



TO: Association of Bay Area Governments (ABAG) Executive Board

DATE: February 13, 2017

Metropolitan Transportation Commission (MTC)

Joint MTC Planning Committee and ABAG Administrative Committee

FR: Brad Paul, ABAG Acting Executive Director

Steve Heminger, MTC Executive Director

RE: Draft Contract for Services for MTC/ABAG Staff Consolidation for Review and Input

### **Summary and Requested Action**

The Association of Bay Area Governments (ABAG) and the Metropolitan Transportation Commission (MTC) jointly retained Management Partners (MP) to conduct a study on the potential merger of the two agencies. MP presented the Options Analysis and Recommendation Report dated April 18, 2016 with seven options. The agencies joined in expressing policy support for Option 7 that proposes ABAG and MTC entering into (1) a contract to consolidate staff functions under one executive director (CS) and (2) a memorandum of understanding regarding new governance options (MOU).

Further, the agencies adopted an Implementation Action Plan (IAP) designed by Management Partners to guide the staff consolidation. The ABAG and MTC senior staffs have been working on the IAP under the policy direction provided by our respective policy bodies. Over the past several months, MTC and ABAG staff have been working diligently to put together a contract for services (CS). A draft of the contract, which represents a consensus by both agency staff, is attached to this memorandum as Attachment A. The balance of this memorandum provides guidance for your policy review of the draft CS.

### **Background and Discussion**

#### **A. Policies and Principles for the Agencies' Support of Option 7 IAP**

At the May 19, 2016 meeting of the Executive Board of ABAG, it approved Resolution 07-16 (Attachment B) expressing its policy support for Options 4 and 7 from Management Partners (Report). Resolution 07-16 also provided approval of the Option 7 IAP if MTC selected Option 7 (see below). Resolution 07-16 also placed specific conditions on ABAG's policy approval of Option 7 and the IAP, including principles to guide the IAP process.

At the May 25, 2016 meeting of the Commission, it approved Resolution 4245 (Attachment C) expressing its policy support for Option 7. MTC's policy support for Option 7 activated the provisions in ABAG's Resolution 07-16 relating to policy support for that option and the concomitant IAP. At its meeting on June 22, 2016, the Commission approved the Option 7 IAP.

There are differences in the policies and principles articulated in the Executive Board Resolution 07-16 and the Commission's Resolution 4245 that informed and conditioned their respective support for Option 7. The staffs have attempted to reflect both sets of policies and principles in the initial draft of the CS and the governance MOU that will follow soon.

#### B. ABAG and MTC Remain Separate and Independent Entities

Under Option 7, ABAG and MTC remain separate entities with their own statutory authorities and responsibilities, policy positions, assets, liabilities, revenues and debts. All existing and future business and programmatic risks remain with the agency conducting that business or program. The ABAG Local Collaboration Programs (LCPs) also retain their assets, liabilities and business risks. ABAG will have the same responsibility for the revenues and assets of the LCPs but MTC staff will be acting on ABAG's behalf in executing those responsibilities.

Based on direct discussions with CalPERS, we understand that: (1) even if ABAG has no employees, its contract with CalPERS remains valid and enforceable and (2) ABAG will continue to be responsible for the unfunded annual liability payments for pensions and for retiree medical benefits<sup>1</sup>. We are seeking confirmation from CalPERS that there are no negative or unforeseen effects on ABAG's or MTC's pension liability as a result of the MTC/ABAG staff consolidation. It will be important to get this determination prior to approval of the contract for services. While we have made progress to this end, CalPERS has requested some additional information to aid in their response.

We recognize that having MTC staff provide services and programs to ABAG exposes MTC to third party claims arising out of those services and programs. We have addressed those risks by clearly articulating that ABAG retains those risks. In addition, we have configured the defense, indemnity, hold harmless and insurance provisions of the contract to manage these risks under a joint acquisition of commercial insurance coverage<sup>2</sup>.

#### C. Developing Work Plans under the Contract for Services

Our initial efforts focused on the components of a straightforward contract for one entity to provide services to another. Therefore, there are provisions in the draft CS that provide procedures for (1) the development of budgets and programmatic work plans for ABAG and the LCPs<sup>3</sup>, (2) MTC to provide administrative and support services to ABAG and the LCPs<sup>4</sup> and (3)

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<sup>1</sup> See section 6.1 of the draft CS.

<sup>2</sup> See sections 9 and 10 of the draft CS.

<sup>3</sup> See sections 3.2 and 4.1 of the draft CS.

<sup>4</sup> See sections 3.3, 3.4 and 4.3 of the draft CS.

compensation to MTC for services provided<sup>5</sup>. These reflect basic and standard processes for negotiating a standard service contract. In addition, the procedures in the draft CS take into account ABAG's and the LCPs' current processes for policy level approval of their respective annual budgets and work plans.

We expect that many of the programmatic work plans for ABAG activities that do not overlap with MTC's activities will be at the sole discretion of ABAG or the LCPs. However, one purpose of Option 7 is to improve coordination between ABAG and MTC over joint programs such as the preparation of updates to the region's sustainable communities strategy, or Plan Bay Area. Since the preparation of the current update will have been mostly completed, the draft CS does not propose a specific process for coordination on work plan for the 2021 update. That will come later from discussions between the ABAG and MTC governing boards.

#### D. Developing Budgets under the Contract for Services

ABAG and the LCPs currently have revenues from multiple sources. Some of the revenues, mainly grants and subventions, may only be used for specific programs and products. The balance, largely ABAG's membership dues and reserves held by ABAG and the LCPs, are discretionary. We anticipate that the development of future budgets and work plans will continue to draw on both types of revenues, including grants and subventions to ABAG and/or the LCPs.

As you have been previously advised, the services provided by the consolidated staff will cost more than those provided by the current ABAG staff. We have identified a number of measures that will address a significant portion of the cost difference for the initial year. We are working diligently to provide a balanced budget, focusing on cost saving opportunities where feasible and minimizing the need for contributions from MTC reserve to address any remaining shortfalls.

The draft CS also recognizes that the cost differences for subsequent years need to be addressed. The draft CS includes a provision where ABAG acknowledges the need to identify additional revenues in the future<sup>6</sup>.

#### E. Executive Policy Oversight of Work under the Contract for Services

The IAP recognized the need for an executive level organizational structure at MTC that supports ABAG's policy bodies and members<sup>7</sup>. To that end, the draft CS includes key functions<sup>8</sup> of the executive director and other key senior staff that support ABAG in its role as a Council of Governments and a joint powers authority and that preserve the essential relationships between the policymakers and members of ABAG and the LCPs and the consolidated staff<sup>9</sup>. These

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<sup>5</sup> See section 5 of the draft CS.

<sup>6</sup> See section 4.2 of the draft CS.

<sup>7</sup> See section B.6 at page 5 of the IAP and section 2.1 of the draft CS.

<sup>8</sup> See section 2.3 of the draft CS.

<sup>9</sup> See section 2.4 of the draft CS.

provisions will be coordinated with the provisions in the CS that better describe the executive organization structure and the Transition Plan.

We have also included a provision for ABAG, if necessary, to raise concerns about the quality and manner of work completed for it or the LCPs<sup>10</sup>. This is a mechanism for policy feedback after the work is performed. Finally, we note that any disputes regarding how the consolidated staff is responding to the policy input and programmatic needs of ABAG and the LCPs are also subject to the dispute resolution procedures in the draft CS.

The organization chart, is still being finalized and will be included along with the Employee Transition Plan as an attachment to the final CS Plan (see discussion in section F of this memorandum).

#### F. Next Steps

Your input and comments will inform the final recommended CS and the following documents:

##### 1) Attachments to the CS

- Transition Plan – the plan for transitioning individuals identified as current employees of ABAG who are expected to accept an offer of employment at MTC.
- Employee Organization Chart – a graphic representation of the hierarchic and functional relationships among the consolidated staff.


##### 2) Memorandum of Understanding regarding governance options

We will also report on our discussions with CalPERS as developments occur.

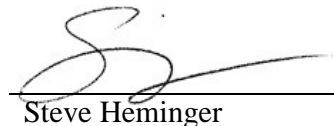
The proposed information meetings to seek input on the Draft CS are as follows:

- February 16: ABAG Executive Board Review of Draft Contract for Services
- February 24: Special Joint MTC Planning/ABAG Administration Committee Review of Draft Contract for Services

The schedule for approval of the CS and MOU will be updated based on the input at the February meetings and the progress of conversations with CalPERS.



Brad Paul



Steve Heminger

BP / SH: ab / bp

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<sup>10</sup> See section 2.5 of the draft CS.

Draft February 13, 2017

CONTRACT FOR SERVICES

between

METROPOLITAN TRANSPORTATION COMMISSION

and

ASSOCIATION OF BAY AREA GOVERNMENTS

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## **CONTRACT FOR SERVICES**

THIS CONTRACT FOR SERVICES (this "Agreement") is made and entered into as of the \_\_\_\_ day of Month, 20\_\_\_\_, by and between the Metropolitan Transportation Commission (herein called "MTC"), a regional transportation planning agency established pursuant to California Government Code § 66500 and the Association of Bay Area Governments, (herein called "ABAG"), a Council of Governments established by agreement among its members pursuant to the Joint Exercise of Powers Act, California Government Code Sections 6500, *et seq.*

### **RECITALS**

MTC is the federally designated Metropolitan Planning Organization ("MPO"), pursuant to Section 134(d) of Title 23 of the United States Code (USC) for the nine-county San Francisco Bay Area region (the "Bay Area" or "region").

ABAG was created in 1961 and serves as the Council of Governments for the 101 cities/towns and nine counties that make up the region with powers and responsibilities granted to it under the laws of the State of California.

In November 2015 MTC and ABAG agreed to jointly retain Management Partners to conduct a merger study and to propose a merger implementation plan.

At the June 2016 meeting of the ABAG Executive Board, it adopted Resolution 07-16 stating its support for merger options 4 and 7 and their respective implementation action plans as presented by Management Partners, with the ABAG Executive Board acknowledging moving forward with merger option 7.

On May 25, 2016 MTC adopted Resolution No. 4245 approving an implementation plan dated May 17, 2016 for merger option 7.

ABAG and MTC have concluded that this Agreement is the preferred means for ABAG and MTC to jointly pursue their respective missions and to carry out their respective responsibilities for the benefit of the San Francisco Bay region.

## TERMS AND CONDITIONS

### 1. DEFINITIONS

ABAG is a joint powers agency that serves as the region's Council of Governments with the statutory responsibilities and powers granted by the California Legislature including, but not limited to, (a) responsibility for preparation of portions of the region's sustainable communities strategy and (b) authority to adopt the regional housing need allocation (RHNA) plan. The ABAG Executive Board and/or its standing committees and Local Collaboration Program governing boards are referenced from time to time in this Agreement in order to represent the interests of ABAG.

ABAG Legacy Employees means the individuals identified in Section [5] of this Agreement, each of whom, as of the Effective Date, is currently an employee of ABAG and is expected, in accordance with the Employee Transition Plan, to accept an offer of employment at MTC.

Effective Date means the effective date of this Agreement as set forth above.

Employee Transition Plan means the plan for transitioning ABAG Legacy Employees to employment at MTC as described in Exhibit [B] to this Agreement.

Enterprise Board means the governing board of a LCP.

Local Collaboration Program (LCP) means, individually or collectively as the context may require, each of the following entities created by ABAG in collaboration with local governments to implement a regional program:

Bay Area Regional Energy Network (BayREN);

San Francisco Estuary Partnership (SFEP);

San Francisco Bay Trail (BayTrail) and Water Trail (Water Trail);

ABAG Finance Authority for Nonprofit Corporations (FAN);

ABAG Finance Authority (ABAG FA);

ABAG PLAN Corporation (PLAN);

ABAG Publicly Owned Energy Resources (POWER);

Shared Agency Risk Pool (SHARP); and

San Francisco Bay Restoration Authority (SFBRA).

MTC ICAP Rate means the indirect cost allocation plan, as approved by the appropriate MTC oversight agency.

Operating Budget and Work Plan means each annual operating budget and work plan for ABAG prepared and submitted by MTC in accordance with Section [4] of this Agreement and approved by the ABAG Executive Board and, to the extent applicable, each LCP governing body. Each operating budget and work plan will describe, in detail, the scope of work to be performed by MTC and the compensation to be paid to MTC for services rendered.



Transitioned Employee means each ABAG Legacy Employee who, after cessation of his or her employment at ABAG, voluntarily accepts an offer of employment at MTC and becomes an employee of MTC.

## **2. PRESERVATION OF RESPONSIBILITIES AND MISSIONS OF ABAG AND THE LCPs**

The parties agree to use their best efforts to preserve, serve and secure the statutory powers and responsibilities of ABAG and the mission of ABAG as the region's Council of Governments following the Effective Date, and similarly to preserve, serve and secure the respective goals and missions of the LCPs. A list of ABAG's statutory responsibilities is attached as Exhibit [A] and may be revised to reflect changes to those responsibilities and powers made by the California Legislature without formal amendment of this contract. To ensure that the services provided under this Agreement serve the goals and missions of ABAG and the LCPs, the parties agree as follows:

2.1 The Executive Director of MTC will perform the following duties and functions with respect to ABAG and the LCPs:

- (a) attend all regular meetings of the ABAG Executive Board and key committees (Administrative Committee, Finance and Personnel Committee, Legislation and Government Operations Committee, Regional Planning Committee) unless excused in advance by the President of such board or chair of the committee, or the attendance of another MTC senior manager is mutually agreed upon;
- (b) attend meetings of the LCP governing boards at which Operating Budgets and Work Plans are adopted by and for the LCPs; and
- (c) ensure that the approved Operating Budgets and Work Plans for ABAG and for each LCP will be implemented as approved, or as modified by ABAG or the LCP, as applicable;
- (d) attend the ABAG General Assembly(ies).

2.2 The Executive Director, the Deputy Executive Director for Local Government Services, the Deputy Executive Director of Policy, and other members of the MTC senior executive team will perform the following duties and functions on behalf of ABAG and the LCPs with the help of other appropriate MTC staff as needed:

(a) keep local elected officials, government officials and stakeholders informed on key issues of concern to the Council of Governments including land use, housing, economic development, resilience, transportation, RHNA, Plan Bay Area, and ABAG's Local Collaboration Programs in part, by:

- (i) meeting regularly with City Managers at the county level;
- (ii) meeting with elected officials at regular countywide meetings of mayors and city council members;
- (iii) meeting with ABAG delegates at the county level on a regular basis.

(b) serve as the primary links between ABAG's Executive Board, Committees and Local Collaboration Programs (LCP) and the MTC executive team and staff regarding issues such as Plan Bay Area, RHNA, housing, land use and LCP programs.

(c) work with appropriate MTC staff to help coordinate the work of MTC staff and ABAG Executive Board related to creating the Annual Budget & Work Plan for ABAG and its Local Collaboration Programs.

2.3 The members of ABAG and LCP's and the members of the policy bodies of ABAG and of the LCPs will continue to have access to, and ability to interact with, the MTC staff who provide services to them, that is commensurate with their respective roles as policymakers and staff.

2.4 ABAG shall provide written reports to the Commission regarding the quality and manner in which ABAG services, programs and work products are delivered, observations on the potential reasons for any deficiencies and suggestions for improvements. The Commission will respond to such reports within 60 calendar days and take them into account when reviewing MTC's satisfactory execution of its duties under the contract.

### **3. SERVICES**

#### **3.1 Standard of Professional Care**

In the performance of services under this Agreement, MTC will exercise professional care, skill, efficiency, and judgment commensurate with that of consultants with expertise in providing such services.

#### **3.2 Operating Budgets and Work Plans**

Except as otherwise identified in this Agreement or the applicable Operating Budget and Work Plan, MTC will assume responsibility for and perform all services and functions necessary to perform ABAG's annual Work Plan. MTC and ABAG will develop, present, seek approval for, and implement Operating Budgets and Work Plans as provided in Section [4].

#### **3.3 Financial Services**

All ABAG finance and accounting functions, including the treasury function, will be assigned to MTC to be completed within the period from the execution date to a year thereafter, in such fashion to close out the transition of all legacy systems in an orderly manner for MTC finance.

ABAG and MTC will develop a transition plan for all ABAG financial systems, including but not limited to: (1) treasury; (2) general ledger, including accounts payable and receivable; (3) budget; and (4) payroll. The transition will occur and MTC will be responsible for all financial systems on or about July 1, 2017.

MTC rules for administration, personnel, payroll, employee relations, purchasing, contracting and other business operations shall apply to the services provided here under, to the extent to which they are compatible with ABAG policies. Notwithstanding the foregoing, ABAG contracts exceeding \$50,000 or such other amount dictated by the ABAG Executive Board, shall be approved by the ABAG Executive Board.

MTC will provide necessary financial reports prior to each ABAG Finance and Personnel Committee meeting, provided, however that such reports shall not be required more often than on a monthly basis.

### 3.4 Legal Services

The MTC Legal Department will provide general legal support services to ABAG and the LCPs.

- (a) Potential Legal Conflicts of Interest. If ABAG, a LCP, or MTC determines in good faith that an actual or potential conflict of interest would exist if the MTC Legal Department were to provide legal services on a specific matter, then, unless the actual or potential conflict of interest is waived by the affected entities, then the affected entity whose matter gave rise to the actual or potential conflict of interest will obtain separate legal counsel. MTC shall not withhold consent or resources to hire outside counsel for ABAG in the event a legal conflict of interest; provided that ABAG independently obtains such separate outside counsel.
- (b) Obtaining Outside Specialized Legal Services. ABAG or a LCP may request that the MTC Legal Department retain outside legal counsel to provide specialized legal services. The MTC Legal Department shall promptly respond to any such request in writing by either (i) agreeing to engage outside legal counsel and commencing to work with ABAG or the LCP, as applicable, to retain such counsel on terms and conditions acceptable to MTC, the MTC Legal Department, and the requesting party or (ii) declining to engage outside legal counsel and providing a brief explanation of the reason(s) such request is being denied.
- (c) Nothing in this Agreement prevents or impairs the ability of ABAG or the LCP to directly retain outside legal counsel, at its own respective expense.

### 3.5 Progress Reports

MTC will provide to the ABAG Executive Board and to the governing bodies of the LCPs quarterly progress reports in form and substance reasonably acceptable to those bodies, detailing the services provided by MTC in the preceding fiscal quarter as well as major activities anticipated in the coming quarter.

## 4. OPERATING BUDGETS AND WORK PLANS; STAFFING

### 4.1 Development and Approval

No later than February 1 of each year, the program managers of each program that is implemented, in whole or in part, for ABAG and of each program implemented for the LCPs will develop a schedule for the development of the Budget and Work Program for their respective program for the next fiscal year. Each schedule will take into account the processes and timelines for the applicable MTC, ABAG and LCP policy bodies to approve a Budget and Work Plan.

Each Budget and Work Program will include all of the following that is applicable to that program for that year:

- (a) description of programmatic activities for that fiscal year;

- (b) proposals for expansion of a current programmatic activity;
- (c) proposals for a new program (see section 4.2 regarding funding new programs);
- (d) description of programmatic activities that will be discontinued in that fiscal year;
- (e) a budget showing the revenue(s) needed to support the proposed Work Plan for that budget year;
- (f) identification of the source of the revenue(s) described in subsection (e) and
- (g) any contingency plan(s) needed to address programmatic uncertainties or budgetary shortfalls.

Each Budget and Work Plan that is approved by all the applicable MTC, ABAG and LCP policy bodies will be implemented in accordance with section 4.2. The Deputy Executive Director for Local Government Services will be responsible for securing the approval of the LCP policy bodies.

If a Budget and Work Plan is not approved by all the applicable MTC, ABAG and LCP policy bodies, the prior year's Budget and Work Plan will remain in effect until the new Budget and Work Plan is approved. The parties may at their discretion use the dispute resolution procedures contained in Section 13 to resolve any differences on proposed new Budget and Work Plans.

Following consultation with ABAG and the FAN Executive Committee, MTC will administer the current FAN portfolio in runout mode such that there will be no new debt issuance under the FAN name. The consolidated staff working for MTC will, no later than \_\_\_\_\_, create a successor ABAG-affiliated conduit financing authority, which shall be a new legal entity with a new name and a new governing body (the ABAG Executive Board or its designee), to continue to meet the conduit financing needs of the region and of ABAG's member jurisdictions.

#### 4.2 Revenues

The ABAG Executive Board and the LCP governing bodies will collaborate and agree on annual work plans and budgets that identify existing revenues needed to support the current work plans and obligations set forth in Section 4.1. As part of this annual process, the ABAG Executive Board and the LCP governing bodies will make best efforts and adopt strategies to identify and secure any additional revenues that may be needed to support the anticipated work plans and obligations set forth in Section 4.1 for that fiscal year. With regard to any new programs proposed by ABAG, if that program is one that solely supports ABAG's services, programs and mission, ABAG will be responsible for securing the funding for that program. If a new program is one that is jointly proposed by ABAG and MTC, the two agencies will agree on how to jointly fund the program.

#### 4.3 MTC Staffing

The MTC employees identified as part of the Budget approval process (which shall contain an organization chart) will be responsible, commencing as of the Effective Date, for providing the services under this Agreement, both to ABAG and to the LCPs. Except as provided in section 6, MTC may remove, replace or add to the list of MTC employees below at any time as needed in the judgment of MTC.

## **5. COMPENSATION AND METHOD OF PAYMENT**

### **5.1 Compensation**

For the first fiscal year in which services under this Agreement commence, ABAG will pay to MTC compensation equal to the amounts scheduled to be paid under pre-existing adopted work plans and budgets for ABAG in that fiscal year.

For all subsequent fiscal years, ABAG will compensate MTC based upon amounts specified in each of the approved Operating Budget and Work Plan for such fiscal year.

Compensation structures may include, subject to budget discussions between MTC and ABAG:

- (a) total or partial cost recovery by MTC, based upon a breakdown of personnel costs, direct costs, and indirect costs;
- (b) total funding by MTC of select entities or programs;
- (c) subsidy of select entities and programs by MTC;
- (d) subsidy of select entities and programs by ABAG; and/or
- (e) subsidy of programs by one or more LCP.

### **5.2 Overhead and Administrative Costs**

The overhead and administrative rate applied to work performed by MTC staff will be the MTC ICAP Rate except for the San Francisco Estuary Partnership (SFEP) and as the parties may otherwise agree in the applicable Budget and Work Plan or under section 5.1.

### **5.3 Payment Procedure and Method**

ABAG will compensate MTC promptly in accordance with the payment schedule set forth in each Operating Budget and Work Plan, without netting or set-off except as agreed to in writing, in advance, by MTC in its sole discretion.

Payment to MTC will be made by wire transfer.

## **6. EMPLOYMENT OF ABAG LEGACY PERSONNEL**

ABAG Legacy Employees are expected to become employees of MTC in accordance with the Employee Transition Plan. Each Transitioned Employee's general duties and responsibilities will be equivalent to his or her prior duties and responsibilities as an ABAG employee.

ABAG represents and warrants that: (a) there are no current open disciplinary actions related to employees proposed to transition to MTC and (b) the information regarding employee benefits, including its CalPERS account, retiree medical benefits, and sick account accruals provided by ABAG and inserted in the Transition Plan is complete and accurate.

The following individuals are hereby identified as ABAG Legacy Employees:

[Insert List or attach schedule – include name, current ABAG title and program affiliation]

#### 6.1 Pension Obligations and Other Employee Benefits

ABAG Legacy Employees are currently represented by the Service Employees' International Union (SEIU), Local 1021, and are part of the California Public Employees' Retirement System (CalPERS). ABAG and MTC will cooperate and coordinate their discussions with SEIU Local 1021 and CalPERS to facilitate the transition of ABAG Legacy Employees from ABAG employment to MTC employment.

The parties hereby agree with respect to any and all Transitioned Employees that ABAG shall have no direct control over any such Transitioned Employees. Such Transitioned Employees shall be treated for all purposes as common law employees of MTC.

ABAG agrees that it will not at any time during the term of this Agreement take any action to terminate its existing contractual relationship with CalPERS and will take all steps necessary to maintain its existing contractual relationship with CalPERS, including but not limited to making annual payments to CalPERS as required by under such contractual arrangements.

#### 6.2 Changes in Employment Status

During the first fiscal year after the Effective Date, prior to making any employment change (including but not limited to termination, reassignment, or promotion) with respect to any Transitioned Employee, MTC will provide the ABAG Executive Board with 30 days prior written notice of the intended change before any action is taken. No Transitioned Employee may be terminated, reassigned, or promoted during such period without prior written notice to the ABAG Executive Board and the affected LCP, if applicable.

#### 6.3 Employee Transition Plan

MTC will follow the terms of the Employee Transition Plan set forth in Exhibit [B], which sets forth various one-time provisions applicable to Transitioned Employees.

#### 6.4 Plan for Staff Consolidation

Transitioned Employees will transition to MTC by May 1, 2017.

#### 6.5 LCP Staffing and Officers

ABAG agrees to make best efforts to work with the LCPs to formally modify any relevant agreements to allow staffing at the LCPs to be contracted to MTC. In those instances in which one or more former ABAG staff members serve in "dual capacities," sitting as officers of LCPs by virtue of their former positions within ABAG, all reasonable efforts will be made to formally modify relevant agreements or otherwise put legal arrangements in place such that MTC staff, will serve as officers of such LCPs.

## 6.6 SFEP Staff

The current existing staff, with the exception of the three staff performing permit work for the Regional Water Quality Control Board, will move the location of their employment from 1515 Clay Street, Suite 1400, Oakland, CA to 375 Beale Street, San Francisco, CA, at such time as the space at 375 Beale Street is ready for occupancy. MTC will pay for the costs of moving the SFEP staff to 375 Beale Street.

## 6.7 Pension and Medical Benefits

ABAG will retain all liability for meeting its annual obligation for outstanding CalPERS pension obligations and retiree medical benefits, and will make meeting such obligations a budgetary priority.

# 7. RESPONSIBILITIES OF MTC PERSONNEL

## 7.1 Personnel

Attached as Exhibit [D] is the MTC organization chart identifying all of the employees of the consolidated staff as of the Effective Date. This organization chart will be updated annually or as changes are made so that the ABAG policy bodies and LCP governing boards have up to date information on people staffing their programs.

# 8. GOVERNANCE STUDY

MTC and ABAG agree to conduct a governance study on the ABAG LCPs and to present the findings to the ABAG Executive Board and appropriate LCP Boards for consideration. The objective of the governance study will be to increase accountability to the ABAG Executive Board and efficiency in the operation of the LCPs.

# 9. RELEASE OF CLAIMS

ABAG, the LCPs, and MTC mutually agree to indemnify and hold each other harmless for any breach of this Agreement, and agree to release any and all claims between or amongst each other arising out of this agreement.

# 10. INSURANCE AND RISK ALLOCATION

## 10.1 Engagement of Consultant(s)

MTC and ABAG will jointly engage a professional risk manager and an insurance broker (who may be the same party) to develop a proposed allocation of legal risk (claims from third parties) between and among MTC, ABAG and the LCPs during the term of the Agreement. The process for selecting and engaging such party or parties will be as follows:

- (a) Not more than 60 days after the Effective Date, MTC will initiate, by procurement procedures employed by MTC in the ordinary course of business, a request for proposals/qualifications (the "Solicitation") for the services described above and to assist and advise MTC in procuring and implementing the policies and practices set forth in subsection 10.2.

- (b) MTC staff will review responses to the Solicitation and evaluate them based on factors such as responsiveness, qualifications/reputation, and cost, and will select one or more preferred providers.
- (c) MTC staff will present the choice of the selected provider(s) to the MTC Administration Committee and the ABAG Finance and Personnel Committee for approval.

## 10.2 Insurance Policies

Upon retention of the consultant retained pursuant to subsection 10.1, MTC will work with the consultant to undertake the following:

- (a) ABAG, the LCPs, and MTC will be insured under one blanket comprehensive general liability policy, professional errors and omissions policy (if applicable) and crime and fidelity policy. ABAG, the LCPs, and MTC will be insured under separate public officials and directors and officers errors and omissions policy
- (b) The allocation of the costs of deductibles under the policy described in the immediately preceding paragraph will be determined on a case by case bases under criteria and processes to be agreed upon by the parties after the Effective Date;
- (c) MTC will be insured under a separate employment practices policy; and
- (d) The costs of any uninsured claims made against either of the parties will be allocated on a case by case basis under criteria and processes to be agreed upon by the parties after the Effective Date.

## 10.3 Business and Programmatic Risks

The parties agree that existing business and programmatic risks will remain with the entity responsible for the relevant business or program.

## 11. NOTICES

All notices or other communications to either party by the other will be deemed given when made in writing and delivered, mailed, emailed, or faxed to such party at their respective addresses as follows:

To MTC:	<p>Attention: Alix Bockelman  Metropolitan Transportation Commission  375 Beale Street, Suite 800  San Francisco, CA 946105  Email: ABockelman@mtc.ca.gov</p>
To ABAG:	<p>Attention: ABAG President  ABAG Vice President  Chair, ABAG Finance Committee  ABAG Administrative Committee  members  address: home address for each person  Email: email address for each person  cc: MTC Deputy Dir. for Local Gov't Services</p>



## **12. DURATION OF AGREEMENT**

This agreement and the services hereunder will continue unless terminated in accordance with the terms herein.

## **13. DISPUTE RESOLUTION**

- (a) ABAG and MTC shall use good faith efforts to resolve all disputes informally. In the event such efforts are unsuccessful, either party may request that MTC provide a written determination as to the proposed resolution of the dispute. Within 30 calendar days of the request, the MTC Administration Committee shall provide a written determination as to the dispute, including the basis for its decision.

Upon the ABAG Administrative Committee's written acceptance of the MTC Administration Committee's determination, the Agreement may be modified and the determination implemented.

If the MTC Administration Committee's determination is not accepted by the ABAG Administrative Committee, the matter shall promptly be referred to the joint MTC board and the ABAG Executive Board for consideration.

If the joint MTC board and ABAG Executive Board cannot agree, they shall retain a facilitator to assist them in reaching a joint resolution.

- (b) If the joint MTC board and ABAG Executive Board cannot agree, the dispute shall be referred to binding arbitration using an arbitration board supplied by JAMS. Each party shall bear the costs and expenses incurred by it in connection with such binding arbitration. The cost shall be shared equally; provided, however, that should the arbitrator(s) find specific fault by one party, then that party shall bear the entire cost. The arbitration shall determine the final outcome of the dispute, including whether and when a termination of this Agreement may occur.

## **14. TERMINATION**

### **14.1 Termination for Cause**

If (i) MTC does not deliver the work products specified in this Agreement in accordance with the mutually agreed upon delivery schedule or fails to perform in the manner called for in the Agreement, as set forth in Section 3 of this Agreement, or (ii) if MTC or ABAG fail to comply with any other material provision of the Agreement, then (A) in the first instance under (i) ABAG may terminate this Agreement for default and (B) in the second instance under (ii) MTC may respectively terminate for ABAG's failure or ABAG may respectively terminate for MTC's failure.

Termination shall be effected by serving a thirty (30) day advance written notice of termination on the affected party, setting forth in detail the manner in which the affected party is in default. If the affected

party does not cure the breach or describe to the complaining party's satisfaction a plan for curing the breach within the thirty (30) day period, commencing on the date of receipt of the notice ("Cure Period"), the complaining party may terminate the Agreement for default, subject to the procedures set forth in Section 13, which shall first require dispute resolution as set forth in Section 13(a), and if unsuccessful, arbitration as set forth in Section 13(b). The final decision in arbitration shall determine whether and when termination shall occur. In the case of (i), if MTC is working diligently to cure the alleged failure of performance, the parties will extend the Cure Period by mutual agreement. The Cure Period may be extended a maximum of six (6) thirty day periods.

If MTC's failure to perform resulted from unforeseeable causes beyond the control of MTC, such as a strike, fire, flood, earthquake or other event that is not the fault of, or is beyond the control of MTC, ABAG, after setting up a new delivery or performance schedule, shall allow MTC to continue work.

#### **14.2 Notice of Termination**

Notice will be given by Certified Mail or Personal Service to the address specified in Section 11.

#### **14.3 Payment for Services Rendered Following Notice of Termination**

MTC will be compensated for all work performed up to and including the date of termination of this Agreement, notwithstanding the delivery of any notice under this Section 14, provided that MTC will not be compensated for any work that is under dispute and identified in the notice provided under section 14.1.

### **15. CHOICE OF LAW**

All questions pertaining to the validity and interpretation of the Agreement will be determined in accordance with the laws of the State of California applicable to agreements made and to be performed within the State.

### **16. PARTIAL INVALIDITY**

If any term or condition of this Agreement is found to be illegal or unenforceable, such term or condition will be deemed stricken and the remaining terms and conditions will remain valid and in full force and effect.

### **17. BENEFIT OF AGREEMENT**

The Agreement will bind and benefit the parties hereto and their heirs, successors, and permitted assigns.

### **18. ENTIRE AGREEMENT; MODIFICATION**

This Agreement, including any attachments, constitutes the complete agreement between the parties and supersedes any prior written or oral communications. This Agreement may be modified or amended only by written instrument executed by both ABAG and MTC. In the event of a conflict between the terms and conditions of this Agreement and the attachments, the terms of this Agreement will prevail.

IN WITNESS WHEREOF, this Agreement has been executed by the parties hereto as of the day and year first written above.

METROPOLITAN TRANSPORTATION  
COMMISSION

ASSOCIATION OF BAY AREA  
GOVERNMENTS

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Jake Mackenzie, Chair

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Julie Pierce, President

**ASSOCIATION OF BAY AREA GOVERNMENTS  
EXECUTIVE BOARD**

**RESOLUTION NO. 07-16**

**ABAG SUPPORT FOR ABAG MTC MERGER STUDY RECOMMENDATION  
OPTION 4 AND OPTION 7**

**WHEREAS**, the cities and counties of the Bay Area formed the Association of Bay Area Governments (ABAG) for the purposes of establishing a permanent forum for discussion and study of regional and subregional problems of interest and concern to them, developing policies and actions, and providing services and undertaking actions to address such problems; and

**WHEREAS**, for over 50 years, local jurisdictions have relied on ABAG, their Council of Governments (COG), to provide the staff support, resources, programs, and partnerships in a manner that provides local jurisdictions with significant input in developing and implementing regional and subregional initiatives, plans and programs, such as Plan Bay Area; and

**WHEREAS**, for decades now, the Metropolitan Transportation Commission (MPO) has conducted subregional and regional transportation planning and funding, working primarily through the Congestion Management Agencies (CMAs); and

**WHEREAS**, last fall MTC adopted Resolution 4210 that provided interim funding for ABAG's work on the update to Plan Bay Area while ABAG and MTC jointly hired a consultant to help them explore opportunities for greater collaboration up to, and including, full merger; and

**WHEREAS**, merging these two regional agencies has the potential to create new opportunities to bring more comprehensive, better integrated transportation and land use planning services to the Bay Area; and

**WHEREAS**, if ABAG becomes part of a larger, more financially secure, merged agency that preserves ABAG's autonomy, policy oversight and statutory regional responsibilities, there would be greater economic flexibility and security for ABAG programs, and guarantee that current ABAG employee and retiree benefits are protected; and

**WHEREAS**, MTC acknowledges the value of the COG to the region and its local jurisdictions, stakeholders and residents, and has made a commitment to preserving ABAG's statutory authority, programs and voice in regional policy decisions; and

**WHEREAS**, both ABAG and MTC proposes to negotiate the terms of a merger as equal partners with each bringing its own strengths, assets and programs to the negotiations.

**ASSOCIATION OF BAY AREA GOVERNMENTS  
RESOLUTION NO. 07-16**

**NOW, THEREFORE, BE IT RESOLVED**, that the ABAG Executive Board expresses policy support for Option 4 (Create a New Regional Agency and Governance Model), and Option 7 (Enter into a Contract between ABAG and MTC to Consolidate Staff Functions under One Executive Director and Enter into an MOU to Pursue New Governance Options (Full Functional Consolidation)), and directs staff to:

- (a) Enter into a letter agreement<sup>1</sup> to continue MTC's financial support of ABAG's planning services pending development and execution of a *Contract for Services* and *MOU* to pursue new governance options with MTC.
- (b) Cooperate with MTC to conduct financial and legal analyses to determine the impact on both ABAG and MTC of a staff consolidation.
- (c) Enter into negotiations and establish a deadline for:
  - 1) A multi-year *Contract for Service* that consolidates MTC and ABAG staff under one executive director and provides staffing for all ABAG statutory duties and responsibilities as the region's COG;
  - 2) A *memorandum of understanding* (MOU) to pursue new governance options within a specified time period.
- (d) Commission/Board Involvement: Request Commission/Board Chairs and/or their representatives to work with respective agency staff, legal counsel and a project manager/facilitator on the *Contract for Service* and *MOU*.
- (e) Employee Relations Committee: Establish a joint employee/management committee with representatives from both MTC and ABAG to assist with the transition process.
- (f) Communications Plan: Document each agency's existing policy structure and responsibilities, and clarify intent to maintain them until and unless there is a successor governance structure; include this as part of a communications plan to Bay Area cities and counties

**BE IT FURTHER RESOLVED** that the ABAG Executive Board requests that the MTC Commission and the ABAG Administrative Committee and/or their representatives work with the Executive Directors, counsels and staffs of ABAG and MTC and a third party manager/facilitator on the *Contract for Service* and *MOU*.

**BE IT FURTHER RESOLVED** that ABAG Executive Board adopts the principles in Attachment A to this resolution to be applied to the implementation of Option 7.

<sup>1</sup> Items (a) through (e) are reflected in Sections A1-A6 of the AIP.

**ASSOCIATION OF BAY AREA GOVERNMENTS  
RESOLUTION NO. 07-16**

**BE IT FURTHER RESOLVED** that the successor to the current Executive Director of MTC shall be appointed by, and report to, the ABAG Executive Board and the Commission of MTC.

**FURTHER BE IT RESOLVED** that the ABAG Executive Board acknowledges that the Action Implementation Plan (AIP), once it is finalized and adopted by ABAG and MTC, is meant to set forth a process to guide the respective agencies as we move forward with Option 7. It is intended as a tool that the agencies may use to help plan the process, and may need to be modified over time.

The foregoing was adopted by the Executive Board this 19<sup>th</sup> day of May, 2016.

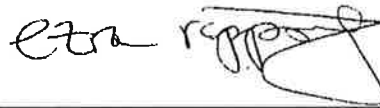


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Julie Pierce  
President

**Certification of Executive Board Approval**

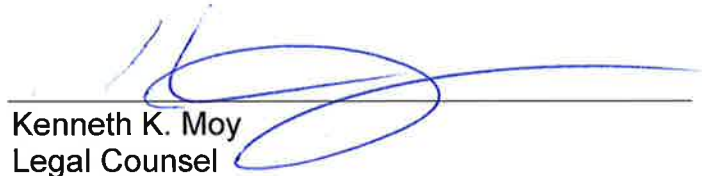
I, the undersigned, the appointed and qualified Secretary-Treasurer of the Association of Bay Area Governments (Association), do hereby certify that the foregoing resolution was adopted by the Executive Board of the Association at a duly called meeting held on the 19<sup>th</sup> day of May, 2016.



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Ezra Rapport  
Secretary-Treasurer

**Approved as To Legal Form**



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Kenneth K. Moy  
Legal Counsel

## ATTACHMENT A

### Principles Applied When Implementing Components of Option 7

- A. The Council of Governments (COG) provides local jurisdictions with the staff support, resources and partnerships necessary for them to have significant input in developing and implementing regional plans such as Plan Bay Area. The COG operates with the clear understanding that all land use authority in California resides with cities and counties. Support for Option 7 is conditioned on the continuation of local engagement and participation in regional planning in the following manner:
  - 1) Cities and counties are essential partners in regional planning.
  - 2) Regional planning incorporates a meaningful and transparent public engagement process.
  - 3) Regional land use planning is responsive to local land use planning to build high quality neighborhoods.
  - 4) In addition to transit and transportation planning, regional land use planning integrates other relevant planning fields, such as water, agriculture and open space, resilience, energy efficiency, climate change adaptation and mitigation, air quality, sea level rise, economic development, and social equity.
- B. The COG should have a voice in developing land use incentives designed to promote the construction of and acquisition/rehabilitation of housing units scaled to support the Bay Area economy.
- C. When integrating the ABAG Planning and Research Department, special attention should be made to retain its collaborative and holistic culture.
- D. In concert with any organizational changes, ABAG and MTC staff should engage in a deliberate process for integrating missions that address: 1) the function, management, mission, and vision of ABAG departments; 2) internal and external relationship maintenance; 3) decision-making structures; and 4) conflict resolution.
- E. ABAG and MTC should designate a Staff Merger committee of Board and Commission members that will provide guidance with respect to merger activities and changes. This committee should be informed by an organizational consultant familiar with the overlapping areas of ABAG and MTC administration. We do not believe important decisions need to be made immediately, and it would be helpful for a committee of elected officials to be in place for any discussion of issues among the staff. The ABAG Executive Board is generally supportive of the worker protection list requested by SEIU in its letter to the ABAG Administrative Committee dated May 3, 2016, subject to refinement of specific timing and implementation issues, and will refer this 10-point Worker Protection Plan from SEIU to the Employee Relations Committee called for in the Implementation Action Plan (IAP).

**ASSOCIATION OF BAY AREA GOVERNMENTS  
RESOLUTION NO. 07-16**

**Attachment B**

- F. MTC administration should endeavor to understand and preserve ABAG's existing programs. Should MTC administration desire to make substantive changes, they must first consult with the ABAG Executive Board.
- G. The staff merger should include the transition of all ABAG staff. Savings and consolidation should take place through existing vacant positions, expected attrition opportunities in further reorganization, and through an organizational development plan approved by both ABAG and MTC.
- H. The ABAG Executive Board will need a management level staff person to act as a liaison to the new administration. The ABAG Board and the Executive Director of MTC should engage in a mutual process for the selection and retention of this liaison. The mechanism to accomplish this should be worked out as part of the IAP. This position will ensure that the ABAG Executive Board has an appropriate connection to staff so it can perform its policy oversight with autonomy.



Date: May 25, 2016

W.I.: 1121

ABSTRACT

## MTC Resolution No. 4245

This resolution approves policy support for the Merger Study Option 7, consolidation of all staff functions of MTC and ABAG within MTC under one executive director and consideration of new governance options, suspends the multi-year funding framework between MTC and the Association of Bay Area Governments (ABAG) consistent with the full functional consolidation, and calls for a letter agreement to support ABAG's planning services through December 31, 2016 as the agencies work toward approval of a contract for services or until completion of the functional consolidation, whichever occurs first.

Further discussion of this subject is contained in Commission memoranda dated May 18, 2016 and materials from the Special Joint MTC Planning and ABAG Administrative Committees from January through April 2016.

Date: May 25, 2016

W.I.: 1121

Re: Policy Support for Consolidation of MTC and ABAG Staff Functions within MTC and Consideration of New Governance Options

METROPOLITAN TRANSPORTATION COMMISSION  
RESOLUTION NO. 4245

WHEREAS, the Metropolitan Transportation Commission (MTC) is the regional transportation planning agency for the San Francisco Bay Area pursuant to California Government Code Section 66500 *et seq.*; and

WHEREAS, MTC is the federally designated Metropolitan Planning Organization (MPO), pursuant to Section 134(d) of Title 23 of the United States Code (USC) for the nine-county San Francisco Bay Area region (the Bay Area or region); and

WHEREAS, the Association of Bay Area Governments (ABAG) was created in 1961 and serves as the Council of Governments for the region; and

WHEREAS, California Government Code § 65080 *et seq.* requires MTC to prepare and update a long-range Regional Transportation Plan (RTP), including a Sustainable Communities Strategy (SCS); and

WHEREAS, Senate Bill 375 (Steinberg, 2008) requires that each metropolitan planning organization in California prepare and adopt an SCS to bring together transportation and land use planning; and

WHEREAS, in the case of the Bay Area there is a special section in the law (Government Code 65080 (b)(2)(B)) that assigns responsibility for preparing the various elements of the SCS to either MTC, ABAG or both, based on the traditional roles each agency has historically performed; and

WHEREAS, the current bifurcated structure between the MTC and ABAG planning departments leads to significant duplication, inefficiencies and missed opportunities in preparing the SCS and to best serve the needs of the Bay Area and its local communities; and

WHEREAS, on October 28, 2015, MTC approved MTC Resolution No. 4210 to integrate the MTC and ABAG planning departments on July 1, 2016 and also to expedite the joint hiring with ABAG of a consultant to conduct a Merger Study and Merger Implementation Plan (MIP) by June 1, 2016 that would explore further integration, up to and including institutional merger between MTC and ABAG; and

WHEREAS, MTC Resolution 4210 stated that in the event that ABAG and MTC approve a MIP before July 1, 2016, the functional consolidation of planning departments shall be pre-empted and principles 2-10 of the resolution shall be void; and

WHEREAS, Management Partners was hired and has completed a Merger Study Options Analysis and Recommendations Report (“Merger Study”) that includes seven distinct options; and

WHEREAS, on April 22, 2016, the Joint MTC Planning and ABAG Administrative Committees recommended Option 7 for consideration by the MTC and ABAG policy boards; now, therefore, be it

RESOLVED, that MTC expresses policy support for the Merger Study’s Option 7, consolidation of all staff functions of MTC and ABAG within MTC under one executive director and the consideration of new governance options, as a near-term approach to better administer the significant and challenging responsibilities set forth in Senate Bill 375; and be it further

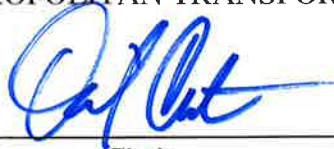
RESOLVED, that MTC directs staff to present a letter agreement for approval at the June 22, 2016 Commission meeting that would continue financial support for ABAG’s planning services through December 31, 2016 as the agencies work toward approval of a Contract for Services or until completion of the functional consolidation, whichever occurs first; and be it further

RESOLVED, that MTC suspends the MTC/ABAG Funding Framework included as Attachment B to MTC Resolution 4210 pending development and execution of the aforementioned Contract for Services; and be it further

RESOLVED, that MTC directs staff to initiate financial and legal analyses to determine the impact on both MTC and ABAG of a staff consolidation; and be it further

RESOLVED, that MTC acknowledges that the proposed Implementation Action Plan, once finalized and adopted by ABAG and MTC, is meant to set forth a more comprehensive process to guide the respective agencies as we move forward to implement a full staff consolidation of ABAG and MTC within the MTC organizational structure.

METROPOLITAN TRANSPORTATION COMMISSION



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Dave Cortese, Chair

This resolution was entered into by the Metropolitan Transportation Commission at a regular meeting of the Commission held in San Francisco, California on May 25, 2016.