

OCTA PROJECT V
SUBRECIPIENT AGREEMENT

THIS AGREEMENT, dated for purposes of identification only this 17th day of March, 2017, is made and entered into by and between the CITY OF COSTA MESA, a municipal corporation ("CITY"), and ANAHEIM TRANSPORTATION NETWORK, a California nonprofit corporation ("ATN").

WITNESSETH:

WHEREAS, ATN is a nonprofit corporation formed and organized as a public-private partnership to solve transportation problems within certain defined areas of the City of Anaheim and the surrounding area; and

WHEREAS, on November 23, 2015, the Orange County Transportation Authority ("OCTA") Board of Directors approved the Measure M2 Project V Community-Based Transit/Circulators Program Guidelines and issued a Call for Projects (the "Program"); and

WHEREAS, the Program provides funding for local agencies to develop community based local transit services that complement regional transit services and meet needs in areas not adequately serviced by regional transit; and

WHEREAS, the CITY applied for the Measure M2 Project V Community-Based Transit/Circulators Program (the "Grant") for the purpose of providing a new bus circulator route to and from Costa Mesa to the Anaheim Resort™ district, ARTIC, and surrounding areas, as well as within Costa Mesa along an approximate 1.5 mile corridor (hereinafter referred to as the "Project"); and

WHEREAS, ATN and the CITY will provide matching funds for each project as required by the OCTA Project V Community Based Transit/Circulators and Program Guidelines; and

WHEREAS, OCTA intends to allocate funds for the CITY's new bus circulator services; and

WHEREAS, ATN and CITY will not use Measure M funds to supplant Developer Fees or other commitments; and

WHEREAS, the CITY and OCTA have entered into that certain Cooperative Agreement No. _____ dated _____ (the "Cooperative Agreement"), for the bus service, signage and the cost of operations, maintenance and marketing for seven years, which Cooperative Agreement is available for review at the CITY and incorporated by reference as if set forth in full herein; and

WHEREAS, by this Agreement the CITY and ATN desire to set forth their intentions and obligations regarding the use of the Grant funds by ATN as a subrecipient of the Grant funds for the bus service operation.

NOW, THEREFORE, for and in consideration of the mutual promises, covenants and conditions contained herein, the parties hereby agree as follows:

PART 1 - RESPONSIBILITIES OF ATN

A. ATN shall provide the following services and meet the following milestones, provided that adjustments to the milestones may be approved by the CITY Public Services Director:

a. Commence service on the service date agreed upon by CITY and ATN ("Service Start Date") using up to two (2) buses from the Anaheim Resort Transportation ("ART") fleet.

b. Provide daily year-round service in accordance with the mutually agreed upon operating schedule.

c. Provide service utilizing fully wrapped, Costa Mesa attraction themed, buses.

d. Include Costa Mesa properties on ART maps, advertising, signs, and website.

e. Ensure that on-street signs providing bus arrival time information are installed and operational by the Service Start Date.

B. ATN shall perform all of the tasks as outlined in the Cooperative Agreement between CITY and OCTA, regarding the use of Grant funds for the bus service operation. Some of these tasks include but are not limited to the following:

1. ATN shall provide to CITY and/or OCTA all system data reporting information necessary to comply with national database reporting requirements by July 31 of each year for the prior fiscal year (July 1 through June 30).

2. ATN shall invoice CITY for eligible capital cost and Operation and Maintenance ("O&M") costs on a monthly basis in accordance with the approved funding schedule, as established by the Cooperative Agreement.

3. ATN shall provide on or before July 31 of each year a fiscal year-end report to CITY and/or OCTA. The fiscal year-end report shall include actual expenses versus budgeted expenses, including revenue, expenditures, vehicle service hours, vehicle service miles, passenger boarding and farebox recovery ratio.

4. ATN shall provide CITY and/or OCTA ridership reporting on a monthly basis in a format approved by OCTA.

5. ATN shall provide to CITY and/or OCTA actual Revenue Vehicle Miles, Boardings, and Operating and Maintenance Cost related to Project service on a quarterly basis.

6. ATN shall meet applicable Federal Transit Administration ("FTA") requirements.

C. Audit and Inspection. ATN and CITY shall maintain a complete set of records in accordance with generally accepted accounting principles. Upon reasonable notice, ATN shall permit the authorized representatives of OCTA and/or CITY to inspect and audit all work, materials, payroll, books, accounts, and other data and records of ATN for a period of five (5) years after final payment, or completion of audit by the CITY and/or OCTA, or after final payment of debt service where local fair share revenues were

pledged, whichever is longer. For purposes of audit, the date of completion of this Agreement shall be the date of OCTA's payment of CITY's final billing (as so noted on the invoice) under this Agreement. OCTA shall have the right to reproduce any such books, records, and accounts.

D. Bankruptcy. In the event that ATN files for bankruptcy protection, ATN shall notify CITY within five (5) business days of such filing.

PART 2 - RESPONSIBILITIES OF CITY

A. CITY will perform all of the tasks outlined in the Cooperative Agreement between CITY and OCTA, regarding the use of Grant funds for the bus service operation. Some of these tasks include but are not limited to the following:

1. CITY will invoice OCTA on a reimbursement basis for services provided by ATN.
2. CITY will provide bus stop locations for ATN services within Costa Mesa.
3. CITY will work with ATN to implement a real-time passenger information system within Costa Mesa.
4. CITY will work with ATN and Travel Costa Mesa ("TCM") to market the transit services to residents, commuters and visitors to the Costa Mesa and Anaheim area.
5. CITY in coordination with TCM will distribute ART passes to CITY partners and reimburse ATN the face value of passes used.
6. CITY will contribute matching funds as specified in the Cooperative Agreement toward actual project costs.

B. Payment.

1. CITY will reimburse ATN for the O&M costs in accordance with the Project V Community-Based Transit Circulator Program 7-YR O&M Funding Plan (the "Funding Plan") set forth in Exhibit A of this Agreement. The Funding Plan indicates the maximum O&M costs for each of the seven (7) years.

2. CITY will reimburse ATN in arrears on a monthly basis for all allowable Project costs upon receipt from ATN of invoices.

3. The funding limit is an estimate and CITY will only reimburse the cost of services actually rendered as authorized by OCTA at or below the funding limitation set forth herein. Funding for this Agreement is subject to the continuing availability to the CITY of funds for this Project. The Agreement may be terminated immediately upon notice of a loss or reduction of Grant funds.

4. ATN will be reimbursed for expended actual allowable direct and indirect costs incurred in the performance of the Project work.

5. ATN must submit final invoice no later than sixty (60) days after the termination date of this Agreement or invoice may not be paid.

C. Required Documentation. ATN shall promptly submit all required documentation to CITY. Invoices submitted by ATN shall include the following information:

- a. Agreement Number C-6-1482;
- b. PROJECT expenditures, specifying the percentage of Project completed and amount to be reimbursed.
- c. Adequate detail describing all work completed.
- d. The following operating statistics for the fiscal year (July 1 through June 30) to date: Revenue Vehicle Hours, Total Boardings, Boardings per Revenue Vehicle Hour, Operating Costs, Net Operating Costs (Costs less fares), Reimbursement per Net Operating Costs, and Reimbursement per Boarding.
- e. Certification signed by ATN that i) The invoice is a true, complete and correct statement of reimbursable costs and progress; ii) The backup information included with the invoice is true, complete and correct in all material respects; iii) All payments due and owing to subcontractors and suppliers have been made; and iv) Timely payments will be made to subcontractors and suppliers from the proceeds of the payments covered by the certification.

f. Such other information as requested by CITY and/or OCTA.

PART 3 - GENERAL TERMS OF AGREEMENT

A. Term. Except as set forth herein, the initial term of this Agreement shall commence on the Service Start Date and continue for one (1) year, and will automatically renew on an annual basis, subject to CITY minimum performance standards of ridership, or December 31, 2023, whichever is earlier, unless terminated earlier as set forth herein. This Agreement may be extended by mutual written agreement of both parties. No services shall commence prior to the Service Start Date, except at ATN's cost and risk, and no charges are authorized until this Agreement is fully executed. Notwithstanding the foregoing, CITY may immediately terminate this Agreement upon notice to ATN of reduction or loss of Grant funds.

B. Termination. In the event any party fails to comply with any term or condition of this Agreement, or fails to provide services in the manner agreed upon by the parties, this shall constitute a material breach of the Agreement. The nonbreaching party shall have the sole and exclusive option either to notify the breaching party that it must cure this breach within fifteen (15) days or provide written notification of its intention to terminate this Agreement with thirty (30) days' written notice. Notification shall be provided in the manner set forth in Part 3, Section G, below. Termination shall not be the exclusive remedy of the nonbreaching party. The nonbreaching party reserves the right to seek any and all remedies provided by law. Contingent upon OCTA's reimbursement of CITY under the Cooperative Agreement, CITY will reimburse ATN for actual costs incurred (not to exceed the total Agreement value), including all noncancellable commitments incurred in performance of this Agreement through the effective date of termination for any reason other than breach.

C. Early Termination. This Agreement may be terminated early if the vehicles or equipment become inoperable through mechanical failure of components or systems directly related to the alternative fuel technology being utilized and such failure is not caused by ATN's negligence, misuse, or malfeasance. CITY may also terminate this

Agreement at any time if OCTA terminates the Cooperative Agreement with CITY following thirty (30) days' written notice to ATN.

D. Independent Party.

ATN is and shall be acting at all times as an independent contractor and not as an employee of CITY. ATN shall have no power to incur any debt, obligation, or liability on behalf of CITY or otherwise act on behalf of CITY as an agent. CITY shall have no power to incur any debt, obligation, or liability on behalf of ATN or otherwise act on behalf of ATN as an agent. Neither CITY nor any of its agents shall have control over the conduct of ATN or any of ATN's employees[A1]. ATN shall not, at any time, or in any manner, represent that it or any of its agents or employees are in any manner agents or employees of CITY. ATN shall secure, at its sole expense, be responsible for any and all payment of Income Tax, Social Security, State Disability Insurance Compensation, Unemployment Compensation, and other payroll deductions for ATN and its officers, agents, and employees, and all business licenses, if any are required, in connection with the services to be performed hereunder. ATN shall indemnify and hold CITY and OCTA harmless from any and all taxes, assessments, penalties, and interest asserted against CITY and/or OCTA by reason of the independent contractor relationship created by this Agreement. ATN further agrees to indemnify and hold CITY and OCTA harmless from any failure of ATN to comply with the applicable worker's compensation laws. CITY shall have the right to offset against the amount of any fees due to ATN under this Agreement any amount due to CITY from ATN as a result of ATN's failure to promptly pay to CITY any reimbursement or indemnification arising under this paragraph.

E. PERS Eligibility Indemnification

In the event that ATN or any employee, agent, or subcontractor of ATN providing services under this Agreement claims or is determined by a court of competent jurisdiction or the California Public Employees Retirement System (PERS) to be eligible for enrollment in PERS as an employee of the CITY or OCTA, ATN shall indemnify, defend, and hold harmless CITY and/or OCTA for the payment of any employee and/or employer

contributions for PERS benefits on behalf of ATN or its employees, agents, or subcontractors, as well as for the payment of any penalties and interest on such contributions, which would otherwise be the responsibility of CITY or OCTA.

Notwithstanding any other agency, state or federal policy, rule, regulation, law or ordinance to the contrary, ATN and any of its employees, agents, and subcontractors providing service under this Agreement shall not qualify for or become entitled to, and hereby agree to waive any claims to, any compensation, benefit, or any incident of employment by CITY or OCTA, including but not limited to eligibility to enroll in PERS as an employee of CITY or OCTA and entitlement to any contribution to be paid by CITY or OCTA for employer contribution and/or employee contributions for PERS benefits.

F. Insurance.

It is agreed that ATN shall secure prior to commencing any activities under this Agreement, maintain, and keep in full force and effect during the term of this Agreement, insurance coverage with an insurance company admitted to do business in California, rated "A," Class X or better in the most recent Best's Key Insurance Rating Guide, as follows:

1. Workers' compensation insurance as required by the State of California. ATN agrees to waive, and to obtain endorsements from its workers' compensation insurer waiving subrogation rights under its workers' compensation insurance policy against the CITY and OCTA, their officers, agents, employees, and volunteers arising from work performed by ATN for the CITY and to require each of its subcontractors, if any, to do likewise under their workers' compensation insurance policies.

2. Commercial general liability, including premises-operations, products/completed operations, broad form property damage, blanket contractual liability, independent contractors, personal injury or bodily injury with a policy limit of not less than One Million Dollars (\$1,000,000.00), combined single limits, per occurrence. If such

insurance contains a general aggregate limit, it shall apply separately to this Agreement or shall be twice the required occurrence limit.

3. Business automobile liability for owned vehicles, hired, and non-owned vehicles, with a policy limit of not less than One Million Dollars (\$1,000,000.00), combined single limits, per occurrence for bodily injury and property damage.

4. Each commercial general liability and business automobile liability insurance policy required by this Agreement shall contain or be endorsed to contain the following provisions:

- a. Additional insureds: "The City of Costa Mesa and Orange County Transportation Authority and their elected and appointed boards, officers, officials, agents, employees, and volunteers are additional insureds with respect to: liability arising out of activities performed by or on behalf of ATN pursuant to its contract with the City and automobiles owned, leased, hired, or borrowed by ATN."
- b. Notice: "Said policy shall not terminate, be suspended, or voided, nor shall it be cancelled, nor the coverage or limits reduced, until thirty (30) days after written notice is given to City of Costa Mesa."
- c. Other insurance: "ATN's insurance coverage shall be primary insurance as respects the City of Costa Mesa, Orange County Transportation Authority and their officers, officials, agents, employees, and volunteers. Any other insurance maintained by the City of Costa Mesa or Orange County Transportation Authority shall be excess and not contributing with the insurance provided by this policy."
- d. Any failure to comply with the reporting provisions of the policies shall not affect coverage provided to the City of Costa Mesa, Orange County Transportation Authority or their officers, officials, agents, employees, and volunteers.

e. ATN's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

5. If any of such policies provide for a deductible or self-insured retention to provide such coverage, the amount of such deductible or self-insured retention shall be approved in advance by City. No policy of insurance issued as to which the City is an additional insured shall contain a provision which requires that no insured except the named insured can satisfy any such deductible or self-insured retention.

6. ATN shall provide to CITY certificates of insurance showing the insurance coverages and required endorsements described above prior to performing any services under this Agreement. The certificates of insurance shall be attached hereto as Exhibit "B" and incorporated herein by this reference.

7. Nothing in this Section shall be construed as limiting in any way, the indemnification provision contained in this Agreement, or the extent to which ATN may be held responsible for payments of damages to persons or property.

8. CITY's Risk Manager is hereby authorized to reduce or waive the requirements set forth above in the event he or she determines that such reduction or waiver is in CITY's best interest.

9. In addition to any other remedies CITY may have if ATN fails to provide or maintain any insurance policies or policy endorsements to the extent and within the time herein required, CITY may, at its sole option:

a. Order ATN to stop work under this Agreement and/or withhold any payment(s) which become due to ATN hereunder until ATN demonstrates compliance with the requirements hereof.

b. Terminate this Agreement, after reasonable notice to ATN and an opportunity to cure.

G. Indemnification.

ATN agrees to defend, indemnify, hold free and harmless the CITY and its elected officials, officers, agents and employees, at ATN's sole expense, from and against any and all claims, actions, suits or other legal proceedings brought against the CITY and/or its elected officials, officers, agents and employees arising out of the performance of ATN, its employees, and/or authorized subcontractors, of the work undertaken pursuant to this Agreement. The defense obligation provided for hereunder shall apply without any advance showing of negligence or wrongdoing by ATN, its employees, and/or authorized subcontractors, but shall be required whenever any claim, action, complaint, or suit asserts as its basis the negligence, errors, omissions or misconduct of ATN, its employees, and/or authorized subcontractors, and/or whenever any claim, action, complaint or suit asserts liability against the CITY, and/or its elected officials, officers, agents and employees based upon the work performed by ATN, its employees, and/or authorized subcontractors under this Agreement, whether or not ATN, its employees, and/or authorized subcontractors are specifically named or otherwise asserted to be liable. Notwithstanding the foregoing, ATN shall not be liable for the defense or indemnification of the CITY for claims, actions, complaints or suits arising out of the sole active negligence or willful misconduct of the CITY.

H. Notices.

Any notices, documents, correspondence or other communications concerning this Agreement or the work hereunder may be provided by personal delivery, facsimile or mail and shall be addressed as set forth below. Such communication shall be deemed served or delivered: (a) at the time of delivery if such communication is sent by personal delivery; (b) at the time of transmission if such communication is sent by facsimile; and (c) 48 hours after deposit in the U.S. Mail as reflected by the official U.S. postmark if such communication is sent through regular United States mail.

CITY:

Public Services Director, Public Services Department

City of Costa Mesa
77 Fair Drive
Costa Mesa, CA 92628
Phone Number: (714) 754-5343
Fax Number: (714) 754-5028

Courtesy copy to:

Brenda Green, City Clerk
City of Costa Mesa
77 Fair Drive
Costa Mesa, CA 92628

ATN:

Diana Kotler, Executive Director
Anaheim Transportation Network
1280 S. Anaheim Boulevard
Anaheim, CA 92805
Phone number:
Fax Number: (714) 563-5289

I. Contract Administration. The Public Services Director, or his or her designee, shall represent CITY in all matters pertaining to the administration of this Agreement.

J. Compliance with Applicable Laws. ATN agrees to comply with all applicable federal, state, and local laws, ordinances, codes and regulations and orders of public authorities, including, but not limited to, Disabled Veterans Business Enterprise Certification, Drug-Free Workplace Certification, Americans with Disabilities Act; California Environmental Quality Act (CEQA), and prevailing wage laws, in the performance of this Agreement and to ensure that the provisions of this clause are included in all subcontracts, if any. ATN further agrees to comply with CITY's Council Policy 100-5, attached hereto as Exhibit C and incorporated herein by this reference. ATN's failure to conform to the requirements set forth in Council Policy 100-5 or any applicable law, ordinance, regulation, code, or order shall constitute a material breach of

this Agreement and shall be cause for immediate termination of this Agreement by CITY upon reasonable notice and an opportunity to cure.

K. Assignment. Neither party shall voluntarily or by operation of law assign, transfer, or delegate all or any part of their rights and obligations under this Agreement without the other party's prior written consent. Any attempted assignment, transfer, or delegation without the other party's prior written consent shall be void and have no effect. Regardless of the other party's consent, no assignment, transfer or delegation shall release the other party of its obligation to perform all other obligations to be performed by the party hereunder for the term of this Agreement.

L. Non-Effect of Waiver. ATN's or CITY's failure to insist upon the performance of any or all of the terms, covenants, or conditions of this Agreement, or failure to exercise any rights or remedies hereunder, shall not be construed as a waiver or relinquishment of the future performance of any such terms, covenants, or conditions, or of the future exercise of such rights or remedies, unless otherwise provided for herein.

M. Attorney's Fees. In the event that litigation is brought by any party in connection with this Agreement, the prevailing party shall be entitled to recover from the opposing party all reasonable costs and expenses, including reasonable attorneys' fees, incurred by the prevailing party in the exercise of any of its rights or remedies hereunder or the enforcement of any of the terms, conditions, or provisions hereof.

N. Force Majeure. Neither CITY nor ATN shall be liable or deemed to be in default for any delay or failure in performance under this Agreement or interruption of services resulting, directly or indirectly, from acts of God, civil or military authority, acts of public enemy, war, strikes, labor disputes, shortages of suitable parts, materials, labor or transportation, or any similar cause beyond the reasonable control of CITY or ATN.

O. Severability. If any provision of this Agreement is determined by a court of competent jurisdiction to be unenforceable in any circumstance, such determination shall not affect the validity or enforceability of the remaining terms and provisions hereof or of the offending provision in any other circumstance. Notwithstanding the foregoing, if the

value of this Agreement, based upon the substantial benefit of the bargain for any party, is materially impaired, which determination made by the presiding court or arbitrator of competent jurisdiction shall be binding, then both parties agree to substitute such provision(s) through good faith negotiations.

P. Governing Law. This Agreement shall be governed by and construed under the laws of the State of California without giving effect to that body of laws pertaining to conflict of laws. In the event of any legal action to enforce or interpret this Agreement, the parties hereto agree that the sole and exclusive venue shall be a court of competent jurisdiction located in Orange County, California.

Q. Non-Discrimination. In performing this Agreement, ATN shall not engage in, nor permit its agents to engage in, discrimination in employment of persons because of their race, religion, color, national origin, ancestry, age, physical handicap, medical condition, marital status, sexual gender or sexual orientation, except as permitted pursuant to Section 12940 of the Government Code.

R. Amendment. Only a writing executed by the parties hereto or their respective successors and assigns may amend or modify the terms of this Agreement.

S. Entire Agreement. This Agreement constitutes the entire agreement between the parties with respect to any matter referenced herein and supersedes any and all other prior writings and oral negotiations. No waiver, alteration or modification of any of the provisions herein shall be binding on any party unless in writing and signed by the parties in interest at the time of such waiver, alteration or modification. The terms of this Agreement shall prevail over any inconsistent provision in any other contract document appurtenant hereto, including exhibits to this Agreement.

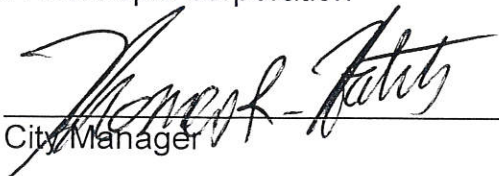
T. Authority. The persons executing this Agreement on behalf of the parties hereto warrant that they are duly authorized to execute this Agreement on behalf of said parties and that by doing so the parties hereto are formally bound to the provisions of this Agreement.

U. Effective Date. This Agreement is effective on the date the last party executes and delivers this Agreement as indicated by the date stated next to that party's signature line (the "Effective Date").

V. Public Route. The parties understand and agree that pursuant to 49 U.S.C. § 5323(d) and 49 CFR Part 604 recipients and subrecipients of FTA assistance are prohibited from providing charter service using federally funded equipment or facilities except under very limited exceptions. Any charter service provided under one of the exceptions to 49 CFR § 604.9 must be "incidental", i.e., it must not interfere with or detract from the provision of mass transportation. The parties understand and agree the ATN serviced provided to CITY is not a charter service but is part of a public route. The parties further understand and agree ATN shall provide only those services via its approved public route system to all passengers seeking transit service between those public route stops. The ATN may evaluate service efficiencies, routes or route stop locations from time to time. Any recommended changes to the ATN service, routes or route stop locations shall be presented to the ATN Board of Directors and shall be held as a public hearing at a regularly scheduled meeting of the ATN Board of Directors.

IN WITNESS WHEREOF, the parties to this Agreement have caused this Agreement to be executed by and through their respective authorized officers as of the date last written below.

CITY OF COSTA MESA,
A municipal corporation



City Manager

Date: 3/17/17

ATN,
A nonprofit corporation



Signature

Date: March 18, 2017

DIANA KOSTER
Executive Director

Name and Title

33-0688792
Taxpayer ID Number

ATTEST:

Brenda Green
City Clerk

APPROVED AS TO FORM:

[Signature]
City Attorney

Date: 03/17/17

APPROVED AS TO INSURANCE:

[Signature]
Risk Management

Date: 3/13/17

DEPARTMENTAL APPROVAL

Paya Sethuraman
Public Services Director

Date: 3-14-17

APPROVED AS TO PURCHASING:

Stephen DeLuvent
Interim Finance Director

Date: 3-15-17

EXHIBIT A
THE FUNDING PLAN

City of Costa Mesa Project V Estimated Funding Schedule

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7
	FY 16/17	FY 17/18	FY 18/19	FY 2020	FY 2021	FY 21/22	FY 22/23

Capital OCTA	\$ 201,737							\$ 201,737
Local Match - 10%	\$ 22,415							
Total Capital	\$ 224,152							
Operations								
OCTA Operations	\$ 369,843	\$ 369,843	\$ 369,843	\$ 369,843	\$ 369,843	\$ 369,843	\$ 369,843	\$ 2,588,901
Local Match	\$ 41,094	\$ 41,094	\$ 41,094	\$ 41,094	\$ 41,094	\$ 41,094	\$ 41,094	\$ 287,656
Total Operations	\$ 410,937	\$ 410,937	\$ 410,937	\$ 410,937	\$ 410,937	\$ 410,937	\$ 410,937	\$ 2,876,557

Total OCTA Share								327,986,638
Total Local Share								33,100,000
Total Project Cost								361,086,638
Total OCTA Percentage								90%
Total City Match Percentage								10%