

RESOLUTION NO. 2019-112

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MARINA AUTHORIZING EXAMINATION OF TRANSACTIONS AND USE TAX RECORDS, AUTHORIZING THE CITY MANAGER TO EXECUTE AN AGREEMENT BETWEEN CITY OF MARINA AND HINDERLITER, DE LLAMAS & ASSOCIATES (HDL), A CALIFORNIA CORPORATION, FOR SALES TAX ANALYSIS, RELATED AUDITING AND SALES TAX REPORTING SERVICES, AND AUTHORIZING THE CITY MANAGER TO EXECUTE AGREEMENT SUBJECT TO REVIEW BY CITY ATTORNEY

WHEREAS, pursuant to Resolution No. 2019-06, the City of Marina entered into a contract with the State Board of Equalization (now the Department of Fee and Tax Administration) to perform all functions incident to the administration and collection of local transactions and use taxes; and

WHEREAS, the City Council of the City of City of Marina deems it necessary for authorized representatives of the City to examine confidential transactions and use tax records of the Department of Fee and Tax Administration pertaining to transactions and use taxes collected by the Department for the City pursuant to that contract; and

WHEREAS, Section 7056 of the California Revenue and Taxation Code sets forth certain requirements and conditions for the disclosure of Department records and establishes criminal penalties for the unlawful disclosure of information contained in, or derived from the transactions and use tax records of the Department; and

WHEREAS, Section 7056 of the California Revenue and Taxation Code requires that any person designated by the City shall have an existing contract to examine the City's sales and use tax records.

NOW, THEREFORE, the City Council of the City of Marina does hereby resolve as follows:

1. Authorize the City Manager to execute agreement on behalf of City subject to review by City Attorney including the following authority from the City to HdL:

Section 3. That Hinderliter, de Llamas & Associates is hereby designated to examine the sales, use and transactions tax records of the Department pertaining to sales, use and transaction taxes collected for the City by the Department. The person or entity designated by this section meets all the following conditions:

- a) has an existing contract with the City to examine those sales, use and transactions tax records;
- b) is required by that contract to disclose information contained in, or derived from, those sales, use and transactions tax records only to the City Manager or his or her designated officials;
- c) is prohibited by that contract from performing consulting services for a retailer during the term of that contract; and,

d) is prohibited by the contract from retaining the information contained in, or derived from those sales, use and transactions tax records, after that contract has expired.

PASSED AND ADOPTED by the City Council of the City of Marina and Successor Agency Board for the Redevelopment Agency for the City of Marina at a regular meeting duly held on the 5th day of November 5, 2019 by the following vote:

AYES: COUNCIL/AGENCY MEMBERS: Berkley, Urrutia, O'Connell, Morton, Delgado

NOES: COUNCIL/AGENCY MEMBERS: None

ABSENT: COUNCIL/AGENCY MEMBERS: None

ABSTAIN: COUNCIL/AGENCY MEMBERS: None

Bruce C. Delgado, Mayor/Chair

ATTEST:

Anita Sharp, Deputy City Clerk/Secretary

EXHIBIT A

AGREEMENT FOR TRANSACTIONS TAX AUDIT & INFORMATION SERVICES

This Agreement is made and entered into as of the ____ day of _____, 2019 by and between the CITY OF MARINA, hereinafter referred to as “CITY” and HINDERLITER, DE LLAMAS AND ASSOCIATES a California Corporation, hereinafter referred to as “CONTRACTOR”.

I. RECITALS

WHEREAS, transactions tax revenues can be increased through a system of continuous monitoring, identification and correction of allocation errors and reporting deficiencies, and

WHEREAS, an effective program of transactions and use tax management can provide for more accurate budget forecasting and financial planning; and

WHEREAS, CITY desires the combination of data entry, report preparation, and data analysis necessary to effectively manage its Measure “N” transactions and use tax base the recovery of revenues either unreported or erroneously allocated to other jurisdictions; and

WHEREAS, CONTRACTOR has the programs, equipment and personnel required to deliver the transactions and use tax related services referenced herein;

THEREFORE, CITY and CONTRACTOR, for the consideration hereinafter described, mutually agree as follows:

II. SERVICES

The CONTRACTOR shall perform the following services:

A. DEFICIENCY/ALLOCATION REVIEWS AND RECOVERY

1. CONTRACTOR shall conduct on-going reviews to identify and correct unreported transactions and use tax payments and distribution errors thereby generating previously unrealized revenue for the CITY. Said reviews shall include:
 - (i) Comparison of county-wide local tax allocations to transactions tax for brick and mortar stores and other cash register-based businesses, where clearly all transactions are conducted on-site within the Measure “N” CITY boundaries, and therefore subject to transactions tax.
 - (ii) Review of any significant one-time use tax allocations to ensure that there is corresponding transaction tax payments for taxpayers with nexus within the CITY boundaries.
 - (iii) Review of state-wide transactions tax allocations and patterns to identify any obvious errors and omissions.
 - (iv) Identification and follow-up with any potentially large purchasers of supplies and equipment (e.g. hospitals, universities, manufacturing plants, agricultural operations, refineries) to ensure that their major vendors are properly reporting corresponding transactions tax payments to the Measure “N” Transactions Tax District.
2. CONTRACTOR will initiate, where the probability of an error exists, contacts with the appropriate taxpayer management and accounting officials to verify whether current tax receipts accurately reflect the local sales activity. Such contacts will be conducted in a professional and courteous manner so as to enhance CITY’s relations with the business community.

3. CONTRACTOR shall prepare and submit to the Department of Tax and Fee Administration all information necessary to correct any allocation errors and deficiencies that are identified, and shall follow-up with the individual businesses and the California Department of Tax and Fee Administration to ensure that all back quarter payments due the CITY are recovered.

B. DATA BASE MANAGEMENT, REPORTS AND STAFF SUPPORT

1. CONTRACTOR shall establish a database containing all applicable Department of Tax and Fee Administration (CDTFA) registration data for each business within the Measure “N” District boundaries holding a seller’s permit account. Said database shall also identify the quarterly transactions and use tax allocations under each account for the most current and previous quarters where available.
2. CONTRACTOR shall provide updated reports each quarter identifying changes in allocation totals by individual businesses, business groups and by categories. Quarterly aberrations due to State audits, fund transfers, and receivables, along with late or double payments, will also be identified. Quarterly reconciliation worksheets to assist finance officer with budget forecasting will be included.
3. CONTRACTOR shall advise and work with CITY Staff on planning and economic questions related to maximizing revenues, preparation of revenue projections and general information on sales, transactions and use tax questions.
4. CONTRACTOR shall make available to CITY the HdL proprietary software program and Measure “N” database containing all applicable registration and quarterly allocation information for CITY business outlets registered with the Department of Tax and Fee Administration. The database will be updated quarterly.

III. CONFIDENTIALITY

Section 7056 of the State of California Revenue and Taxation code specifically limits the disclosure of confidential taxpayer information contained in the records of the California Department of Tax and Fee Administration. This section specifies the conditions under which CITY may authorize persons other than CITY officers and employees to examine State Sales, Use and Transactions Tax records.

The following conditions specified in Section 7056 (b), (1) of the State of California Revenue and Taxation Code are hereby made part of this agreement.

- A. CONTRACTOR is authorized by this Agreement to examine sales, use or transactions and use tax records of the Department of Tax and Fee Administration provided to CITY pursuant to contract under the conditions established by the California Revenue and Taxation law.
- B. CONTRACTOR is required to disclose information contained in, or derived from, those sales, use or transactions and use tax records only to an officer or employee of the CITY who is authorized by resolution to examine the information.
- C. CONTRACTOR is prohibited from performing consulting services for a retailer, as defined in California Revenue & Taxation Code Section 6015, during the term of this Agreement.
- D. CONTRACTOR is prohibited from retaining the information contained in, or derived from those sales or transactions and use tax records, after this Agreement has expired. Information obtained by examination of Department of Tax and Fee Administration records shall be used only for purposes related to collection of local sales and use tax or for other governmental functions of the CITY as set forth by resolution adopted pursuant to Section 7056 (b) of the Revenue and Taxation Code.

The resolution shall designate the CONTRACTOR as a person, authorized to examine sales and use tax records and certify that this Agreement meets the requirements set forth above and in Section 7056 (b), (1) of the Revenue and Taxation Code.

IV. CONSIDERATION

A. CONTRACTOR shall be paid **\$100** monthly billed quarterly for the transaction district tax reports that we include with the quarterly sales tax analyses. CONTRACTOR shall be paid **25%** of the initial amount of new transactions or use tax revenue received by the CITY as a result of audit and recovery work performed by CONTRACTOR (hereafter referred to as "audit fees"). New revenue shall not include any amounts determined and verified by CITY or CONTRACTOR to be increment attributable to causes other than CONTRACTOR'S work pursuant to this agreement. In the event that CONTRACTOR is responsible for an increase in the tax reported by businesses already properly making tax payments to the CITY, it shall be CONTRACTOR'S responsibility to separate and support the incremental amount attributable to its efforts prior to the application of the audit fee. Said audit fees will apply to state fund transfers received for those specific quarters identified as being missing and/or deficient following completion of the audit by CONTRACTOR and confirmation of corrections by the California Department of Tax and Fee Administration but shall not apply prospectively to any future quarter. CONTRACTOR shall provide CITY with an itemized quarterly invoice showing all formula calculations and amounts due for audit fees.

CONTRACTOR shall obtain prior approval from CITY for each specific business for which payment of audit fees will be expected. Said approval shall be deemed given when the City Manager or his/her designated representative, signs a Work Authorization form, a copy of which is attached as "Exhibit A." CITY shall pay audit fees upon CONTRACTOR'S submittal of evidence of State fund transfers and

payments to CITY from businesses identified in the audit and approved by the CITY.

- B. Above sum shall constitute full reimbursement to CONTRACTOR for all direct and indirect expenses incurred by CONTRACTOR in performing audits including the salaries of CONTRACTOR'S employees, and travel expenses connected with contacting local and out-of-state businesses and the Department of Tax and Fee Administration Staff.
- C. Extra work beyond the Scope of Services set forth in this agreement shall not be performed by CONTRACTOR or reimbursed or paid for by CITY unless such extra work is specifically authorized in writing by City Manager or his/her designated representative. CONTRACTOR shall be compensated for any additional services in the amounts and in the manner as agreed to by the CITY and CONTRACTOR at the time the CITY's written authorization is given to CONTRACTOR for the performance of said services.
- D. Any invoices not paid in accordance with the Thirty (30) day payment terms, shall accrue monthly interest at a rate equivalent to ten percent (10%) per annum until paid.
- E. CONTRACTOR unilaterally retains the right to divide any recovery bills in excess of \$25,000 over a one (1) year period (Four (4) quarterly billings).
- F. CONTRACTOR shall provide CITY with an itemized quarterly invoice showing all formula calculations and amounts due for the audit fee (including, without limitation, a detailed listing of any corrected misallocations), which shall be paid by CITY no later than 30 days following the invoice date.

VI. CITY MATERIALS AND SUPPORT

CITY shall adopt a resolution in a form acceptable to the California Department of Tax and Fee Administration and in compliance with Section 7056 of the Revenue and Taxation Code, authorizing CONTRACTOR to examine the confidential sales, use, and transactions tax records of CITY. CITY further agrees to continue CONTRACTOR'S authorization to examine the confidential records of the CITY by maintaining CITY's name on the CITY Resolution until such time as all audit adjustments have been completed by the California Department of Tax and Fee Administration and audit fees due the CONTRACTOR have been paid.

VII. LICENSE, PERMITS, FEES AND ASSESMENTS

CONTRACTOR shall obtain such licenses, permits and approvals (collectively the "Permits") as may be required by law for the performance of the services required by this Agreement. CITY shall assist CONTRACTOR in obtaining such Permits, and CITY shall absorb all fees, assessments and taxes which are necessary for any Permits required to be issued by CITY.

VIII. TERMINATION

This Agreement may be terminated for convenience by either party by giving 30 days written notice to the other of such termination and specifying the effective date thereof. Upon the presentation of such notice, CONTRACTOR shall continue to work through the date of termination. Upon termination as provided herein, CONTRACTOR shall be paid the value of all tax analysis and reporting work performed less payments previously made by CITY. In ascertaining the value of the work performed up to the date of termination, consideration shall be given to amounts due for any unpaid invoices, and to businesses identified by CONTRACTOR which make tax payments after termination of this Agreement as a result of CONTRACTOR'S work. After CITY receives said tax payments for such businesses, CONTRACTOR shall be paid the audit fees resulting from tax payments made by the business for back quarter reallocations. Compensation

for any audit work previously authorized and satisfactorily performed shall be made at the times provided in the preceding section entitled "Consideration."

All documents, data, surveys and reports prepared by CONTRACTOR pursuant to this Agreement shall be considered the property of the CITY and upon payment for services performed by CONTRACTOR, such documents and other identified materials shall be delivered to CITY by CONTRACTOR.

IX. INDEPENDENT CONTRACTOR

CONTRACTOR shall perform the services hereunder as an independent contractor and shall furnish such services in his own manner and method, and under no circumstances or conditions shall any agent, servant, or employee of CONTRACTOR be considered as an employee of CITY.

X. COOPERATIVE AGREEMENT

It is intended any other public agency (e.g., city, county, district, public authority, public agency, municipality, or other political subdivision of California) located in the state of California shall have an option to procure identical services as set forth in this Agreement. The CITY of Marina shall incur no responsibility, financial or otherwise, in connection with orders for services issued by another public agency. The participating public agency shall accept sole responsibility for securing services or making payments to the vendor.

XI. NON-ASSIGNMENT

This Agreement is not assignable either in whole or in part by CONTRACTOR without the written consent of CITY.

XII. ATTORNEY'S FEES

In the event a legal action is commenced to enforce any of the provisions of this Agreement, the prevailing party shall be entitled to recover its costs and reasonable attorney's fees.

XIII. GOVERNING LAW

The laws of the State of California shall govern the rights, obligations, duties and liabilities of the parties to this Agreement and shall also govern the interpretation of this Agreement.

XIV. INDEMNIFICATION

With respect to losses, claims, liens, demands and causes of action arising out of the CITY's use of the results of CONTRACTOR's services as provided to the City pursuant to this Agreement, CONTRACTOR hereby agrees to protect, defend, indemnify, and hold the CITY free and harmless from any and all losses, claims, liens, demands, and causes of action of every kind and character including, but not limited to, the amounts of judgments , penalties, interest, court costs, legal fees, and all other expenses incurred by the CITY arising in favor of any party, including claims, liens, debts, personal injuries, death, or damages to property (including employees or property of the CITY).

CITY hereby agrees to protect, defend, indemnify, and hold CONTRACTOR free and harmless from any and all losses, claims, liens, demands, and causes of action of every kind and character arising from CONTRACTOR's performance or lack of performance under this Agreement including, but not limited to, the amounts of judgments , penalties, interest, court costs, legal fees, and all other expenses incurred by CONTRACTOR arising in favor of any party, including claims, liens, debts, personal injuries, death, or damages to property (including employees or property of the CONTRACTOR).

Each party to this Agreement agrees to investigate, handle, respond to, provide defense for, and defend at its sole expense any such claims, demand, or suit for which it has agreed to indemnify the other party pursuant to this paragraph. Each party also agrees to bear all other costs and expenses related to its indemnity obligation, even if the claim or claims alleged are groundless, false, or fraudulent. This provision is not intended to create any cause of action in favor of any third party against CONTRACTOR or the CITY or to enlarge in any way the liability of CONTRACTOR or the CITY but is intended solely to provide for indemnification of each party from liability for damages or injuries to third persons or property arising from this contract or agreement on the terms set forth in this paragraph.

XV. NOTICE

All notices sent by a party under this Agreement shall be in writing and shall be deemed properly delivered to the other party as of the date of receipt, if received on a business day prior to 3:00 PM local time, or otherwise on the next business day after receipt, provided delivery occurs personally, by courier service, or by U.S. mail to the other party at its address set forth below, or to such other address as either party may, by written notice, designate to the other party. Notices to CONTRACTOR shall be sent to HINDERLITER, de LLAMAS and ASSOCIATES, 120 S State College Blvd., Suite 200, Brea, CA 92821; and notices to CITY shall be sent to CITY OF MARINA, 211 Hillcrest Avenue, Marina, CA 93933.

XVI. ENTIRE AGREEMENT; ETC.

This Agreement expresses the full and complete understanding of the parties with respect to the subject matter hereof and supersedes all prior or contemporaneous proposals, agreements, representations and understandings, whether written or oral, with respect to the subject matter. This Agreement may not be amended or modified except in writing signed by each of the parties hereto. This Agreement shall be

construed as to its fair meaning and not strictly for or against either party. The headings hereof are descriptive only and not to be construed in interpreting the provisions hereof.

XVII. COUNTERPARTS; AUTHORITY TO SIGN

This Agreement may be executed in any number of counterparts, each of which will constitute an original and all of which, when taken together, will constitute one agreement. Any signature pages of this Agreement transmitted by facsimile or sent by email in portable document format (PDF) will have the same legal effect as an original executed signature page. Each of the persons signing on behalf of a party hereto represents that he or she has the right and power to execute this Agreement on such party's behalf.

(SIGNATURES ON FOLLOWING PAGE)

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed on the date first above written by their respective officers duly authorized in that behalf.

CITY: CITY OF MARINA

City Manager

CONTRACTOR:
HINDERLITER, DE LLAMAS & ASSOCIATES
A California Corporation

Andrew Nickerson, President

APPROVED AS TO FORM:
CITY COUNSEL:

SAMPLE

SAMPLE

EXHIBIT A

Transactions Tax Audit

Work Authorization No. _____

The following business or businesses located in the City of Marina have been identified as having the potential for generating additional tax revenues to the City of Marina. Contractor is hereby authorized to contact the given business(s) and the California Department of Tax and Fee Administration to verify the accuracy of the current reporting methodology and obtain the necessary documentation for the Department of Tax and Fee Administration, to bill for uncollected transactions and use tax payments or modify misallocated payments and to return revenues that may be due to the District.

Contractor's compensation shall be \$100 monthly billed quarterly and 25% of the new transactions tax revenue received by the District as a result of audit and recovery work performed by Contractor, as set forth in the Agreement between Contractor and City.

CITY: CITY OF MARINA

By:_____

Date: _____

HINDERLITER, DE LLAMAS AND ASSOCIATES

By:_____

Date_____

October 4, 2019

Item No. **8g(1)**

Honorable Mayor and Members
of the Marina City Council

City Council Meeting
of November 5, 2019

**CITY COUNCIL CONSIDER ADOPTING RESOLUTION NO. 2019- ,
AUTHORIZING EXAMINATION OF TRANSACTIONS AND USE TAX
RECORDS, AUTHORIZING THE CITY MANAGER TO EXECUTE AN
AGREEMENT BETWEEN CITY OF MARINA AND HINDERLITER, DE
LLAMAS & ASSOCIATES (HDL), A CALIFORNIA CORPORATION,
FOR SALES TAX ANALYSIS, RELATED AUDITING AND SALES TAX
REPORTING SERVICES, AND AUTHORIZING THE CITY MANAGER
TO EXECUTE AGREEMENT SUBJECT TO REVIEW BY CITY
ATTORNEY**

REQUEST:

It is requested that the City Council Adopt Resolution No. 2019-:

1. Authorizing examination of transaction and use tax records;
2. Approve a replacement agreement to include Measure N Sales Tax audit between City of Marina and Hinderliter, de Llamas & Associates (HdL), a California Corporation for sales tax analysis, related auditing and sales tax reporting services, and;
3. Authorize the City Manager to execute agreement subject to review by City Attorney

BACKGROUND:

On November 6, 2018, Marina's voters approved Measure N, the City of Marina's One and One-half Cent Transactions & Use Tax measure (an add-on sales tax), by over 51%. The City Council adopted an ordinance adding Chapter 3.06 to the Municipal Code to provide for this new tax. The operative date of the new tax was April 1, 2019 and will be effective until March 2034.

ANALYSIS:

The City of Marina entered into a contract with the California State Department of Tax and Fee Administration to perform all functions incident to the administration and collection of local transactions and use taxes of Measure N. The City Manager is designated in writing to the California Department of Tax and Fee Administration to authorize the City staff member(s) authorized to examine transactions and use tax records. The information obtained by examination of Department records shall be used only for purposes related to the collection of City transactions and use taxes.

Additionally, the City Council adopted Resolution No. 2009-19 that approved an agreement between City of Marina and Hinderliter, De Llamas & Associates (HDL), a California Corporation, for sales tax analysis, related auditing and sales tax reporting services (Agreement).

If the City wishes to have HDL to be able to audit the Measure N sales tax, a resolution is required to authorize examination of transaction and use tax records and amend the Agreement between the City, Agency and HDL. Considering the current effective agreement is from 2009, staff recommends simply replacing the current agreement with the attached agreement which will also include Measure N sales tax auditing (**EXHIBIT A**).

FISCAL IMPACT:

Should the City Council approve this request, the HDL would be authorized to examine the City of Marina transactions and use tax records and enlisted to provide sales tax analysis, audit and reporting services.

There is no additional cost for the HDL transactions and use tax reports and analysis. The fee for transactions tax related audit and recovery work will be 25% of all new transactions tax or related use tax recovered for those specific quarters identified as being missing and/or deficient. It is not possible to determine the amount, if any, of non-payments that would be recovered to approximate the total contingent fee.

CONCLUSION:

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

Respectfully submitted,

Eric Frost
Finance Director
City of Marina

REVIEWED/CONCUR:

Layne Long
City Manager
City of Marina