



ANN ARBOR BIKE SHARE MASTER AGREEMENT

This Ann Arbor Bike Share Master Agreement and its Attachments (altogether, the "Agreement") is by and between the Clean Energy Coalition, a Michigan non-profit corporation located at 924 North Main Street, Suite 2, Ann Arbor, MI 48104 ("CEC" or "Recipient") and the City of Ann Arbor, a Michigan local municipality located at 301 E. Huron Street, Ann Arbor, MI 48107 ("City"), and is effective as of the ____ day of _____, 2013.

WHEREAS, CEC and City desire to collaborate and establish a bike-sharing program (the "Program") at various locations throughout the City of Ann Arbor, Michigan and on the University of Michigan campus;

WHEREAS, the Bike Share Parties have identified CEC as the lead organization, program operator, and named applicant for the preparation and submittal of the Program grant, in which CEC and other Bike Share Parties will be collaborators and/or financial contributors;

WHEREAS, the City desires to enter into this Agreement to describe and establish the responsibilities and agreements of the Bike Share Parties; and

WHEREAS, the grant application for the Program was approved by the U.S. Department of Transportation Federal Highway Administration for funding through the Congestion Mitigation Air Quality Program, "Grant Funds";

NOW THEREFORE, the City agrees as follows:

ARTICLE 1

DEFINITIONS

- 1.1.** "Bike Share Parties" means Clean Energy Coalition, the University of Michigan, the City of Ann Arbor, and the Ann Arbor Transportation Authority.
- 1.2.** "Change Order" means a document issued and executed by CEC to change some aspect of the Work described in the Statement of Work (SOW) and accepted in writing by the City,
- 1.3.** "Designated Representative" means the duly authorized representative for each party, who will provide the general administration of this Agreement on behalf of CEC and shall be the Bike Share Party's field representative and point of contact for all matters relating to the Work. The City's Designated Representative does not have authority to amend or waive any portion of this Agreement. CEC may change its Designated Representative at any time with a fully qualified replacement upon reasonable prior written notification to the Bike Share Party. The Bike Share Party may change its Designated Representative at any time upon reasonable prior written notification to CEC.

- 1.4.** “Equipment” means all materials, apparatus, equipment, goods, tools, component parts and supplies purchased pursuant to a Specific Project under this Agreement.
- 1.5.** “Force Majeure” means any event, occurrence or condition beyond the reasonable control of a party that prevents or delays performance including, but not limited to, acts of God, acts of civil or military authorities, restrictions imposed by federal, state, or other governmental legislation or rules or regulations thereof, fires, strikes or other labor disputes, floods, epidemics, quarantine restrictions, war, riots, acts of terrorism (including threatened acts of terrorism if warnings of same are communicated by a governmental agency), delays in transportation, or embargoes or other events, occurrences or conditions beyond the reasonable control of a party.
- 1.6.** “Grant Funds” means funds administered by the Michigan Department of Transportation (MDOT) through the U.S. Department of Transportation Federal Highway Administration Congestion Mitigation Air Quality Program, which is a reimbursement program that requires a 20% local cash match.
- 1.7.** “Capital Expenditures” means expenditures for the acquisition cost of capital assets (equipment, buildings, land), or expenditures to make improvements to capital assets that materially increase their value or useful life. Acquisition cost means the cost of the asset including the cost to put it in place. Acquisition cost for equipment, for example, means the net invoice price of the equipment, including the cost of any modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired. Ancillary charges, such as taxes, duty, protective in transit insurance, freight, and installation may be included in, or excluded from the acquisition cost in accordance with the governmental unit's regular accounting practices. A list of approved Capital Expenditures for 2013/2014 is provided in attached Appendix C.
- 1.8.** “Jobsite” means the location of the Work or Services as described in the SOW.
- 1.9.** “Laws” means all laws, statutes, codes, ordinances, rules, regulations, lawful orders, and other legal requirements, as amended from time to time, of all federal, state, county and local governmental agencies and authorities that are applicable to the Work and any of the City's obligations under the Contract Documents.
- 1.10.** “Milestone Date” means the date of Substantial Completion, the date of Final Completion, and any other dates stated in the SOW or Project Schedule for a Specific Project for completion of the Work.
- 1.11.** “Project Schedule” means the schedule approved by the City for the performance of the Work. The Project Schedule for each Specific Project shall be one of the Contract Documents and shall be attached to the SOW for the Specific Project either at the time this Agreement is executed or soon thereafter.
- 1.12.** “Punchlist” means an itemized list prepared by the CEC identifying those portions of the Work that have not been completed in accordance with the requirements of this Agreement. CEC shall complete all Work (including all corrections or replacements) indicated by the Punchlist and submit or re-submit a Certificate of Final Completion once so completed or corrected.
- 1.13.** “Services” means all of the labor, supervision, administration and other services described in the Scope of Work or required to complete the Work, including without limitation, engineering, design, fabrication, construction, installation, demolition, testing, technical assistance, delivery of Equipment, if appropriate for the Services rendered, and documentation.
- 1.14.** “Specific Project” or “Project” means the Work defined in the SOW to be performed by CEC.

- 1.15. "Statement of Work (SOW)" means a document prepared and issued by CEC and accepted by the City that defines, among other things, the type, scope, price, and duration of the Work under this Agreement for the Specific Project or Projects.
- 1.16. "Subcontractor" means any person, partnership, corporation, joint venture, or other commercial entity contracting directly with CEC to furnish any part of the Work, or a person, partnership, corporation, joint venture, or other commercial entity contracting with a Subcontractor of CEC to furnish any part of the Work.
- 1.17. "Substantial Completion" means the point at which the entire or designated portion of CEC's Project is sufficiently complete such that CEC can operate or utilize the Specific Project, with only Punchlist items remaining to be completed.
- 1.18. "Work" means all Equipment and Services required of or performed by CEC as described in the SOW and this Agreement.

ARTICLE 2

PAYMENT; OWNERSHIP OF EQUIPMENT

- 2.1 **Payment.** CEC shall begin the Work once it has secured a minimum commitment of \$125,000 for the local cash match, and (b) has secured fully executed Agreements from each of the Bike Share Parties for the Financial Commitments identified in Section H of Appendix A in this Agreement. Payment to CEC will be made on a reimbursement basis and is contingent upon the submittal by CEC of proper documentation to the Bike Share Parties as defined in this Agreement. Payments are due no later than 45 days after submission of invoices and proper documentation to the Bike Share Party from which reimbursement is due. No other payments are authorized under this Agreement.
- 2.2 **Grant Funds.** Once AATA receives a contract from MDOT, an MOU (Memorandum of Understanding) is signed between AATA and CEC, and the local Capital Expenditure match has been spent down for FY2013, Grant Fund reimbursements will be administered by MDOT.
- 2.3 **Program Payment from the City of Ann Arbor.** The City of Ann Arbor agrees to pay up to \$125,000 in FY 2014 for Capital Expenditures and up to \$25,000 in FY2015 for Capital Expenditures pending FY2015 Budget Approval. The City of Ann Arbor's payment will serve as the required 20% local match for the Grant Funds. The City will reimburse CEC 20% of each documented Capital Expenditure as provided in Paragraph 2.1. If necessary, the City and CEC may agree to modifications of items and dollar amounts in Appendix C.
- 2.4 **Ownership of Equipment.** CEC shall be the exclusive and sole owner of all Equipment purchased for the Program.

ARTICLE 3

STANDARDS FOR PERFORMANCE; FINANCIAL OPERATIONS

- 3.1 **Standards.** The Bike Share Parties shall comply with all standards for the Work as set forth in this Agreement.
- 3.2 **Certificate of Completion.** No Milestone Date shall be deemed met and no Specific Project shall be deemed complete without a Certificate of Completion executed by all of the Bike Share Parties.
- 3.3 **Progress Reports.** CEC agrees to comply with all reporting obligations as outlined in this Agreement and its SOW. CEC shall submit quarterly performance reports to the Bike Share Parties at quarterly Bike Share Stakeholder Meetings.

3.4 Submittals. CEC will submit all documents, invoices, and/or notices electronically via email to the Bike Share Party Designated Representatives. Invoices will include supporting documentation from vendors and subcontractors, labor breakdown by labor category, labor rate, labor hours, and total cost in each category along with the timeframe covered. Invoices will include a description of Capital Expenditures and Services, and date(s) of the Services. A list of approved Capital Expenditures and Services approved for reimbursement is listed in Appendix C.

3.5 Schedule of Performance. CEC shall complete all Work and perform all Services on or prior to the Milestone Dates for such completion as set forth in the Project Schedule in Appendix B. Actual delays in the performance of Work or in meeting Milestone Dates shall be reported to the Bike Share Parties' Designated Representatives.

3.6 Force Majeure. If, because of Force Majeure, a party is unable in whole or in part to perform its obligations under this Agreement, or the performance of such obligations shall become impracticable, then the obligations (other than payment) shall be suspended to the extent they cannot be performed because of such Force Majeure and the party shall not be liable any nonperformance or for any loss, damage or delay occasioned by or arising from any event of Force Majeure and the Project Schedule shall be equitably adjusted.

3.7 Compliance with Applicable Law. When performing their Work under this Agreement, the Bike Share Parties agree at all times to comply with all applicable federal, state, and local laws, regulations, and rules including, but not limited to those referenced in this Agreement either specifically by name or by website address ("Laws").

3.8 Books and Records; Fiscal Year. CEC shall maintain complete and accurate books and records of the Program. Such books of account, together with a list of the names and addresses of each Bike Share Party, shall be maintained at all times at CEC's offices and shall be open to reasonable inspection and examination by any Bike Share Party or their duly authorized representatives during reasonable business hours upon reasonable notice to CEC. The Program's fiscal year shall be the calendar year.

3.9 Reports. CEC shall provide to the Bike Share Parties, in the time, manner, and form that CEC determines and accepted by the Bike Share Parties, reports concerning the financial condition and results of operation of the Program and each Bike Share Party's pro rata investment in the Program ("Share"). CEC shall endeavor to furnish to each Bike Share Party within ninety (90) days after the end of each fiscal year or as soon as practical thereafter, an annual report of the business and operations of the Program during such year, together with such information as may be necessary for the preparation of each Bike Share Party's federal and state income or other tax returns. Such annual report shall include a statement of each Bike Share Party's share of income, gain, loss, deduction, and credit. Quarterly reports shall be presented at the Bike Share Stakeholder Group meetings. Such quarterly reports shall include a report of membership, ridership, and maintenance, marketing and outreach activities in the last quarter. At the end of each fiscal year, each Bike Share Party's Share in the Program shall be adjusted so that each Bike Share Party's Share shall equal an amount determined by the following formula:

$$\frac{\text{Aggregate Capital Contributions of Bike Share Party}}{\text{Aggregate Capital Contributions of All Bike Share Parties}} \times 100$$

3.10 Allocations. The Program's net profits, net losses, and other items of income, gain, loss, deduction, and credit shall be allocated among the Bike Share Parties in accordance with the pro rata Share held by each Bike Share Party. Notwithstanding the foregoing, items of income, gain, loss, and deduction with respect to any property contributed to the Program by any Bike Share Party shall be allocated among the Bike Share

Parties so as to take account of any variation between the adjusted basis of such property to the Program for federal income tax purposes and its value in determining a Bike Share Party's Share. If the value of the property is later adjusted, subsequent allocations of income, gain, loss, and deduction with respect to the property shall be made accordingly. The Bike Share Parties intend that the allocations of the Program's Revenues and Expenses shall be applied in a manner consistent with Generally Acceptable Accounting Principles.

3.11 Distributions. CEC may make Program revenue allocations subject to the mutual agreement of the Bike Share Parties, subject first to the reasonable reinvestment requirements of the Program. Distributions may be made only after CEC determines, in its reasonable judgment, that the Program has cash on-hand exceeding the Program's current and anticipated needs (including operating expenses, debt service, acquisitions, and reserves). All distributions shall be made to the Bike Share Parties in accordance with each Bike Share Party's Share. Distributions shall be in cash or property, or both, as CEC determines. No distribution shall be declared or made if, after giving it effect, the Program would not be able to pay its debts as they became due in the usual course of business.

ARTICLE 4

WARRANTY

4.1 Disclaimer of Warranties. NEITHER PARTY MAKES ANY EXPRESS OR IMPLIED REPRESENTATIONS OR WARRANTIES OF ANY KIND WITH RESPECT TO THE SUBJECT MATTER OF THIS AGREEMENT INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY ARISING BY USAGE OF TRADE, COURSE OF DEALING OR COURSE OF PERFORMANCE AND ANY IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE, MERCHANTABILITY, OR NON-INFRINGEMENT.

4.2 Survival. This Article shall survive the termination of this Agreement.

ARTICLE 5

SUBCONTRACTORS; INDEPENDENT CONTRACTOR STATUS

5.1 Subcontractors. Subject to the terms of this Agreement, CEC may utilize Subcontractors to perform portions of the Work.

5.2 Subcontracts. CEC may employ Subcontractors in connection with its performance of the Work, and if so, will advise the Bike Share Parties of the identity of each Subcontractor prior to the commencement of the Work. Subcontractors must agree to comply with all relevant Laws and terms and conditions in this Agreement. CEC will keep the Bike Share Party advised of the performance of its Subcontractors and vendors. No Subcontract shall relieve CEC of its obligations to complete its Work under this Agreement.

5.4 Independent Contractor Status. CEC and any of CEC's Subcontractors shall be independent contractors and not an agent, partner, joint venturer or employee of any Bike Share Party. CEC and any of CEC's Subcontractors shall be solely responsible for the terms and conditions of employment for its employees working pursuant to this Agreement or any SOW for Specific Projects, including, but not limited to, their hire, supervision, transfer, termination, wages, withholdings, benefits, insurance, and workers' compensation. Nothing in this Agreement or any SOW shall be construed or interpreted to mean that any Bike Share Party is a co-employer, joint employer, or a single employer with CEC or any Subcontractor (regardless of tier). In the event CEC or any of CEC's Subcontractors is a party to a collective bargaining agreement, or any other labor agreement or contract covering its employees, CEC shall be solely responsible for all obligations under those agreements.

ARTICLE 6

TERM AND TERMINATION

6.1 Term. The initial term of this Agreement is three (3) years from the Effective Date (“initial Term”).

6.2 Termination for Breach. This Agreement may be terminated immediately if any Bike Share Party breaches its material obligations under this Agreement and fails to cure such breach within thirty (30) days after written notice of such breach; provided that, such cure period shall be extended for such time is reasonably necessary to cure the breach if the breach is capable of being cured, and the breaching party promptly commences to cure its breach and diligently and continually prosecutes measures which are reasonably calculated to cure such breach. Termination or suspension of performance is the non-breaching Bike Share Party’s sole remedy for breach of this Agreement.

6.3 Termination for Financial Infeasibility. This Agreement shall terminate automatically during the Initial Term or any Successive Term upon the occurrence of one or more of the following:

- a. Failure by any Bike Share Party to meet its financial obligations under this Agreement;
- b. All Bike Share Parties agree that the Program is financially infeasible, and therefore, it is in the best interests of all parties to terminate the Program.

6.4 Allocation of Assets on Termination. Upon termination of the Program, CEC shall liquidate and terminate Program’s operations as soon as practical. Any profits and losses during liquidation of the Program shall be allocated as set forth in 3.10 of this Agreement.

ARTICLE 7

NOTICE

7.1 Notice. Unless specifically provided otherwise in this Agreement, any notice or other communication provided for in this Agreement or any notice which either party may desire to give to the other shall be in writing and shall be deemed to have been properly given if and when received if delivered by hand, including delivery by commercial courier or delivery service, or United States mail, either U.S. Express Mail, registered mail or certified mail, with all postage fully prepaid, in each case addressed to the Designated Representative of each party at the following addresses:

If to CEC: Clean Energy Coalition
Attn: Sean Reed
924 North Main Street, Suite 2
Ann Arbor, MI 48104
Phone: 734-585-5720 ext. 31

If to City: City of Ann Arbor
Attn: Eli Cooper
301 E. Huron St., PO Box 8647
Ann Arbor, MI 48107-8647
Phone: 734.794.6430.ext 43710

or at such other address as either party shall designate by written notice to the other. Either party may change its address by giving notice of such change in accordance with this Article.

7.2 Survival. This Article shall survive the termination of this Agreement.

ARTICLE 8

DISPUTE RESOLUTION

8.1 Step Negotiations. The parties shall attempt in good faith to resolve promptly by negotiation any disputes, claims, or counterclaims (“Dispute”) arising out of or relating to this Agreement. CEC agrees that it shall request and require each and all of its insurers, suppliers, Subcontractors (regardless of tier), employees, agents, and representatives, to submit, upon CEC’s request, any Disputes to the Dispute Resolution procedures specified herein. Any party may give the other party written notice of any Dispute not resolved in the normal course of business. Executives of both parties one level above the Specific Project personnel who have previously been involved in the Dispute (“Executives”) shall meet at a mutually acceptable time and place within ten (10) days after receipt of such notice by the receiving party, and thereafter, as often as they reasonably deem necessary, to exchange relevant information and to attempt to resolve the Dispute. If the matter has not been resolved within thirty (30) days from the referral of the Dispute to the Executives, or if no meeting of the Executives has taken place within fifteen (15) days after such referral, either party may initiate mediation as provided herein. If a party intends to be accompanied at a meeting by an attorney, the other party shall be given at least three (3) days notice of such intention and may also be accompanied by an attorney. From the date a notice of Dispute is received by the receiving party, all applicable statutes of limitations and defenses based upon the passage of time shall be tolled while the procedures specified herein are pending. The parties will take such action, if any, required to effectuate such tolling. All negotiations pursuant to this clause are confidential and shall be treated as compromise and settlement negotiations for purposes of the Federal Rules of Evidence and any applicable state rules of evidence.

8.3 Arbitration or Litigation. All Disputes not resolved by negotiation may be resolved by arbitration if agreed to by the parties, or litigation.

8.4 Work to Continue. In the case of any Dispute (including any Dispute which is or may be the subject of negotiation), CEC shall continue to perform the Work pending final determination of the Dispute, and the City shall continue to make payments to CEC in accordance with the Agreement.

8.5 Survival. This Article shall survive the termination of this Agreement.

ARTICLE 9

MISCELLANEOUS

9.1 Entire Agreement; Governing Law; Amendment. This Agreement contains the entire agreement between the parties and cancels and supersedes any previous understanding or agreement, whether written or oral. Amendments must be in writing and signed by an authorized representative of each party. This Agreement shall be governed by the laws of the State of Michigan without regard to its conflict of laws principles. The parties irrevocably consent that jurisdiction and venue shall be appropriate in a Michigan court should any legal dispute arise among or between them in connection with this Agreement. No purported oral modification, waiver, or rescission of the Agreement by an employee or agent of either party shall operate as a modification, waiver, or rescission of any of the provisions of the Agreement. No course of prior dealing, usage of trade, and course of performance shall be used to modify, supplement, or explain any terms of the Agreement. No waiver of any provision of the Agreement shall be binding on either party unless set forth in a writing signed by each party’s Designated Representative.

9.2 Counterparts; Assignment. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. This Agreement is binding on the Bike Share Parties and their respective successors and assigns. This Agreement may not be assigned by any party without the prior written consent of the other party(ies).

9.3 Captions. The captions and headings used in this Agreement and in the Attachments are for the convenience of the parties and shall not be used in construing the meaning of this Agreement.

9.4 No Third-Party Beneficiaries. No provision of the Agreement is intended or shall be construed to be for the benefit of any third party (other than a joint owner of a plant or facility, whether as a tenant in common or otherwise, for which the Work is intended).

9.5 Limitation On Liability. THE LIABILITY OF EITHER PARTY FOR ANY CLAIM OR ACTION, WHETHER IN CONTRACT OR TORT OR PURSUANT TO STATUTE OR UNDER ANY OTHER LEGAL THEORY (INCLUDING, WITHOUT LIMITATION, NEGLIGENCE AND STRICT LIABILITY), RELATED TO ANY LIABILITIES OF ANY KIND WHATSOEVER, (INCLUDING, WITHOUT LIMITATION, LOSS OR DAMAGE ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR ITS SUBJECT MATTER, THE RELATIONSHIP CREATED BY THIS AGREEMENT, ANY SERVICES OR OTHER CONDUCT OR FAILURE TO ACT IN CONNECTION WITH THIS AGREEMENT), SHALL BE LIMITED TO ACTUAL, DIRECT DAMAGES. UNDER NO CIRCUMSTANCES SHALL EITHER PARTY BE LIABLE TO THE OTHER OR THAT PARTY'S OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, REPRESENTATIVES, SUBSIDIARIES, SUCCESSORS, OR ASSIGNS FOR INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES OF A COMMERCIAL NATURE SUCH AS, BUT NOT LIMITED TO, LOST PROFITS, LOST BUSINESS, OR LOSS OF USE OF EQUIPMENT OR FACILITIES. THIS LIMITATION OF LIABILITY SHALL NOT APPLY TO LIABILITY FOR DEATH OR PERSONAL INJURY TO THE EXTENT APPLICABLE LAW PROHIBITS SUCH LIMITATION.

9.6 Limitations on Action. Any legal action against either party to this Agreement must be filed with the appropriate judicial jurisdiction within two (2) years after the cause of action first arose.

9.7 Nonwaiver; Severability. If a party breaches this Agreement, the other party's failure to enforce any right under this Agreement will not be deemed a waiver of any right under this Agreement or at law. If, for any reason, any terms of this Agreement are deemed unenforceable or inoperative by any court, then the remaining terms of this Agreement shall remain in effect.

9.8 Debarment. CEC is not currently debarred or suspended from doing business with the federal government nor delinquent in debt to the United States as defined in OMB Circular A-129.

9.9 Survival. This Article shall survive the termination of this Agreement.

IN WITNESS WHEREOF, the parties mutually agree to the terms of this Agreement as of the date first written above.

CLEAN ENERGY COALITION

CITY OF ANN ARBOR

Sean Reed, Executive Director

John Hieftje, Mayor

Jacqueline Beaudry, City Clerk

Approved as to Substance

Steven D. Powers, City Administrator

Craig Hupy, Public Services Administrator

Approved as to Form and Content

Stephen K. Postema, City Attorney