

**AGREEMENT BETWEEN THE CITY OF MERCED AND FAIRBANK,
MASLIN, MAULLIN, METZ & ASSOCIATES TO PROVIDE OPINION
RESEARCH SERVICES**

THIS AGREEMENT is made effective this 19th day of SEPTEMBER, 2017, by and between the City of Merced, a California Charter Municipal Corporation, (hereinafter referred to as "City") and the Fairbank, Maslin, Maullin, Metz & Associates (hereinafter referred to as "FM3").

WHEREAS, the FM3 provides opinion research services, including questionnaire design, sample preparation, pre-test of interview, telephone interviewing, data analysis, cross-tabulation services and presentation of survey results; and

WHEREAS, the City desires to obtain opinion research services related to potential ballot financing options to support the construction and enhancement of public facilities within the City of Merced; and

WHEREAS, the FM3 has the ability to provide the desired opinion research services, which include the necessary professional and staff time related to designing questionnaires, administering resident survey, performing data analysis and cross-tabulation, and presenting the results of the survey to the City.

NOW, THEREFORE, the parties hereto, in consideration of the mutual covenants hereinafter recited, hereby agree as follows:

1. SCOPE OF SERVICES. FM3 will provide opinion survey services by compiling a voter sample list, telephone or dual mode (internet and telephone) survey averaging 20 minutes per interview, of 400 to 600 likely November 2018 voters. These services will include:

- a. All professional and staff time
- b. Questionnaire design
- c. Sample preparation
- d. Pre-test of interview
- e. Telephone and/or online interviewing
- f. Data analysis and cross-tabulation, and
- g. Presentation of survey results

Both parties will reach a mutual agreement on the contents of the questionnaire instrument. Client agrees that, when its approval is called for hereunder, it will

promptly review and approve all such matters in good faith and in consultation with FM3, and that its approval will not be unreasonably withheld or delayed.

The City shall be solely responsible for the use of the public opinion research provided by FM3 under this Agreement. It is understood and agreed that FM3 is solely responsible for the results of the public opinion research provided pursuant to this Agreement. FM3 shall at all times comply with state and federal law, and any statute, rule, regulation or order from any governmental or regulatory agency.

2. **TIME OF PERFORMANCE.** Both parties will reach a mutual agreement on schedule for delivery of the survey. The term of this Agreement shall commence upon mutual execution of Agreement and shall continue until services have been performed.

3. **COMPENSATION.** The City agrees to pay to FM3 an amount not to exceed Twenty-nine Thousand Two Hundred and Fifty (\$29,250) and the associated payment terms as detailed in Exhibit A, attached hereto and incorporated herein by this reference.

4. **RECORDS.** It is understood and agreed that all plans, studies, specifications, data magnetically or otherwise recorded on computer or computer diskettes, record, files, reports, ect., in possession of the FM3 relating to the matters covered by the Agreement shall be the property of the City, and FM3 hereby agrees to deliver the same to the City upon termination of the Agreement. It is understood and agreed that the documents and other materials, including but not limited to those set forth hereinabove, prepared pursuant to this Agreement are prepared specifically for the City and are not necessarily suitable for any future or other use.

5. **CONSULTANT'S BOOKS AND RECORDS.** FM3 shall maintain and all ledgers, books of account, invoices, vouchers, canceled checks, and other records or documents evidencing or relating to charges for services or expenditures and disbursements charged to the City for a minimum of three (3) years, or for any longer period required by law, from the date of final payment to FM3. Any records or documents required to be maintained shall be made available for inspection, audit and/or copying at any time during regular business hours, upon oral or written request of the City.

6. **INDEPENDENT CONTRACTOR.** It is expressly understood that FM3 is an independent contractor and that its employees shall not be employees of

or have any contractual relations with the City. FM3 shall be responsible for the payment of all taxes, workers' compensation insurance and unemployment insurance. Should FM3 desire any insurance protection, FM3 is to acquire same at its expense.

In the event FM3 or any employee, agent, or subcontractor of FM3 providing services under this Agreement is determined by a court of competent jurisdiction or the California Public Employees Retirement System (PERS) to be eligible for enrollment in PERS as an Employee of the City, FM3 shall indemnify, protect, defend and hold harmless the City for the payment of any employee and/or employer contribution for PERS benefits on behalf of FM3 or its employees, agents, or subcontractors, as well as for the payment of any penalties and interest on such contributions, which would otherwise be the responsibility of City.

7. INDEMNITY. FM3 shall indemnify, protect, defend (with legal counsel selected by the City), save and hold City, its officers, employees, and agents, harmless from any and all claims or causes of action for death or injury to persons, or damage to property resulting from intentional or negligent acts, errors, or omissions of Consultant or Consultant's officers, employees, volunteers, and agents during performance of this Agreement, or from any violation of any federal, state or municipal law or ordinance, to the extent caused in whole or in part, by the willful misconduct, negligent acts, or omissions of FM3's work, or resulting from the negligence of the City, its officers, employees, volunteers and agents, except for loss caused by the sole negligence or willful misconduct of the City or its officers, employees, volunteers or agents. It is understood that the duty of FM3 to indemnify and hold harmless includes the duty to defend as set forth in Section 2778 of the California Civil Code. Acceptance by City of insurance certificates and endorsements required under this Agreement does not relieve FM3 from liability under this indemnification and hold harmless clause. This indemnification and hold harmless clause shall survive the termination of the Agreement and shall apply to any damages or claims for damages whether or not such insurance policies shall have been determined to apply. By execution of this Agreement, FM3 acknowledges and agrees to the provisions of this section and that it is a material element of consideration.

8. INSURANCE. During the term of this Agreement, FM3 shall maintain in full force and at its own cost and expense, the following insurance coverage:

- a. **Workers' Compensation Insurance.** Full workers' compensation insurance shall be provided with a limit of at least One Hundred Thousand Dollars (\$100,000) for any one person and as required by law, including Employer's Liability limits of \$1,000,000.00 per accident. The policy shall be endorsed to waive the insurer's subrogation rights against the City.
- b. **Professional Liability Insurance.** FM3 shall carry professional liability insurance appropriate to FM3's profession in the minimum amount of One Million Dollars (\$1,000,000).
- c. **Qualifications of Insurer.** The insurance shall be provided by an acceptable insurance provider, as determined by City, which satisfies all of the following minimum requirements:
 - a. An insurance carrier admitted to do business in California and maintain an agent for service of process within this State; and
 - b. An insurance carrier with a current A.M. Best rating of A: VII or better (except for workers' compensation provided through the California State Compensation Fund).
- d. **Certificate of Insurance.** FM3 shall compete and file with the City prior to engaging in any operation or activity set forth in this Agreement, certificates of insurance evidencing coverage as set forth above and which shall provide that no cancellation or expiration by the insurance company will be made during the term of this Agreement, without thirty (30) days written notice to City prior to the effective date of such cancellation – including cancellation for nonpayment of premium.
- e. **Notwithstanding any language in the Agreement to the contrary,** FM3 shall be entitled to be paid pursuant to the terms of this Agreement until FM3 has obtained the insurance required by this Section 10 and provided documentation of said insurance to the City. In addition to any other remedies City may have, City reserves the right to withhold payment if FM3's insurance policies are not current.

9. **ASSIGNABILITY OF AGREEMENT.** It is understood and agreed that this Agreement contemplates personal performance by FM3 and is based upon a determination of its unique personal competence and experience and upon its specialized personal knowledge. Assignments of any or all rights, duties or

obligations of FM3 under this Agreement will be permitted only with the express written consent of the City.

10. **TERMINATION FOR CONVENIENCE OF CITY.** The City may terminate this Agreement any time by mailing a notice in writing to FM3 that the Agreement is terminated. Said Agreement shall then be deemed terminated, and no further work shall be performed by FM3. If the Agreement is so terminated, the Consultant shall be paid for that percentage of the phase of work actually completed, based on a pro rata portion of the compensation for said phase satisfactory completed at the time the notice of termination is received.

11. **CONFORMANCE TO APPLICABLE LAWS.** FM3 shall comply with its standard of care regarding all applicable Federal, State, and municipal laws, rules and ordinances. No discrimination shall be made by FM3 in the employment of persons to work under this contract because of race, color national origin, ancestry, disability, sex or religion of such person.

FM3 hereby promises and agrees to comply with all of the provisions of the Federal Immigration and Nationality Act (8 U.S.C.A. 1101 et seq.), as amended; and in connection therewith, shall not employ unauthorized aliens as defined therein. Should FM3 so employ such unauthorized aliens for the performance of work and/or services covered by this Agreement, and should any agency or instrumentality of the federal or state government, including the courts, impose sanctions against the City for such use of unauthorized aliens, FM3 hereby agrees to, and shall, reimburse City for the cost of all such sanctions imposed, together with any and all costs, including attorneys' fees, incurred by the City in connection therewith.

12. **WAIVER.** In the event that either the City or FM3 shall at any time or times waive any breach of this Agreement by the other, such waiver shall not constitute a waiver of any other or succeeding breach of this Agreement, whether of the same or any other covenant, condition or obligation. Waiver shall not be deemed effective until and unless signed by the waiving party.

13. **ONCONSISTENT OR CONFLICTING TERMS IN AGREEMENT AND EXHIBITS.** In the event of any contradiction or inconsistency between any attached document(s) or exhibit(s) incorporated by reference herein and the provisions of the Agreement itself, the terms of the Agreement shall control.

Any exhibit that is attached and incorporated by reference shall be limited to the purposes for which it is attached, as specified in this Agreement. Any contractual terms or conditions contained in such exhibit imposing additional obligations on the City are not binding upon the City unless specifically agreed to in writing, and initialed by the authorized City representative, as to each additional contractual term or condition.

14. **AMBIGUITIES.** This Agreement has been negotiated at arms' length between persons knowledgeable in the matters dealt with herein. Accordingly, and rule of law, including, but not limited to, Section 1654 of the Civil Code of California, or any other statutes, legal decisions, or common-law principles of similar effect, that would require interpretation of any ambiguities in this Agreement against the party that drafted this Agreement is of no application and is hereby expressly waived.

15. **VENUE.** This Agreement and all matters relating to it shall be governed by the laws of the State of California and any action brought relating to this Agreement shall be held exclusively in a state court in the County of Merced.

16. **AMENDMENT.** This Agreement shall not be amended, modified, or otherwise changed unless in writing and signed by both parties.

17. **INTEGRATION.** This Agreement constitutes the entire understanding and agreement of the parties and supersedes all previous and/or contemporaneous understanding or agreement between the parties with respect to all or any part of the subject matter hereof.

18. **AUTHORITY TO EXECUTE.** The person or persons executing this Agreement on behalf of the parties hereto warrants and represents that he/she/they has/have the authority to execute this Agreement on behalf of their entity and has/have the authority to bind their party to the performance of its obligation hereunder.

19. **COUNTERPARTS.** This Agreement may be executed in one or more counterparts with each counterpart being deemed an original. No counterpart shall be deemed to be an original or presumed delivery unless and until the counterparts executed by the other parties hereto are in the physical possession of the party or parties seeking enforcement thereof.

20. All notices, requests, demands or other communications under the Agreement shall be in writing. Notice shall be sufficiently given for all purposes as follows:

- a. First Class Mail. When mailed first class to the last address of the recipient known to the Party giving notice, notice is effective three mail delivery days after deposit in a United States Postal Service office of mailbox.
- b. Certified Mail. When mailed certified mail, return receipt requested, notice is effective upon receipt if delivery is confirmed by a return receipt.
- c. Overnight Delivery. When delivered by an overnight delivery service, charges prepaid or charged to the sender's account, notice is effective on delivery, if delivery is confirmed by the delivery service.

Any correctly addressed notice that is refused, unclaimed or undeliverable because of an act or omission of the party to be notified shall be deemed effective as of the first date that the notice was refused, unclaimed or deemed undeliverable by the postal authorities, messengers or overnight delivery service.

Mailing and contact information for notice to the Parties of this Agreement at the time of endorsement of this Agreement is as follows:

City of Merced
678 W. 18th Street
Merced, CA 95340
(209) 385-6834

Attn: Steve Carrigan, City Manager

Fairbank, Maslin, Maullin, Metz & Associates, Inc.
1999 Harrison Street, Suite 2020
Oakland, CA 94612
(510) 451-9521

Attn: Curt Below

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed on the date first above written.

CITY OF MERCED
A California Charter Municipal
Corporation

BY: [Signature]
City Manager

ATTEST:
STEVE CARRIGAN, CITY CLERK

BY: [Signature]
Assistant/Deputy City Clerk

APPROVED AS TO FORM:

BY: [Signature] 9-18-17
City Attorney Date



300475 PO # 128495
ACCOUNT DATA:

BY: [Signature]
Verified by Finance Officer
Funds available 10/19/17 per
449-1001-627.65-00 116040
\$29,250.00 PL 10/19/17

FAIRBANK, MASLIN, MAULLIN, METZ &
ASSOCIATES, INC.

Date: September 19, 2017

By: [Signature]

Exhibit A: Compensation

- It is agreed that Fairbank, Maslin, Maullin, Metz & Associates, Inc. (FM3) will provide public opinion research services (Services) for the City of Merced (City) for a total cost not to exceed \$29,250.
- The parties acknowledge that if the City requests a survey exceeding \$29,250, or not to exceed \$36,750, those additional amount(s) will need to be authorized by the City Council.
- As compensation for Services under this Agreement, the City agrees to pay FM3 a minimum fee of \$15,000 upon the signing of this agreement. The remaining balance of the final cost agreed upon by both parties in writing, will be due and payable 30 days after completion of survey. The City shall pay FM3's invoices for Services rendered within fifteen (15) days after each invoice's date. In the event that any invoice remains unpaid on the sixtieth (60) day after the date on the invoice, interest of 1.5 percent per month shall be payable on the unpaid balance.
- When FM3's Services conclude, all unpaid charges owed shall become immediately due and payable, according to the terms in the preceding paragraph.
- Travel and other direct expenses, including, but not limited to, extra reproduction of reports and delivery fees, are included in the not to exceed amounts provided by this Exhibit.