

RESOLUTION NO. 5012

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SOLEDAD APPROVING AN AGREEMENT FOR UTILITY BILL AUDITING SERVICES WITH UTILITY COST MANGEMENT LLC. AND AUTHORIZING THE CITY MANAGER TO EXECUTE SAID AGREEMENT ON BEHALF OF THE CITY OF SOLEDAD FOR THE EVALUATION AND RECOMMENDATIONS REGARDING ELECTRIC UTILITY BILLS FOR THE CITY'S WATER RECLAMATION FACILITY AND MUNICIPAL WATER WELL FACILITIES

WHEREAS, the City's FY 2013-2014 electric bills for water and wastewater facilities totaled \$828,010; and

WHEREAS, the City has a need to have a specialty consultant review PG&E's electric rate plans they have the City on and associated rates currently being charged, as well as alternative rate plans available, to make sure the City is on the best plan available from PG&E for industrial accounts; and

WHEREAS, during this current FY 2014-2015 the City will be benefitting from completion of three energy savings project; and

WHEREAS, PG&E has rate increases applied for to the Public Utility Commission that will continue to raise rates each year; and

WHEREAS, in addition to the energy savings projects in progress, the City will benefit from expert evaluation, analyses and recommendations regarding plans, tariffs, times of use and energy shaving possibly available to the City; and

WHEREAS, Utility Cost Management, LLC (UCM) has performed this service for 32 other California Cities and dozens of other agencies and utility districts; and

WHEREAS, UCM receives no compensation unless clients receive refunds or savings as a direct result of their work and UCM is never paid until after clients receive refunds or savings, thus ensuring that there cannot be any out-of-pocket costs associated with their services; and

WHEREAS, Staff is recommending that the Council approve and authorize the City Manager to execute an Agreement with UCM; and

NOW THEREFORE, BE IT HEREBY RESOLVED, by the City Council of the City of Soledad that the Agreement between the City and UCM, a copy of which is attached hereto as Exhibit "A" and by reference incorporated herein, is hereby approved and the City Manager is hereby authorized and directed to execute the same on behalf of the City of Soledad.


PASSED AND ADOPTED by the City Council of the City of Soledad at a regular meeting duly held on the 1st day of October, 2014 by the following vote:

AYES, and in favor thereof, Councilmembers: Christopher K. Bourke, Richard J. Perez, Mayor Pro Tem Alejandro Chavez and Mayor Fred J. Ledesma

NOES, Councilmembers: None

ABSTAIN, Councilmembers: None.

ABSENT, Councilmembers: Patricia D. Stephens



FRED J. LEDESMA, Mayor

ATTEST:



ADELA P. GONZALEZ, City Clerk

**AGREEMENT TO PROVIDE
UTILITY BILL AUDITING SERVICE**

This agreement is made by and between Utility Cost Management LLC ("UCM") and the entity signing below ("Client") as follows:

1. **Applicable to Client's Utility Accounts.** Unless otherwise stated in an addendum initialed by both parties, this Agreement will apply to all water, sewer, garbage, gas and electricity accounts (and any related utility user taxes, other taxes, assessments, surcharges or fees) with respect to which Client:
 - (a) is receiving utility service as of the Effective Date (as defined below),
 - (b) has received utility service within three years prior to the Effective Date,
 - (c) receives utility service within one year after the Effective Date, or
 - (d) has permitted or authorized UCM to obtain a copy of the utility bill.The water, sewer, garbage, gas and electric accounts described in this paragraph are hereinafter referred to as "Utility Accounts". The "Effective Date", as that term is used above, is the first day of the calendar month after both UCM and Client have signed this Agreement.
2. **Client to Provide Utility Bills.** On or promptly after Client's execution of this Agreement, Client will provide UCM with a copy of at least one month's utility bills for all of Client's Utility Accounts.
3. **UCM Authorized to Obtain Information on Utility Accounts.** UCM is hereby authorized to obtain and review information relating to the Utility Accounts. If site visits are necessary, UCM will first obtain proper authorization.
4. **UCM's Findings Letter.** UCM will use its best efforts to identify the basis for any refunds, credits or Future Savings (as defined below) on Client's Utility Accounts. UCM will send one or more a "Findings Letters" to Client that generally sets forth the basis for any refunds, credits or Future Savings identified by UCM. UCM may, from time to time, supplement or amend the Findings Letter.
5. **Steps to Obtain Refunds or Savings.** UCM is authorized by Client to take steps to obtain the refunds, credits or Future Savings identified in the Findings Letter. Such steps may include, but are not limited to, communicating, negotiating and dealing with utility providers (or, in the case of utility user taxes or other governmental charges, the appropriate government entity), and seeking relief from the California Public Utilities Commission in a complaint proceeding or other proceeding.
6. **Cooperation By Client.** Client will cooperate with UCM, as reasonable, in UCM's efforts to carry out the purposes and intent of this Agreement. Such cooperation will include, but not be limited to, providing information upon request by UCM concerning Client's utility expenditures, utility service and operations.
7. **UCM's Compensation.**

UCM's compensation will consist of the amounts set forth in both (a) and (b) below.

- (a) **Refunds or Credits.** If Client receives a refund or credit that was identified in the Findings Letter, then Client will pay to UCM 50% of the amount refunded or credited. The amount of the refund or credit for this purpose will include all amounts refunded or credited (including any portion attributable to interest) for any overcharges that were incurred by Client prior to the date that the overcharges no longer appeared on the Client's utility bill. Payment of UCM's 50% compensation is due within 30 days of the date UCM mails an invoice to Client.
- (b) **Future Savings.** If Client obtains Future Savings that were identified in the Findings Letter, then Client will pay UCM 50% of such Future Savings that accrue during a Three-Year Savings Period. "Future Savings" is the amount by which Client's charges on its Utility Accounts are reduced as a result of a change in the billing rate, calculation, method or procedure. Future Savings will be calculated as the difference between the amount Client was billed on its Utility Accounts during the Three-Year Savings Period, and the amount that it would have been billed on its Utility Accounts during the Three-Year Savings Period if there had been no change in its billing rate, calculation, method or procedure. The Three-Year Savings Period begins on the date that the change in the billing rate, calculation, method or procedure is first reflected on Client's utility bill, and ends three years thereafter. UCM will

submit invoices periodically to Client for payment based on the Future Savings as they accrue. The invoices will verify (a) that Future Savings have actually been realized by Client, and (b) the amount of such Future Savings. Payment of UCM's invoices is due within 30 days of the date the invoices are mailed to Client. The compensation under this subparagraph will not include compensation for Future Savings that are: (a) the result of a reduction in the amount of utility usage by Client, or (b) the result of Client's utilization of a different utility supplier that provides lower cost utility service.

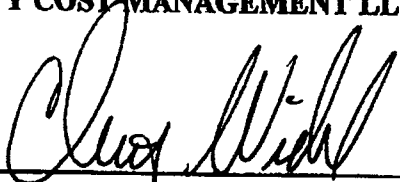
- (c) **Client's Prior Knowledge of Basis For Refund, Credit, or Future Savings.** Client is not obligated to pay UCM pursuant to this paragraph for any refund, credit or Future Savings received by Client for which Client had submitted to the utility provider a written claim prior to the date of UCM's Findings Letter. However, Client is obligated to pay UCM pursuant to this paragraph whether or not Client knew of the basis for the refund, credit or Future Savings prior to the date of UCM's Findings Letter, and whether or not Client's receipt of the refund, credit or Future Savings was the result of steps taken by UCM or others, including attorneys.
8. **Termination; Effect.** This Agreement will terminate 7 days after either party faxes a written notice of termination to the other party. Upon termination, UCM will cease all work on behalf of Client. However, if termination occurs after UCM has sent its Findings Letter to Client, then Client will remain obligated to pay UCM, pursuant to this Agreement, for any refunds, credits or Future Savings that were identified in the Findings Letter and that are thereafter obtained by Client. UCM may continue to obtain and review Client's utility billing and other information following termination in order to periodically verify whether Client has obtained a refund, credit or Future Savings that was identified in the Findings Letter.
9. **If Client Is Not Utility Customer.** By providing a copy of any utility bill to UCM, Client is thereby agreeing that the Utility Account represented by such bill will be governed by this Agreement, regardless of whether or not Client is the Utility Customer with respect to such Utility Account. For purposes of this Agreement, the Utility Customer is the entity that (i) is named on the Utility Account as reflected by the utility bill, (ii) receives the utility service on the Utility Account, (iii) pays for or is liable for the charges on the Utility Account, or (iv) is the owner of the property at which the utility service is provided on the Utility Account. If Client is not the Utility Customer for a Utility Account then, with respect to that Utility Account, Client represents that it is signing this Agreement in its capacity as agent for the Utility Customer, and as such is authorized to legally bind the Utility Customer to the terms of this Agreement. Client further agrees that the terms of this Agreement will be equally binding on both Client and Customer, that all references in this Agreement to "Client" will also be deemed to be references to the Utility Customer, and that Client and the Utility Customer will be jointly and severally liable for payment of UCM's compensation under this Agreement.
10. **No Legal Services.** Client acknowledges and understands that: (1) Only an attorney can provide legal services or advice, (2) UCM is not an attorney or law firm, and does not and will not provide legal services or advice, (3) UCM does not and will not act as an attorney for Client or any other person, (4) Nothing in this Agreement, and no act, omission or statement by UCM, or its owners or employees, will be construed to create an attorney-client relationship between UCM and Client or any other person, (5) UCM is not subject to the California Rules of Professional Conduct, which govern the conduct of attorneys, and (6) Client should consult an attorney if it wishes to receive legal services or advice.
11. **Disclosure of Information.** UCM may obtain information that pertains to Client's business, operations, or affairs, including but not limited to its utility charges and utility usage. Client expressly authorizes UCM to use and disclose such information to others as necessary to carry out the services contemplated by this Agreement. Notwithstanding the foregoing, UCM shall treat all information provided by Client as confidential and shall make a good-faith effort to ensure that said information is only disseminated for the services described herein.
12. **Release of Claims Against UCM.** Client acknowledges and agrees that UCM has made no express or implied representation or warranty that it will be successful in identifying or obtaining any refunds, credits, or Future Savings on Client's Utility Accounts. Client hereby covenants not to bring any action for damages against UCM that is based upon or relates to any failure by UCM to identify or obtain refunds, credits, or Future Savings to which Client was or is entitled.
13. **Insurance Requirements.** UCM shall, at its own cost and expense, maintain commercial general and automobile liability insurance for the term of this Agreement, in a form satisfactory to Client, in an amount not less than \$1,000,000 per occurrence, combined single limit coverage for risks associated with the work contemplated by this Agreement. Such coverage shall include but not be limited to protection against claims arising from bodily and personal injury, including

death resulting therefrom, and damage to property resulting from activities contemplated by this Agreement, including the use of owned and non-owned automobiles. UCM shall also, at its sole cost and expense, maintain Statutory Worker's Compensation Insurance and Employer's Liability Insurance for any and all persons employed directly or indirectly by UCM, with limits of not less than \$1,000,000 per accident. In the alternative, UCM may rely on a self-insurance program to meet those requirements, but only if the program of self insurance meets the standards of the California Labor Code. All such insurance shall cover on an occurrence basis. City, its officers, officials, employees and agents are to be covered as additional insureds on the aforesaid insurance policies.

14. **Indemnification and Hold Harmless.** To the full extent permitted by law, UCM shall indemnify, defend and hold harmless Client, its governing body, officers, employees and agents from and against any and all liability, loss, damage, claims, expenses and costs (including without limitation, attorney fees and cost and fees of litigation) (collectively "Liability") to the extent caused by the negligence, recklessness, or willful misconduct of UCM in the performance of this Agreement, except such Liability caused by the active, sole negligence or willful misconduct of Client. This indemnification obligation is not limited by any limitation on the amount or type of damages available under any applicable insurance coverage and shall survive the expiration or early termination of this Agreement with respect to Liability arising during the term of the Agreement. With respect to third party claims against UCM, UCM waives any and all rights of any type to express or implied indemnity against the Client Indemnitees.
15. **Representations Made By Client.** It may become necessary for Client to make certain representations to the utility provider or other entity in order obtain refunds, credits or Future Savings identified by UCM in its Findings Letter. Client hereby warrants that any such representations made by Client will be true and correct in all respects.
16. **Late Payment Penalty.** If payment of any invoice is not received by UCM within 30 days of the date the invoice was mailed, then interest on the amount owing will accrue, beginning on the 31st day after the invoice was mailed to Client, at the rate of 1% per month (prorated on a daily basis). In addition, if any payment is not received by UCM within 60 days of the date the invoice was mailed to Client, then a fee equal to 5% of the amount owing (including any accrued interest) will be imposed on the 61st day after the invoice was mailed. Interest will continue to accrue at 1% per month (prorated on a daily basis) on the entire amount due until paid in full.
17. **Status of UCM.** At all times during the term of this Agreement, UCM shall be an independent contractor and shall not be an employee of Client. Client shall have the right to control UCM only insofar as the results of UCM's services rendered pursuant to this Agreement, otherwise, Client shall not have the right to control the means by which UCM accomplishes the services rendered pursuant to this Agreement. UCM shall have no authority, express or implied, to act on behalf of Client in any capacity whatsoever as an agent. UCM shall have no authority, express or implied, pursuant to this Agreement to bind Client to any obligation whatsoever.
18. **Assignment and Subcontracting.** Client and UCM recognize and agree that this Agreement contemplates personal performance by UCM and is based upon a determination of UCM's unique competence, experience, and specialized personal knowledge. Moreover, a substantial inducement to Client for entering into this Agreement was and is the professional reputation and competence of UCM. UCM may not assign this Agreement or any interest therein without the prior written approval of Client. UCM shall not subcontract any portion of the performance contemplated and provided for herein without the prior written approval of Client.
19. **Applicable Law.** This Agreement is executed in and intended to be performed in the State of California, and the laws of that state will govern its interpretation and effect.
20. **Venue.** Venue in any legal action arising from or related to this agreement will be Fresno County, California.
21. **Paragraph References.** A reference to a "paragraph" of this Agreement includes both the numbered paragraph, as well the subparagraphs, if any, that are part of such paragraph. Subparagraphs are designated by lower case letters (e.g., "(a)", "(b)", "(c)").
22. **Severability.** If any term, provision, covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the rest of the agreement shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

- 23. **Interpretation.** In construing this Agreement, no consideration shall be given to the fact or presumption that any party had a greater or lesser hand in drafting of this Agreement.
- 24. **Entire Agreement.** This instrument contains the entire Agreement of the parties relating to the rights granted and obligations assumed in this instrument. Any oral representations or modifications concerning this instrument shall be of no force or effect unless contained in a subsequent written modification signed by the party to be charged
- 25. **Signor Authorized to Bind Client.** The individual signing this agreement on behalf of Client hereby represents and warrants that he/she is authorized to sign on behalf of the Client and to legally bind Client to the terms of this Agreement.

UTILITY COST MANAGEMENT LLC

By: 

Signature

Chris Wiehl

Print Name

Marketing/Sales Director


Title

10/6/2014

Date

City of Soledad

Print Client Name

By: 

Signature

Adela P. Gonzalez

Print Name

City Manager

Title

10/03/2014

Date

Initials: ag Initials: CW