

CITY OF EL PASO, TEXAS
AGENDA ITEM DEPARTMENT HEAD'S SUMMARY FORM

DEPARTMENT: Planning and Economic Development

AGENDA DATE: November 16, 2010 Regular Agenda

CONTACT PERSON/PHONE: Kathryn Dodson, PhD, Director 541-4670

DISTRICT(S) AFFECTED: ALL

SUBJECT:

Discussion and action to authorize the City Manager to sign a Services Agreement with El Paso Electric to authorize the Company to administer an incentive program for solar programs for residential and commercial properties in El Paso using funding from additional City franchise fees and Palo Verde Performance Reward Funds . (All Districts)

[Economic Development, Kathryn Dodson (915)541-4670]

BACKGROUND/DISCUSSION:

In 2005, City Council granted to El Paso Electric Company a franchise to operate the electric utility for transmission and distribution of electrical energy within the boundaries of the City of El Paso. The City Council will consider an amendment to the franchise on November 16, 2010, to increase the street rental fee by 0.75%, which is to be used for economic development purposes, including, among other things, solar energy rebates and incentives. In addition, on June 28, 2005, the City Council of the City of El Paso approved a resolution to accept an award of approximately \$5,822,173 from the El Paso Electric Company Palo Verde Performance Rewards for demand-side management programs to assist small business and commercial customers, subject to the approval of the City Council.

This item is to contract with El Paso Electric to administer financial incentives for solar programs for residential and commercial properties, and allocate City Funds of \$500,000 from the increased street rental fee paid by El Paso Electric and \$500,000 from the Palo Verde Performance Rewards for fiscal years 2011 and 2012. The City Funds will be available under the same guidelines established by El Paso Electric for its residential and commercial solar incentive program.

PRIOR COUNCIL ACTION:

Yes. On June 8, 2010, City Council by resolution directed the City Manager to include in the City's budget certain funds to fund financial incentives solar programs for residential and commercial properties.

AMOUNT AND SOURCE OF FUNDING:

\$500,000 (Palo Verde Fund) and \$500,000 ("Additional Fee" as outlined in Services Agreement) for FY11 and FY12

BOARD/COMMISSION ACTION:

N/A

*****REQUIRED AUTHORIZATION*****

DEPARTMENT HEAD: _____


Department Head

STATE OF TEXAS)
)
COUNTY OF EL PASO) **SERVICES AGREEMENT FOR
ENERGY EFFICIENCY INCENTIVES**

This Agreement entered into this _____ day of _____, 2010, by and between the City of El Paso, a municipal corporation situated in El Paso County, Texas, hereinafter referred to as "City", and El Paso Electric Company, hereinafter referred to as "EPE".

RECITALS

WHEREAS, the City Council of the City of El Paso granted to El Paso Electric Company a franchise to operate the electric utility for transmission and distribution of electrical energy within the boundaries of the City of El Paso on July 12, 2005 by Ordinance No. 16090 and amended on November 16, 2010 to increase the street rental fee by 0.75% (the "Additional Fee") which is to be used for economic development purposes, including, among other things, solar energy rebates and incentives;

WHEREAS, on June 28, 2005, the City Council of the City of El Paso approved a resolution to accept, on behalf of the City, an award of approximately \$5,822,173 from the El Paso Electric Company Palo Verde Performance Rewards for demand-side management programs to assist small business and commercial customers, pursuant to the terms and conditions of the settlement of Public Utility Commission of Texas Docket No. 20450 and subject to the approval of the City Council of all projects to be funded;

WHEREAS, in conjunction with the City's approval of the settlement of EPE's rate case on June 8, 2010, the City Council by resolution directed the City Manager to include in the City's budget certain funds to fund financial incentives solar programs for residential and commercial properties, to wit \$500,000 from the Additional Fee paid by El Paso Electric and \$500,000 from the Palo Verde Performance Rewards for fiscal years 2011 and 2012;

WHEREAS, EPE has established a financial incentive Solar Photovoltaic Pilot Program ("Solar P/V Energy Efficiency Program") to help EPE customers meet a portion of their energy needs with solar electric systems; and

WHEREAS, the City desires to contract with EPE to administer the solar program incentives and funding for residential and commercial customers on the terms and conditions set forth herein.

WITNESSETH

The City and EPE, for the consideration and mutual promises as herein, set forth agree as follows:

1. TERM

The term of this Agreement shall begin on the date entered above and shall end upon the expiration on December 31, 2012. The term of this Agreement may be extended only upon the written approval of both parties.

2. EPE RESPONSIBILITIES

A. EPE will administer the Solar P/V Energy Efficiency Program funded in part by EPE and by the City, as set forth herein and in accordance with the program guidelines as described in the Solar P/V Pilot Program Guidebook (Exhibit A). In the event that EPE determines it is necessary to revise the Guidelines during the Term of this Agreement, EPE will consult with City staff in order to ensure compliance with any City requirements and obtain the written consent of the City's Deputy City Manager responsible for utility regulation oversight ("Deputy City Manager"), which consent shall not be unreasonably withheld. If the parties cannot agree to revisions, the parties may terminate the Agreement pursuant to Section 10 of this Agreement.

B. EPE will make reasonable efforts to fully subscribe/reserve and disburse the incentive payments attributable to City Funds (as defined below) but EPE bears no liability if the funds are not fully reserved or disbursed.

C. City funds from Palo Verde Performance Rewards Fund ("Palo Verde Fund") can only be used as incentives for commercial projects, except as set forth in Section 4, Compensation. The remaining City funds from Additional Fee may be used as incentives for either commercial or residential projects, except as set forth in Section 4, Compensation. The Palo Verde Fund and Additional Fee are sometimes jointly referred to as "City Funds" in this Agreement.

D. All City Funds will be used for commercial or residential projects within the El Paso city limits.

E. Residential projects will be limited to 10kW system each. Commercial projects will be limited to 25kW each.

F. City Funds allocated in City FY2011 Budget (both Additional Fee and Palo Verde Fund) will be reserved for specific projects by June 30, 2011 and disbursed no later than December 31, 2011. Funds allocated in City FY2012 budget will be reserved for specific projects by June 30, 2012 and disbursed no later than December 31, 2012.

G. Incentives per kW (\$/kW) will be established by EPE at the beginning of each program year in consultation with the City.

H. EPE will provide a monthly report to the City by the 15th of the next following month in such form as the parties may agree. The monthly report will include an accounting of each of the City Funds, the amounts reserved, disbursed and administrative fees expended. The monthly report will also include such project details

as the parties may agree.

I. EPE shall provide a QUARTERLY report on all remaining Palo Verde Funds including those funds set aside for the Solar P/V Energy Efficiency Program.

3. CITY RESPONSIBILITIES

A. For the services rendered under this Agreement, City will pay to EPE as Compensation for Program Administration and pay for the cost of the Solar P/V Energy Efficiency Program incentives provided to EPE customers under this Agreement, all as set forth in Section 4, Compensation.

B. For the Solar P/V Energy Efficiency Program, the City has allocated \$500,000 from the Palo Verde Fund and \$500,000 from the Additional Fee in FY 2011 and, subject to appropriation as required by law, will allocate the City Funds in the same amounts and from the same funding sources in FY2012. All payments by the City under this Agreement are payable only out of current City revenues. In the event that funds relating to this Agreement do not become available, such as by City Council not appropriating the funds, the City shall have no obligation to pay or perform any services related herein to EPE, except to the extent that EPE has in good faith obligated any funds by contract with third parties prior to actual notice of non-appropriation, for the City's fiscal year during which time such funding is not available or appropriated. Should City experience a funding unavailability, either party may choose to terminate the Agreement subject to Section 10 above.

4. COMPENSATION AND METHOD OF PAYMENT

A. The total amount of Compensation, including payment of incentives under the Solar P/V Energy Efficiency Program and the associated costs for administering the program ("Program Administration") shall not exceed ONE MILLION AND NO/100 Dollars (\$1,000,000) per year for City Fiscal Years 2011 and 2012, provided that no more than FIVE HUNDRED THOUSAND AND NO/100 (\$500,000) shall be set aside each City fiscal year from the Palo Verde Fund and no more than FIVE HUNDRED THOUSAND AND NO/100 (\$500,000) shall be paid from the Additional Fee.

B. The Program Administration fees shall not exceed ONE HUNDRED THOUSAND AND NO/100 DOLLARS (\$100,000), provided that no more than FIFTY THOUSAND AND NO/100 (\$50,000) shall be set aside each City fiscal year from the Palo Verde Fund and no more than FIFTY THOUSAND AND NO/100 DOLLARS (\$50,000) shall be paid in any fiscal year from the Additional Fee. EPE agrees that at no time shall it make a claim against the City for more than the compensation provided under the terms of this Agreement.

Program Administration Fees will be billed to the City as a) a fixed fee on a time and materials basis ("Fixed Fee") based on the hourly fee schedule attached as Exhibit B, or such hourly fee as the City's Deputy City Manager may approve in writing, which will not exceed \$50,000 and b) a performance-based fee ("Performance-Based Fee") based upon the incentives disbursed for completed Solar Projects, which will not exceed

\$50,000.

The Performance-Based Fee shall be calculated each month by multiplying the amount of the City Funds disbursed within the calendar month by the rate of \$0.0555 per dollar of City Funds, which amount was calculated based upon the formula below:

$$\begin{aligned} & \text{Performance-Based Administrative Fee} \\ & = \\ & \text{Performance-Based Administrative Fees / Total Incentive Distributed} \\ & = \\ & \$50,000 / \$900,000 \\ & = \\ & \$0.0555 \text{ per } \$1.00 \text{ Incentive Distributed} \end{aligned}$$

C. As of the date of this Agreement, EPE administers the Palo Verde Funds on behalf of the City of El Paso and such funds are retained by EPE until such time City requests funds for reimbursement on various approved projects. EPE shall submit to the Deputy City Manager a MONTHLY detailed Invoice and accompanying report that specifically identifies costs utilizing Palo Verde Funds and Additional Fee monies. Following the City's review and approval, the City shall make payments for those costs relating to the Additional Fee and notify EPE that they may deduct the costs relating to the Palo Verde Funds from its monies set aside for such purpose. Payment shall be made within thirty (30) days and is subject to the payment terms and conditions set forth in the Prompt Payment Act, Texas Government Code Section 2251.

5. APPLICABLE LAWS

EPE shall perform all services under this Agreement in accordance with all applicable local, state, and federal laws and regulations.

6. INDEPENDENT CONTRACTOR

Nothing contained herein shall be construed as creating the relationship of employer and employee between the City and EPE. No partnership or joint venture is intended to be created by this Agreement, nor any principal-agent or employer-employee relationship between the parties or any of their officers, employees, agents or sub-consultants. As an independent contractor, each party understands and agrees that it will be responsible for its respective acts or omissions, and the other party shall in no way be responsible as an employer to the other party's officers, employees, agents, representatives or sub-contractors who perform any service in connection with this Agreement.

7. ASSIGNMENT/SUBCONTRACTORS

The services to be provided under this Agreement are specific to EPE and shall not be assigned or delegated without the prior written consent of the City. Notwithstanding the above, the City acknowledges that EPE has a contract with a third-party to provide services under this Agreement and hereby consents to such subcontract. EPE will notify City in writing of its intent to change its subcontractor. EPE will ensure that any subcontractor will comply with all applicable terms of this Agreement. EPE will provide written notification to City if it becomes necessary for EPE to utilize other subcontractors to fulfill its obligations to City.

8. INDEMNIFICATION.

EPE UNDERSTANDS AND AGREES THAT IT AND/OR ITS SUBCONTRACTOR(S) SHALL INDEMNIFY AND HOLD HARMLESS THE CITY AGAINST ANY AND ALL CLAIMS, DEMANDS, DAMAGES, COSTS AND EXPENSES, INCLUDING INVESTIGATION EXPENSES AND REASONABLE ATTORNEY FEES FOR THE DEFENSE OF SUCH CLAIMS AND DEMANDS, ARISING OUT OF OR ATTRIBUTED DIRECTLY OR INDIRECTLY TO THE NEGLIGENT, GROSS NEGLIGENT, INTENTIONAL, MALPRACTICE OR WILLFUL ACTS OR OMISSIONS OF EPE, ITS AGENTS, SUBCONTRACTORS, EMPLOYEES, OR REPRESENTATIVES IN RENDERING THE SERVICES UNDER THIS AGREEMENT.

A. Without modifying the conditions of preserving, asserting or enforcing any legal liability against the City as required by the City Charter or any law, the City will promptly forward to EPE every demand, notice, summons or other process received by the City in any claim or legal proceeding contemplated herein.

B. In addition, EPE shall promptly advise the City in writing of any claim or demand against the City or EPE known to EPE related to or arising out of EPE activities under this Agreement.

C. EPE understands and agrees that it will 1) investigate or cause -the investigation of accidents or occurrences involving such claim or demand; 2) negotiate or cause to be negotiated the claim or demand as EPE may deem expedient; and 3) defend or cause to be defended on behalf of the City all suits for damages even if groundless, false or fraudulent, brought because of such claim or demands.

D. EPE understands and agrees that it will pay all final judgments establishing liability of the City in actions defended by EPE pursuant to this section along with all reasonable attorneys' fees and costs incurred by the City including interest at the rate specified in such final judgment accruing and premiums on any appeal bonds.

E. The City, at its election will have the right to participate in any such negotiations or legal proceedings to the extent of its interest without relieving EPE of any of its obligations under this paragraph.

9. LIABILITY INSURANCE

EPE agrees it or its subcontractor will provide public liability insurance and property damage insurance naming the City as an Additional Insured in an amount no less than \$500,000 for each person and \$1,000,000 for each single occurrence for bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property.

A. Upon execution hereof, EPE shall file with the Purchasing Division, Financial Services Department, a copy of the Certificate of Insurance showing that such insurance coverage is in effect during the terms of this Agreement.

B. Issuers of Policies. The issuer of any policy must have a certificate of authority to transact insurance business in the State of Texas. Each issuer must be responsible, reputable, and have financial capability consistent with the risks covered. Each issuer shall be subject to approval by the City's Purchasing Manager in his or her sole discretion as to conformance with these requirements.

C. Deductibles. A policy may contain deductible amounts only if the City's Purchasing Manager approves the amount and scope of the deductible. EPE shall assume and bear any claims or losses to the extent of such deductible amount and waives any claim it may ever have for the same against the City, its officers, agents or employees.

D. Cancellation. Each policy must expressly state that it may not be canceled or non-renewed unless thirty (30) days advance notice of cancellation or intent not to renew is given in writing to the City's Purchasing Manager by the insurance company. EPE shall give written notice to the Director of Administrative Services for the City's Purchasing Manager **within five (5) days** of the date upon which total claims by any party against EPE reduce the aggregate amount of coverage below the amounts required by this Agreement.

E. Subrogation. Each policy must contain an endorsement to the effect that the issuer waives any claim or right in the nature of subrogation to recover against the City, its elected and appointed officials, officers, agents or employees.

F. Endorsement of Primary Insurance. Each policy must contain an endorsement that such policy is primary insurance, so long as it is customary in the industry and under Texas law for such insurance to be primary, to any other insurance available to the City, the Additional Insured, with respect to claims arising hereunder and that the insurance applies separately to each insured.

G. Liability for Premium. If any of the policies referred to above do not have a flat premium rate and such premium has not been paid in full, such policy must have a rider or other appropriate certificate of waiver sufficient to establish that the issuer is entitled to look only to EPE for any further premium payment and has no right to recover any premiums from the City.

10. TERMINATION

A. Either party may terminate this Agreement if the other is in default upon thirty (30) days written notice to the other party provided that the other party shall be given a reasonable time to cure said default. The City or EPE may terminate this Agreement for any cause upon thirty (30) days written notice to the other party.

B. Termination shall be without prejudice to any obligation by one party to the other, which shall have accrued and be owing prior thereto.

C. Upon termination, EPE shall return any materials belonging to the City, such as documents pertaining to incentives provided using City Funds or other property which are the property of the City which are currently in EPE's possession.

11. NOTICES

All notices, communications and reports under this Agreement shall be hand-delivered or mailed, certified, return receipt requested, to the respective parties at the respective addresses shown below, unless and until either party is otherwise notified in writing by the other party:

CITY: City Manager
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901

With copy to:
Deputy City Manager, Finance
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901

Sustainability Manager
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901

EPE: Energy Efficiency Manager
El Paso Electric Company
100 N. Stanton
El Paso, Texas 79905

12. WAIVER

Action or inaction by either party regarding any default, breach or condition precedent shall not be construed as a waiver of any other default, breach or condition precedent or any other right hereunder.

13. DISCRIMINATION

A. Discrimination Prohibited: No person in the United States shall, on the grounds of race, creed, color, national origin, sex, age, or handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any programs or activity funded in whole or in part with funds made available to EPE pursuant to the terms of this Agreement, or any written amendment hereto.

B. Specific Discriminatory Actions prohibited: EPE may not utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination on the basis of race, creed, color, sex national origin, age or disability, or having the effect of defeating or substantially impairing accomplishment of the objectives of the programs funded pursuant to this Agreement or any written amendment hereto with respect to individuals of a particular race, color, national origin, creed, sex, age or disability.

14. ENTIRE AGREEMENT; MODIFICATION OR AMENDMENT

This Agreement contains all commitments and agreements of the parties hereto, and no verbal or other written commitment shall have any force or effect if not contained herein. This Agreement may be modified, amended, or supplemented only by a written instrument duly authorized and executed by both parties.

15. VENUE

The parties hereto agree that this Agreement shall be enforceable in El Paso, Texas, and if legal action is necessary to enforce it, exclusive venue shall lie in El Paso County, Texas.

16. CONTRACT INTERPRETATION

In interpreting the various provisions of this Agreement in a court of law, any court having jurisdiction shall apply the laws of the State of Texas to interpret the terms and provisions in this Agreement.

17. SEVERABILITY

If any provision of this Agreement is found by a court of competent jurisdiction to be illegal, invalid, or unenforceable, the remainder of this Agreement will not be affected and in lieu of each provision which is found to be illegal, invalid or unenforceable, there will be added as part of this Agreement a provision which preserves the intention of the unenforceable provision, but which complies with the law.

18. CAPTIONS

The captions to the various paragraphs of this Agreement are for informational purposes only and shall not alter the substance of the terms and conditions of this Agreement.

19. BINDING AGREEMENT. The individual signing this Agreement for each of the parties acknowledges that he is authorized to do so and said individual further warrants that he or she is authorized to commit and bind that party to the terms and conditions of this Agreement.

(Signature Page attached)

STATE OF TEXAS)
)
COUNTY OF EL PASO) **SERVICES AGREEMENT FOR
ENERGY EFFICIENCY INCENTIVES**

(SIGNATURE PAGE)

IN WITNESS WHEREOF, the parties have executed this Agreement in the City of El Paso to be effective on the date and year first above written.

EL PASO ELECTRIC COMPANY

Print Name: _____
Title _____

THE CITY OF EL PASO

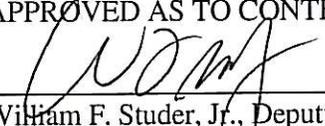
Joyce A. Wilson
City Manager

APPROVED AS TO FORM:



Bertha A. Ontiveros
Assistant City Attorney

APPROVED AS TO CONTENT:



William F. Studer, Jr., Deputy City Manager
Finance and Public Safety

EXHIBIT A

SOLAR P/V PILOT PROGRAM GUIDELINES

EXHIBIT B

HOURLY FEE SCHEDULE

Principals	\$200/Hr.
VP - Operations	\$150/Hr.
General Manager/Manager – EnerTrek® Products	\$150/Hr.
Project Manager	\$125/Hr.
Senior Engineer	\$150/Hr.
Senior Associate/Program Manager	\$120/Hr.
Energy Analyst	\$90/Hr.
Energy Analyst II/Project Engineer	\$105/Hr.
Senior Developer/Senior Software Engineer	\$150/Hr.
Software Developer/Software Engineer	\$115/Hr.
Software Developer II/ Software Engineer, Applications II	\$125/Hr.
Software Programmer II/Web Developer II	\$105/Hr.
Office Manager	\$65/Hr.
Intern	\$70/Hr.
Database Analyst/Project Support	\$60/Hr.
Clerical/Support	\$50/Hr.
Contract Software Developer/Software Engineer	\$115/Hr.
Photovoltaic Programs	\$156/Hr.
Photovoltaic Programs	\$78/Hr.
Photovoltaic Programs	\$52/Hr.

Direct Expenses:

Direct expenses such as travel and materials are billed at cost without additional markup. Software programming services are subject to Texas sales tax for services delivered in Texas, unless the client has a current tax-exempt certificate.