

**MEMORANDUM OF UNDERSTANDING FOR ON-SITE IMPROVEMENTS
AT ORANGE CENTER SCHOOL**

This Agreement is made and entered into effective the ____ day of _____ 2017, by and between the CITY OF FRESNO, a California municipal corporation (City) and ORANGE CENTER SCHOOL DISTRICT (District) to establish a framework for the District to pay for on-site improvements at Orange Center School.

RECITALS

WHEREAS, The City obtained funding for the on-site improvements related to safe drinking water and disability access (Project); and

WHEREAS, the funding for the Project is provided by the California State Water Resources Control Board (SWRCB); and

WHEREAS, The SWRCB has agreed to allow the City to act as a funding pass through to provide the District the funding to complete the Project; and

WHEREAS, the District will submit monthly invoices to the City; and

WHEREAS, the City will reimburse the District the funds for the Project and the City will submit the invoices to the SWRCB for reimbursement; and

WHEREAS, the City will keep the invoiced amounts received from the SWRCB.

NOW, THEREFORE, in consideration of the above recitals, which recitals are contractual in nature, the mutual covenants herein contained and such other and further consideration as is hereby acknowledged, the parties agree as follows:

1. PARTICIPATING AGENCIES AND DESIGNATED CONTACT PERSONS

City Representative: [Name]
[Title]
[Address]
[City, State, Zip]
Tel:
Fax:
E-mail:

District Representative: [Name]
[Title]
[Address]
[City, State, Zip]
Tel:
Fax:
E-mail:

2. ROLES, CONTRIBUTIONS, AND RESPONSIBILITIES

The City shall:

- a. Act as a “pass through” for the State Revolving Funds loan, for the on-site improvements (Improvements) at the District.
- b. Provide assistance to the District on the selection of a design engineer, project manager and contractor (Contractors).
- c. Pay up to \$300,000 to the District to pay the Contractors’ monthly invoices.
- d. Submit monthly invoices from the Contractors to the SWRCB.
- e. Receive reimbursement for the monthly invoiced funds from the SWRCB.

The District shall:

- a. Hire the Contractors to complete the on-site improvements.
- b. Render monthly invoices to the City for all work performed by the Contractors.
- c. Accept payment from the City for the Contractors’ monthly invoices submitted to the City.
- d. Use a competitive selection process or emergency procurement process to retain the Contractors to design, manage and perform the onsite improvements.
- e. Require the selected Contractors to coordinate with the California Department of the State Architect in defining obligational limits of project ADA components prior to advertising for construction.
- f. Require the Contractors to prepare construction documents suitable for competitively bidding the District on-site improvements project. The construction documents may to include Bid Alternate Items to allow District to remove project elements in order to stay within the funding available from the SWRCB.
- g. Comply with all State Revolving Fund loan requirements, some of the requirements are included in State Revolving Fund Loan No. 1000276-001C, attached as **Exhibit A**.
- h. Require an on-site system water quality test, which must be approved by the City and SWRCB.

3. EFFECTIVENESS, DURATION, AND TERMINATION

This Agreement shall be effective upon its complete execution by the parties’ authorized agents and shall remain in effect through December 31, 2018, or completion of the Project, whichever occurs first. Either party may at any time terminate this Agreement with cause upon written notice to the other party following the other party’s failure to reasonably cure an event of non-performance hereunder following thirty days written notice thereof. Termination shall be effective as of the date specified in said notice of termination. Upon termination or expiration of this Agreement, the District shall pay City any outstanding loaned funds not reimbursed by the SWRCB.

4. COMPLIANCE WITH GOVERNING LAW

Each party shall comply with all federal, state and local laws, rules and regulations in its pursuit hereof. No party in its performance of this Agreement shall employ

discriminatory practices on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, sexual orientation, ethnicity, status as a disabled veteran, or veteran of the Vietnam era.

5. CAPACITY OF THE PARTIES

Each party is acting in an independent capacity. Nothing in this Agreement and nothing in the course of dealings between the parties hereunder shall be deemed to create any fiduciary relationship, trust, partnership, joint venture, agency, or employment relationship, jointly and severally.

In addition and without limitation, each party shall be solely responsible for all matters relating to payment of its employees, including, but not limited to, compliance with applicable social security withholding, workers' compensation insurance, benefits and all other regulations governing such matters. Personnel supplied by City will not for any purpose be considered employees or agents of the District. The City assumes full responsibility for the actions of such personnel while they are performing services pursuant to this Agreement, and shall be solely responsible for their supervision, daily direction and control, payment of salary (including withholding of income taxes and social security), disability benefits and the like, as applicable. Conversely, personnel supplied by the District will not for any purpose be considered employees or agents of the City. The District assumes full responsibility for the actions of such personnel while they are performing services pursuant to this Agreement, and shall be solely responsible for their supervision, daily direction and control, payment of salary (including withholding of income taxes and social security), disability benefits and the like, as applicable.

The City and District agree and acknowledge that their relationship is strictly and solely that of an independent contractor to each other. The City's employees and/or agents are not entitled to any employee benefits or insurance, including without limitation any health care, worker's compensation, unemployment or disability benefits, to be provided by District. The District agrees and acknowledges that its employees and/or agents are not entitled to any employee benefits or insurance, including without limitation any health care, worker's compensation, unemployment or disability benefits, to be provided by the City.

The parties further agree and acknowledge that each party is solely responsible for determining the method and means by which it will fulfill its obligations hereunder. Each shall be solely responsible for payment of all sales, use, or other taxes assessed against or associated with the performance of each party's respective obligations or on the exercise of their rights under this Agreement, including without limitation income, payroll or employment-related taxes and payments.

Neither party shall engage any person or entity to serve in any capacity, or incur any expense or obligation on behalf of the other without the prior written consent of both parties.

6. INDEMNIFICATION AND INSURANCE

To the furthest extent allowed by law, District shall indemnify, hold harmless and defend the California State Water Resources Control Board and City of Fresno and each of their officers, officials, employees, agents, and authorized volunteers from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort or strict liability, including but not limited to personal injury, death at any time and property damage) incurred by SWRCB or City, District or any other person, and from any and all claims, demands and actions in law or equity (including attorney's fees and litigation expenses), arising or alleged to have arisen directly or indirectly out of the performance of this Agreement. District's obligations under the preceding sentence shall apply to any negligence of City or any of its officers, officials, employees, agents or authorized volunteers, but shall not apply to any loss, liability, fines, penalties, forfeitures, costs, or damages caused solely by the gross negligence, or by the willful misconduct, of City or any of its officers, officials, employees, agents, or authorized volunteers.

If District should subcontract all or any portion of the work to be performed under this Agreement, the District shall require each subcontractor to indemnify, hold harmless and defend California State Water Resources Control Board and City of Fresno and each of their officers, officials, employees, agents, and authorized volunteers in accordance with the terms of the preceding paragraph.

The two preceding paragraphs shall survive termination or expiration of this Agreement.

Throughout the life of this Agreement, the District shall pay for and maintain in full force and effect all policies of insurance required hereunder with an insurance company(ies) either (i) admitted by the California Insurance Commissioner to do business in the State of California and rated not less than "A- VI" in Best's Insurance Rating Guide, or (ii) authorized by City's Risk Manager. The required policies of insurance as stated in **Exhibit B** shall maintain limits of liability of not less than those amounts stated therein. However, the insurance limits available to the California State Water Resources Control Board and City of Fresno and each of their officers, officials, employees, agents, and authorized volunteers as additional insureds, shall be the greater of the minimum limits specified therein or the full limit of any insurance proceeds to the named insured.

The District shall be responsible for payment of any deductibles contained in any insurance policies required hereunder and the District shall also be responsible for payment of any self-insured retentions.

The above described policies of insurance shall be endorsed to provide an unrestricted thirty calendar day written notice in favor of the City of policy cancellation of coverage, except for the Workers' Compensation policy which shall provide a ten calendar day written notice of such cancellation of coverage. In the event any policies are due to expire during the term of this Agreement, the District shall provide a new certificate

evidencing renewal of such policy not less than fifteen calendar days prior to the expiration date of the expiring policy(ies). Upon issuance by the insurer, broker, or agent of a notice of cancellation in coverage, the District shall file with the City a new certificate and all applicable endorsements for such policy(ies).

The General Liability and Automobile Liability insurance policies shall be written on an occurrence form and shall name California State Water Resources Board and City and each of their officers, officials, agents, employees and volunteers as an additional insured. Such policy(ies) of insurance shall be endorsed so the District's insurance shall be primary and no contribution shall be required of SWRCB or City. Any Workers' Compensation insurance policy shall contain a waiver of subrogation as to California State Water Resources Board and City and each of their officers, officials, agents, employees and volunteers. District shall have furnished City with the certificate(s) and applicable endorsements for ALL required insurance prior to City's execution of this Agreement. District shall furnish City with copies of the actual policies upon the request of City's Risk Manager and this requirement shall survive termination or expiration of this Agreement.

The fact that insurance is obtained by the District shall not be deemed to release or diminish the liability of the District or its subcontractors, including, without limitation, liability under the indemnity provisions of this Agreement. The duty to indemnify California State Water Resources Control Board and City of Fresno and each of their officers, officials, employees, agents, and authorized volunteers shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by the District. Approval or purchase of any insurance contracts or policies shall in no way relieve from liability nor limit the liability of the District.

If at any time during the life of the Agreement or any extension, the District fails to maintain the required insurance in full force and effect, all work under this Agreement shall be discontinued immediately until notice is received by City that the required insurance has been restored to full force and effect and that the premiums therefore have been paid for a period satisfactory to City. Any failure to maintain the required insurance shall be sufficient cause for City to terminate this Agreement.

If the District should subcontract all or any portion of the services to be performed under this Agreement, District shall require each subcontractor to provide insurance protection in favor of California State Water Resources Control Board and City of Fresno and each of their officers, officials, employees, agents, and authorized volunteers in accordance with the terms of this section, except that any required certificates and applicable endorsements shall be on file with the District and City prior to the commencement of any services by the subcontractor.

7. ATTORNEY'S FEES

If a party is required to commence any proceeding or legal action to enforce or interpret any term, covenant or condition of this Agreement, the prevailing party in such

proceeding or action shall be entitled to recover from the other party its/their reasonable attorney's fees and legal expenses.

8. PRECEDENCE OF DOCUMENTS

In the event of any conflict between the body of this Agreement and any exhibit/attachment hereto, the terms and conditions of the body of this Agreement shall control and take precedence over terms and conditions expressed within the exhibit/attachment. Furthermore, any terms or conditions contained within any exhibit/attachment hereto which purport to modify the allocation of responsibility or liability between the parties, provided for within the body of this Agreement, shall be null and void.

9. NOTICES

Any notice required or intended to be given to a party under the terms of this Agreement shall be in writing and shall be deemed to be duly delivered the earlier of (a) actual receipt by personal delivery to the representative (as defined herein), as the case may be, or in lieu of such personal service, by way of Federal Express or other similar courier addressed to such party at the appropriate address set forth herein, (b) the date of receipt by facsimile to the City Representative or the FSSL Representative, or (c) three business days after the date of mailing (postage pre-paid return receipt requested). Either party may change its address for the purpose of this Paragraph by giving written notice of such change to the other.

10. BINDING

Once this Agreement is signed by all the parties, it shall be binding upon, and shall inure to the benefit of, the parties, and each party's respective heirs, successors, assigns, transferees, agents, servants, employees and representatives.

11. ASSIGNMENT

There shall be no assignment by any party of its rights or obligations under this Agreement without the prior written approval of the other party. Any attempted assignment by a party, its successors or assigns, shall be null and void unless approved in writing by the other party.

12. WAIVER

The waiver by any party of a breach by the other of any provision of this Agreement shall not constitute a continuing waiver or a waiver of any subsequent breach of either the same or a different provision of this Agreement.

No provisions of this Agreement may be waived unless in writing and approved by and signed by all parties to this Agreement. Waiver of any one provision herein shall not be deemed to be a waiver of any other provision herein.

No action or omission by either party shall constitute a breach of this Agreement unless the injured party first notifies the other party of the purported breach in writing setting forth the alleged breach or default and said party does not cure the same within a reasonable period of time. The payment of any fee or compensation or performance of any obligation hereunder by either party shall not constitute a waiver of any breach by the other party or of any of the rights and remedies which either party may have as a result of such breach. No waiver by either party of breach of the Agreement shall be implied from any failure by the other party to take action on account of such breach if such breach persists or is repeated. Waivers by either party of any covenant, term or condition contained herein shall not be construed as a waiver of any subsequent breach of the same covenant, term or condition.

13. GOVERNING LAW AND VENUE

This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of California. Venue for purposes of the filing of any action regarding the enforcement or interpretation of this Agreement and any rights and duties hereunder shall be Fresno, California.

14. HEADINGS

The section headings in this Agreement are for convenience and reference only and shall not be construed or held in any way to explain, modify or add to the interpretation or meaning of the provisions of this Agreement.

15. SEVERABILITY

The provisions of this Agreement are severable. The invalidity or unenforceability of any one provision in this Agreement shall not affect the other provisions.

16. INTERPRETATION

The parties acknowledge that this Agreement in its final form is the result of the combined efforts of the parties and that, should any provision of this Agreement be found to be ambiguous in any way, such ambiguity shall not be resolved by construing this Agreement in favor or against any party, but rather by construing the terms in accordance with their generally accepted meaning.

17. ENTIRE AGREEMENT

It is mutually understood and agreed that the foregoing along with the attached exhibits constitutes the entire Agreement between the parties. Any modifications or amendments to this Agreement must be in writing signed by an authorized agent of each party.

THE REST OF THIS PAGE IS INTENTIONALLY LEFT BLANK.
SIGNATURES APPEAR ON THE NEXT PAGE.

IN WITNESS THEREOF, the parties have caused their authorized agents to execute this Agreement:

CITY OF FRESNO,
A California municipal corporation

ORANGE CENTER SCHOOL DISTRICT,

By: _____
Wilma Quan-Schechter, City Manager

By: _____

Name: _____

APPROVED AS TO FORM:
DOUGLAS T. SLOAN
City Attorney

Title: _____

By: _____
Brandon M. Collet Date
Deputy City Attorney

ATTEST:
YVONNE SPENCE, CMC
City Clerk

By: _____
Deputy

Attachment: Exhibit A - State Revolving Fund Loan No. 1000276-001C
Exhibit B - Insurance Requirements

EXHIBIT A

EXHIBIT B

Agreement Between City of Fresno and Orange Center School District

MINIMUM SCOPE OF INSURANCE

Coverage shall be at least as broad as:

1. The most current version of Insurance Services Office (ISO) Commercial General Liability Coverage Form CG 00 01, providing liability coverage arising out of your business operations. The Commercial General Liability policy shall be written on an occurrence form and shall provide coverage for "bodily injury," "property damage" and "personal and advertising injury" with coverage for premises and operations (including the use of owned and non-owned equipment), products and completed operations, and contractual liability (including, without limitation, indemnity obligations under the Agreement) with limits of liability not less than those set forth under "Minimum Limits of Insurance."
2. The most current version of ISO *Commercial Auto Coverage Form CA 00 01, providing liability coverage arising out of the ownership, maintenance or use of automobiles in the course of your business operations. The Automobile Policy shall be written on an occurrence form and shall provide coverage for all owned, hired, and non-owned automobiles or other licensed vehicles (Code 1- Any Auto). If personal automobile coverage is used, the City, its officers, officials, employees, agents and volunteers are to be listed as additional insureds.
3. Workers' Compensation insurance as required by the State of California and Employer's Liability Insurance.

MINIMUM LIMITS OF INSURANCE

District, or any party the District subcontracts with, shall maintain limits of liability of not less than those set forth below. However, insurance limits available to California State Water Resources Control Board and City of Fresno and each of their officers, officials, employees, agents, and authorized volunteers as additional insureds, shall be the greater of the minimum limits specified herein or the full limit of any insurance proceeds available to the named insured:

1. **COMMERCIAL GENERAL LIABILITY:**
 - (i) \$1,000,000 per occurrence for bodily injury and property damage;
 - (ii) \$1,000,000 per occurrence for personal and advertising injury;
 - (iii) \$2,000,000 aggregate for products and completed operations; and,
 - (iv) \$2,000,000 general aggregate applying separately to the work performed under the Agreement.

2. **COMMERCIAL AUTOMOBILE LIABILITY:**
\$1,000,000 per accident for bodily injury and property damage.
3. **WORKERS' COMPENSATION INSURANCE** as required by the State of California with statutory limits.
4. **EMPLOYER'S LIABILITY:**
 - (i) \$1,000,000 each accident for bodily injury;
 - (ii) \$1,000,000 disease each employee; and,
 - (iii) \$1,000,000 disease policy limit.

UMBRELLA OR EXCESS INSURANCE

In the event District purchases an Umbrella or Excess insurance policy(ies) to meet the "Minimum Limits of Insurance," this insurance policy(ies) shall "follow form" and afford no less coverage than the primary insurance policy(ies). In addition, such Umbrella or Excess insurance policy(ies) shall also apply on a primary and non-contributory basis for the benefit of the California State Water Resources Control Board and City of Fresno and each of their officers, officials, employees, agents, and authorized volunteers.

DEDUCTIBLES AND SELF-INSURED RETENTIONS

District shall be responsible for payment of any deductibles contained in any insurance policy(ies) required herein and District shall also be responsible for payment of any self-insured retentions. Any deductibles or self-insured retentions must be declared on the Certificate of Insurance, and approved by, the City's Risk Manager, or designee. At the option of the City's Risk Manager, or designee, either:

- (i) The insurer shall reduce or eliminate such deductibles or self-insured retentions as respects California State Water Resources Control Board and City of Fresno and each of their officers, officials, employees, agents, and authorized volunteers; or
- (ii) District shall provide a financial guarantee, satisfactory to City's Risk Manager, or designee, guaranteeing payment of losses and related investigations, claim administration and defense expenses. At no time shall SWRCB or City be responsible for the payment of any deductibles or self-insured retentions.

OTHER INSURANCE PROVISIONS/ENDORSEMENTS

The General Liability and Automobile Liability insurance policies are to contain, or be endorsed to contain, the following provisions:

1. California State Water Resources Control Board and City of Fresno and each of their officers, officials, employees, agents, and authorized volunteers are to be covered as additional insureds. District shall establish additional insured status for the SWRCB and City and for all ongoing and completed operations by use of ISO Form CG 20 10 11 85 or both CG 20 10 10 01 and CG 20 37 10 01 or by an executed manuscript

insurance company endorsement providing additional insured status as broad as that contained in ISO Form CG 20 10 11 85.

2. The coverage shall contain no special limitations on the scope of protection afforded to California State Water Resources Control Board and City of Fresno and each of their officers, officials, employees, agents, and authorized volunteers. Any available insurance proceeds in excess of the specified minimum limits and coverage shall be available to the Additional Insured.
3. For any claims related to this Agreement, District's insurance coverage shall be primary insurance with respect to the California State Water Resources Control Board and City of Fresno and each of their officers, officials, employees, agents, and authorized volunteers. Any insurance or self-insurance maintained by the California State Water Resources Control Board and City of Fresno and each of their officers, officials, employees, agents, and authorized volunteers shall be excess of District's insurance and shall not contribute with it. District shall establish primary and non-contributory status by using ISO Form CG 20 01 04 13 or by an executed manuscript insurance company endorsement that provides primary and non-contributory status as broad as that contained in ISO Form CG 20 01 04 13.

The Workers' Compensation insurance policy is to contain, or be endorsed to contain, the following provision: District and its insurer shall waive any right of subrogation against California State Water Resources Control Board and City of Fresno and each of their officers, officials, employees, agents, and authorized volunteers.

All policies of insurance required herein shall be endorsed to provide that the coverage shall not be cancelled, non-renewed, reduced in coverage or in limits except after thirty calendar days written notice by certified mail, return receipt requested, has been given to City. District is also responsible for providing written notice to the City under the same terms and conditions. Upon issuance by the insurer, broker, or agent of a notice of cancellation, non-renewal, or reduction in coverage or in limits, District shall furnish City with a new certificate and applicable endorsements for such policy(ies). In the event any policy is due to expire during the work to be performed for City, District shall provide a new certificate, and applicable endorsements, evidencing renewal of such policy not less than fifteen calendar days prior to the expiration date of the expiring policy.

VERIFICATION OF COVERAGE

District shall furnish City with all certificate(s) and **applicable endorsements** effecting coverage required hereunder. All certificates and **applicable endorsements** are to be received and approved by the City's Risk Manager, or designee prior to City's execution of the Agreement and before work commences. All non-ISO endorsements amending policy coverage shall be executed by a licensed and authorized agent or broker. Upon request of City, District shall immediately furnish City with a complete copy of any

insurance policy required under this Agreement, including all endorsements, with said copy certified by the underwriter to be a true and correct copy of the original policy. This requirement shall survive expiration or termination of this Agreement.