asserted or brought against HCD by the federal Department of Housing and Urban Development, which is a funding source for the Program, as a result of the City's use of Program funds for ineligible expenses under the Standard Agreement. The indemnification obligations of City shall indefinitely survive the payment of the Reimbursement Amount to HCD.

8. Amendment. This Agreement shall not be altered or amended except in a writing duly executed between both of the parties hereto.

9. Partial Invalidity. If any provision of this Agreement shall be invalid, illegal, or unenforceable, the validity, legality and enforceability of the remaining provisions hereof shall not be in any way affected or impaired thereby.

10. Interpretation. This Agreement has been negotiated by and between the representatives of both parties, and each party has had the opportunity to have this Agreement reviewed and drafted by their respective legal counsel. Therefore, any rule of law (including, without limitation, California Civil Code section 1654 or similar statute) or legal decision to the effect that ambiguities are to be construed against the drafting party is hereby waived.

11. Waiver. No waiver of any right or obligation of either party hereto shall be effective unless in writing, specifying such waiver, executed by the party against whom such waiver is sought to be enforced. A waiver by either party of any of its rights under this Agreement on any occasion shall not be a bar to the exercise of the same right on any subsequent occasion or of any other right at any time.

12. Attorneys' Fees. The prevailing party in any action to enforce or interpret this Agreement shall be entitled to recover its reasonable attorneys' fees and costs as determined by the court.

13. Notices. All notices, demands, and communications between the parties shall not be deemed given unless sent by certified mail, return receipt requested, or express delivery service with a delivery receipt, or personal delivery with a delivery receipt, to the principal office of the parties as follows:

HCD

Department of Housing and
Community Development
State of California
Attn: Moira Monahan, Chief
Operations Branch
2020 W. El Camino Avenue #500
P.O. Box 952054
Sacramento, CA 94252-2054

City

City of Marina
Attn: City Manager
211 Hillcrest Avenue
Marina, California 93933

Such written notices, demands, and communications may be sent in the same manner to such other addresses as the affected party may from time to time designate as provided in this Section 13. Receipt shall be deemed to have occurred on the date marked on a written receipt as the date of delivery or refusal of delivery, or attempted delivery if undeliverable.

14. Governing Law; Jurisdiction; Venue. This Agreement shall be interpreted and enforced in accordance with the laws of the State of California. Any action to interpret or enforce this Agreement shall be filed in the Superior Court of Sacramento County, California.

15. Authority. Each party hereto represents and warrants that the individual(s) executing this Agreement on behalf of such party has full right, power, and authority to execute and deliver this Agreement to the other party, and that such authority is duly evidenced by all requisite resolutions, approvals, consents, and similar written authorizations.

16. Multiple Originals; Counterparts. This Agreement may be executed in multiple originals, each of which is deemed to be an original, and may be signed in counterpart.

17. No Defaults by HCD. City hereby represents and warrants that as of the date hereof, HCD is not in default under any terms or provisions of the Standard Agreement or any other agreement executed by HCD and City in connection therewith, and that no event has occurred that, with the passage of time or the giving of notice, would constitute a default thereunder.

18. Effectiveness. This Agreement shall become effective upon the date of execution by HCD and the concurrent receipt by HCD of the first annual payment payable by the City pursuant to Section 2 above.

(Signatures Contained on Following Page)

This Agreement is being executed in Sacramento, California on the date first written above.

“HCD”

Department of Housing and Community
Development, State of California,
a public agency of the State of California

By: _____

Title: _____

“City”

City of Marina, California
a political subdivision of the
State of California

By: _____

Its: _____

Approved As to Form

City Counsel, City of Marina

By: _____

Title: _____

June 15, 2016

Item No: **8f(1)**

Honorable Mayor and Members
of the Marina City Council

City Council Meeting
of June 21, 2016

**CITY COUNCIL CONSIDER ADOPTING RESOLUTION NO. 2016- ,
APPROVING THE REIMBURSEMENT AND INDEMNIFICATION
AGREEMENT BETWEEN THE CITY OF MARINA AND THE
DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT IN THE
AMOUNT OF \$196,207, AS OBLIGATION OF COMMUNITY
DEVELOPMENT BLOCK GRANT (CDBG) PROGRAMS; AND,
AUTHORIZING CITY MANAGER TO EXECUTE DOCUMENT(S) ON
BEHALF OF THE CITY SUBJECT TO FINAL REVIEW AND APPROVAL
BY CITY ATTORNEY**

REQUEST:

It is requested that the City Council consider:

1. Adopting Resolution No. 2016- , approving the Reimbursement and Indemnification Agreement between the City of Marina and the Department of Housing and Community Development in the Amount of \$196,207 as obligation of Community Development Block Grant (CDBG) programs; and, authorizing City Manager to execute document(s) on behalf of the City subject to final review and approval by City Attorney.

BACKGROUND:

For years, the City received Community Development Block Grant (CDBG) funds from the Department of Housing and Community Development (HCD) which were part of the Microenterprise Technical Assistance Program. These funds were used to provide assistance to businesses operating out of the Marina Technology Center with the goal of expanding these businesses and creating new jobs.

Last year the Department of Housing and Community Development completed an audit of the grant funds previously allocated to the City of Marina for the Microenterprise Technical Assistance Program. The audit determined that some of the expenditures made by the City of Marina under this program that were previously authorized and approved by HCD, were not eligible costs and must be reimbursed to HCD. The ineligible costs totaled \$196,207.

ANALYSIS:

The City has negotiated repayment of the \$196,207 of ineligible expenses over a three year period. The Reimbursement and Indemnification Agreement will incorporate three annual payments of approximately \$65,402. The first payment will be made by the City when the Repayment Plan Schedule is executed, with the next two payments remitted on that same date the following two years (**EXHIBIT "A"**).

FISCAL IMPACT:

Should the City Council approve this request, the project cost for FY 16-17 is \$65,402.33; FY 17-18 is \$65,402.33; and, in FY 18-19 is \$65,402.34 for a total of \$196,207, which has been budgeted.

CONCLUSION:

This request is submitted for City Council consideration and possible action.

Respectfully submitted,

Marilyn Lidyoff
Economic Development Coordinator
City of Marina

REVIEWED/CONCUR:

Layne Long
City Manager
City of Marina