

ETP Agreement
ET00-0000

Best Agency Training Project

This ETP Funding Agreement (Agreement) is entered into between the Employment Training Panel (ETP or Panel) and Best Agency (Contractor).

This Agreement is for the reimbursement of training costs by the Panel pursuant to its authority at Unemployment Insurance Code Section 10200 *et seq.* The term is from --/--/-- to --/--/--. Said reimbursement shall be disbursed from the Employment Training Fund in a total amount not to exceed \$0,000,000 (Approved Amount).

This Agreement consists of five Sections and four Exhibits, as shown below:

Section 1. Recitals
Section 2. Representations
Section 3. Performance Standards
Section 4. Payment Details
Section 5. General Provisions

Exhibit A: Chart 1
Exhibit B: Menu Curriculum
Exhibit C: Subcontracts
Exhibit D: Definitions

Exhibits A through D are hereby incorporated-by-reference as part of this Agreement, as if fully set forth herein.

1. Recitals

The parties are entering this Agreement to promote a healthy labor market in California. The purpose of this Agreement is to reimburse training costs from the Employment Training Fund in keeping with ETP program goals at Unemployment Insurance Code Section 10200 *et seq.*

In entering this Agreement, the parties recognize the value of training, particularly the need for California employers to remain competitive in a global business environment. The parties agree that good and valuable consideration exists for this Agreement.

2. Representations

- 2.1 Legislative Appropriation: Contractor understands that payment under this Agreement is valid and enforceable only if sufficient funds are appropriated in the State Budget Act for the relevant Fiscal Year. Payment under this Agreement is subject to any additional restrictions, limitations or conditions imposed by the Legislature, in the Budget Act or otherwise. If sufficient funds are not appropriated or otherwise made available for disbursement from the Employment Training Fund as needed for this Agreement, the Panel's liability for payment shall be limited to available funds and payment shall be disbursed only for the actual hours of training delivered as of the date Contractor receives a Notice of unavailable funds from ETP.
- 2.2 Incremental Encumbrance: This Agreement shall be incrementally encumbered insofar as only a percentage of the total Amount Approved will be made available for payment in the first and subsequent Fiscal Year(s).
- 2.3 Development Fees: Contractor represents that ETP funds will not be used to pay for any fees or costs incurred prior to the Panel's approval of funding under this Agreement.
- 2.4 Criteria for Participating Employers: Contractor is aware that all participating employers must be subject to paying the Employment Training Tax for each trainee. Contractor is aware that all participating employers must face out-of-state competition, unless funded under Special Employment Training. Contractor is aware that all participating employers must have no more than a 20% turnover rate in the prior calendar year. Contractor is aware that training agencies are not eligible as Participating Employers.
- 2.5 Funding Limitations: Contractor is aware of Funding Limitations established by the Panel and published on the ETP Website as of the effective date of this Agreement. Contractor represents that it will adhere to these Limitations in its recruitment and selection of Participating Employers.
- 2.6 Confidentiality: The Panel represents that trainee Social Security Numbers will only be used to access trainee employment and wage history in the Unemployment Insurance data base maintained by the Employment Development Department. The Panel represents that trainee demographic information will only be used to compile statistical data, in the aggregate. The Panel represents that the Social Security Numbers and demographic information will be maintained in confidence using administrative, technical and physical safeguards. Contractor understands that it is solely responsible for obtaining this confidential information from the participating employers or trainees, along with any written release it deems necessary. ETP represents that there is no statutory or regulatory requirement for a written release.
- 2.7 In-Kind Contribution: Contractor represents that participating employers will make a financial commitment to training and will not use ETP funding to displace their own training resources. In addition, Contractor represents that In-Kind Contributions of at least \$00 will be made to the cost of training, through wages paid during the hours of training by participating employers and other valuations made in accordance with Title 22, California Code of Regulations (CCR), Section 4401.1.
- 2.8 Substantial Contribution: Contractor understands that its reimbursement will be reduced by either 15% or 30% for the purpose of making a Substantial Contribution to the cost of training if a participating employer(s) earned payment under a prior ETP Agreement, under the standards set forth in Title 22, CCR, Section 4410. (See also Reimbursement Rate in

Section 4.)

- 2.9 Job-related Training: Contractor represents that training will be in job-related skills.
- 2.10 Compensation During Retraining: Contractor is aware of the standards for compensating incumbent employees during "mandatory" training in accordance with state and federal work orders.
- 2.11 Charges to Trainees: Contractor understands that it cannot charge tuition, fees, or costs to trainees for training funded under this Agreement without prior written approval by the Executive Director of ETP.
- 2.12 Tuition Reimbursement: Contractor represents that it will not charge, or will fully reimburse trainees for any tuition, fees, or costs they may have already paid for training that is funded by ETP.
- 2.13 Nondiscrimination: Contractor represents that participating employers will be "equal opportunity" employers compliant with all state and federal laws pertaining to fair employment practices.
- 2.14 Trainer Credentials: Contractor represents that training will only be delivered by instructors who are competent in the subject matter. Contractor represents that: a) instructors will satisfy certification and licensing requirements as may be applicable; b) any trainee who is also a trainer will complete all class/lab hours in each topic of training prior to delivery of training on that topic.
- 2.15 Responsibility: Contractor understands that it is directly responsible for the administration and delivery of all training funded under this Agreement.
- 2.16 Liaison: Contractor represents that it will fully inform all participating employers about their rights and obligations under the training project funded under this Agreement, and will periodically review their participation for compliance with the performance standards of this Agreement. Contractor represents that it will promptly inform ETP of any discrepancy or problem regarding the role or performance of participating employers under this Agreement.
- 2.17 Professional Employer Organization: Contractor understands that participating employers may only use the services of a PEO if, under their services agreement, they operate as co-employers. This means the participating employers must not fully relinquish the responsibility to pay wages; make benefit payments; and withhold, collect, report and remit payroll-related taxes, including the Employment Training Tax. Contractor understands that participating employers must retain the exclusive right to direct and control the work performed by trainees during retention, and to set the amount of their post-retention wages.
- 2.18 Misrepresentation: Contractor understands that any misrepresentation of material fact made by it or its agent to the Panel or ETP staff, whether set forth herein or otherwise, constitutes grounds for immediate termination of this Agreement.
- 2.19 Union Representation: Contractor represents that participating employers will be required to submit union letters of support for all trainees that are represented.

3. Performance Standards

- 3.1 Payment Earned: Contractor shall not be entitled to retain the Progress Payments or Final Payment for any trainee unless it demonstrates compliance with the requirements set forth in this Agreement. (See definition of Payment Earned in Exhibit D.) Contractor must demonstrate compliance using ETP procedures, to the sole satisfaction of ETP.
- 3.2 Hours of Training: Reimbursable hours of training will vary depending on the method of delivery. Advanced Technology (AT) is considered a method of delivery for this purpose. Class/Lab includes Videoconference, Simulated Laboratory and Productive Laboratory. Class/Lab may be delivered by the E-Learning methodology.
- 3.2.1 Class/Lab/Videoconference: Reimbursement is for actual hours of attendance, within the range of hours for each Job Number as identified in Exhibit B, Menu Curriculum and in Exhibit A, Chart 1. Each trainee must attend training for the minimum number of hours for payment to be earned, and payment cannot be earned for attendance beyond the maximum number of hours.
- 3.2.2 Range of Hours: Reimbursement for retraining is capped at 200 total training hours per-trainee. Reimbursement for new hire training is capped at 260 total training hours per-trainee.
- 3.3 Retention: All trainees must be employed by a participating employer on a full-time basis, with wages reported in California, for the applicable hours and time period of retention by Job Number. Retention cannot begin until the end of all training per-trainee, and must be completed within the term of this Agreement.

Job Number: 1 Job Description: Retrainee

Retention is at least 90 consecutive days full-time with one employer. Full-time employment means 35 hours per week.

- 3.4 Post-Retention Wage: All trainees must earn at least the Post-Retention Wage identified for the county or region in which trainees are employed. Health benefits (employer share-of-cost for medical, dental and vision care) of up to \$3.06 per hour may be included in wages for Job Number 1.

Job Number: 1 Job Description: Retrainee

Trainees must earn at least \$15.26 per hour in Sacramento County.

- 3.5 Trainee Eligibility: All trainees must meet the eligibility standards set forth in Unemployment Insurance Code Section 10201(c).
- 3.6 Managers and Supervisors: Managers and Supervisors must not exceed 20% of the total trainee population in Job Number(s) 0, as shown in Exhibit A, Chart 1. Otherwise, all trainees must be "frontline workers" within the meaning of Title 22, CCR, Section 4400(ee).
- 3.7 Top-Level Executives: Payment cannot be earned for Top-Level Executives who set company policy. Trainees employed in the occupation of President, Vice-President, Director, Chief Executive Officer, Chief Investment Officer, Chief Financial Officer, Chief Counsel, General Counsel, Chief Operating Officer and similar capacities are presumed to be Top-Level Executives. That presumption will be rebutted if the occupation(s) is

identified in Exhibit A, Chart 1.

- 3.8 Enrollment: Eligibility for enrollment must be established prior to the start-of-training. To establish eligibility, Contractor must provide ETP with each trainee's Social Security Number. (See also Payments in Section 4.) Eligibility must be established, and enrollment must be reported, in the form and manner prescribed by ETP.
- 3.9 Multiple Enrollment: A trainee cannot be enrolled in the same Job Number more than once within the same project. A trainee can be enrolled in another Job Number, but only after having completed the minimum number of hours designated for the Job Number in which originally enrolled, and having satisfied the retention and minimum wage requirements applicable to the original Job Number. Thus, enrollment in another Job Number must follow Final Payment under the original Job Number.
- Upon enrollment in another Job Number, a trainee must again satisfy the retention and minimum wage requirements, as applicable. The retention requirement cannot be satisfied simultaneously for more than one Job Number.
- 3.10 Training Ratio: The trainer-to-trainee ratio must not exceed 1:20 for Class/Lab training, except for: 1) Advanced Technology in which case the ratio must not exceed 1:10, 2) Productive Lab courses in which case the ratio must not exceed 1:3. However, for courses certified by OSHA (OSHA 10/30 and HAZWOPER) and courses approved or certified by the Department of Transportation (HAZMAT) the ratio must not exceed 1:40. The trainer-to-trainee ratio must not exceed 1:15 for New Hire Training. There is no trainer-to-trainee ratio for courses delivered as Computer-Based Training (CBT).
- 3.11 Out-of-State Vendor: No training may be delivered by an out-of-state vendor without prior written approval by ETP. Contractor must provide ETP with written notice of proposed services by an out-of-state vendor at least seven working days in advance, in the form and manner prescribed by ETP.
- 3.12 Occupations: Training shall be funded only for trainees working in the occupations approved by the Panel for each Job Number, as shown in "Exhibit A, Chart 1."
- 3.13 Relocation: Contractor will be liable for repaying ETP for any training funds received, for any Participating Employer that relocates or closes the California facility at which training was provided to a location out-of-state; or transfers trainee jobs to a location out-of-state, within three years of termination of this Contract. The repayment demand will be made at the discretion of the Panel in accordance with the standards set forth in Title 22, CCR, Section 4446.5. The voluntary transfer by one or more employees to another facility located outside of California, absent facility relocation, does not constitute a relocation or closure under this Section.

4. Payment Details

- 4.1 Reimbursement Rate: Contractor will be reimbursed at an hourly rate per trainee, based on the delivery method and type of training. (See definition of Reimbursement Rate, Exhibit D). All Laboratory, E-Learning, and Videoconference training is reimbursed at the Class/Lab rate.

If a participating employer is responsible for making a Substantial Contribution, the rate will be adjusted accordingly by either 15% or 30% accordingly to the standards in Title 22, CCR, Section 4410. (See Substantial Contribution in Section 2.)

- 4.2 Support Costs: Contractor will also be reimbursed up to \$00 for outreach and recruitment of participating employers by an 8% adjustment to the Program Costs for Job Number(s) 0. (See Contract Totals in Exhibit A, Chart 1 and definition of Program Costs in Exhibit D.)

- 4.3 Curriculum: ETP reimbursement is limited to the types of training approved for a given Job Number as shown in "Exhibit B: Menu Curriculum."

- 4.4 Payments: A trainee must be enrolled and must have completed at least 8 hours of training before any payments will be made. Payments may be made in three stages on a per-trainee basis, by Job Number.

4.4.1 The first Progress Payment (P1) will be approximately 25% of the Average-Cost-per Trainee, payable upon enrollment and after the first eight hours of training.

4.4.2 The second Progress Payment (P2) will be paid upon completion of all training hours. Progress Payment (P1) and (P2) combined cannot exceed 75% of the Actual Cost per trainee within the range of training hours specified in Chart 1 for each Job Number.

Trainees invoiced for P2 will be deemed to have entered into the retention period applicable to the Job Number in which originally enrolled.

4.4.3 The Final Payment (F) is payable at the end of retention, based on hours of training actually completed with reference to the minimum and maximum hours.

- 4.5 Wage Reporting: Contractor must report the actual hourly wage paid for each trainee at the completion of retention. This information is used by ETP to verify full-time employment.

- 4.6 Administrative Costs: The hourly reimbursement rate includes an allowance for training administration. Administrative costs funded by ETP shall not exceed 13% of payment earned for Retraining and 20% of payment earned for New-Hire training.

- 4.7 Invoicing: Contractor must submit timely and accurate invoices for the Progress Payments and Final Payment, using the form and manner prescribed by ETP. The Fiscal Closeout invoicing should be submitted to ETP no later than 30 days after this Agreement has terminated.

- 4.8 Fiscal Closeout: Payments will be made by invoice on a per-trainee basis. The total payments must be reconciled for all trainees taken as a whole at the time of Fiscal Closeout.

- 4.9 Suspend Payment: ETP may, at its sole discretion, suspend or withhold any payment if it appears Contractor has or will fail to perform its obligations under this Agreement. ETP shall give Contractor written Notice of the suspension/withhold and provide a reasonable opportunity for cure. This right to suspend or withhold payment is in addition to, and may be exercised concurrent with, termination.
- 4.10 Overpayment: The Progress Payments and Final Payment will not be earned until all performance standards and any other conditions of reimbursement have been satisfied. Contractor must promptly repay ETP for any overpayment identified at Final Closeout, or in a subsequent Audit. Repayment must include statutory interest computed from the first day of the month following the overpayment.
- 4.11 Unearned Payment: All unearned payments shall be returned to ETP with statutory interest computed from the first day of the month following the date the funds are received. If the Contractor petitions for bankruptcy, ETP shall be listed and scheduled as a creditor.
- 4.12 Liability Offset: Payments made or earned under this Agreement may be used to offset any outstanding financial liabilities owed under a prior Agreement at the sole discretion of ETP. This provision shall remain in full force and effect until the funds owed have been repaid, including statutory interest.

5. General Provisions

- 5.1 Party Intent: In the event of ambiguity, the intent of the parties shall be construed in accordance with the written proposal (ETP 130) and open-meeting discussions at the time the training proposal was considered by the Panel. In construing intent, the parties also agree to abide by the definitions set forth in Exhibit D of this Agreement. Otherwise, words and phrases shall be given their common English meaning. Section headings are for convenience only, and not to be used to determine any of the rights or obligations of the parties.

In the event of a material discrepancy between the text of this Agreement and Exhibit A, Chart 1, the latter shall prevail; but for wages in which case Post-Retention Wage in Section 3 shall prevail. All such discrepancies are subject to correction by Amendment.

- 5.2 Severability: If any provision of this Agreement is held illegal, invalid or unenforceable in whole or in part it shall be modified to the minimum extent necessary; and, the remaining provisions shall not be affected thereby.
- 5.3 Subcontractor Identification: Contractor must identify all subcontractors as they become known, prior to and during the term of this Agreement, in the form and manner prescribed by ETP. In so doing, Contractor must provide at least the following information: business name and address; contact person name, title, address, phone and email; description of services to be provided; and fees or rate payable.
- 5.4 Subcontract Terms: Contractor may subcontract with a third party for training or administrative services in connection with this Agreement. ETP shall not be named as a party on any subcontract. A subcontract for administrative services must be in writing, and must be filed with ETP prior to its effective date. A subcontract or oral agreement for training services must be disclosed and its terms made available to ETP upon demand. An administrative subcontract must incorporate the provisions set forth under "Exhibit C: Subcontracts." ETP reserves the right to monitor the delivery of services under any subcontract. Contractor shall use best efforts to correct performance problems identified by ETP as a result of monitoring.
- 5.5 Participating Employers: Contractor must identify all participating employers as they become known, prior to and during the term of this Agreement, in the form and manner prescribed by ETP. In so doing, Contractor must provide at least the following information: business name and address; contact person name, title, address, phone and email. Contractor may charge participating employers a refundable or nonrefundable deposit as specified in a mutual written Agreement signed by both parties, upon prior review and approval by ETP, as set forth in Title 22, CCR, Section 4409.1.
- 5.6 ETP Name: Any material used to promote this training project, and any other writing that uses the ETP name or logo, must be approved in advance by ETP.
- 5.7 Audits: ETP has the right, during normal business hours, to examine or audit any and all electronic or paper records, and documents related to the delivery of services, including accounting source payroll documents, under this Agreement to the extent it deems necessary. This right begins upon the effective date of this Agreement, and extends to 4 years from termination of this Agreement or 3 years from Fiscal Closeout or appeal resolution, whichever is later. Audits will be conducted in accordance with Generally Accepted Government Auditing Standards and may utilize statistical sampling with extrapolation of an error rate.

- 5.8 Online Tracking: Contractor must use the ETP Online Class/Lab Tracking System to upload/enter attendance data. Contractor must upload/enter this data within 90 days of the date of training delivery.
- 5.9 Monitoring Access: Contractor shall ensure that ETP has access to its facilities or those of a participating employer or training vendor as needed to monitor performance under this Agreement. Contractor shall use best efforts to ensure that ETP also has access to trainers and trainees for the purpose of performance-related interviews. During the term of this Agreement, all Rosters and any other pertinent records of training delivery or cost must be maintained at the Contractor's central facility in California.
- 5.10 Rosters: Contractor must maintain the originals of all training attendance Rosters for a period of not less than 4 years from termination of this Agreement or 3 years from Fiscal Closeout or appeal resolution, whichever is later. All Rosters and any other pertinent records of training delivery or cost must be maintained at the Contractor's central facility in California.
- 5.10.1 Class/Lab: Contractor must obtain from the participating employers, and maintain (as stated above), the original Class/Lab Rosters in hard-copy signed by each trainee and instructor. There is no exception for participating employers using a Learning Management System or other electronic recordkeeping for the Class/Lab method of delivery, including Productive Lab.
- 5.11 Termination without Cause: Either party may terminate this Agreement without cause by serving written Notice at least 30 calendar days in advance.
- 5.12 Termination with Cause: ETP may terminate this Agreement immediately, without serving advance Notice, if it determines at its sole discretion that Contractor or its agent has engaged in fraud, misrepresentation or other egregious conduct in connection with this Agreement, or has violated any law pertinent in the course of meeting its obligations under this Agreement. In the alternative, ETP may terminate this Agreement for a defect in performance or related problem by serving written Notice at least 30 calendar days in advance, and giving Contractor at least that time period as an opportunity to cure the defect or problem, as determined in its sole discretion.
- 5.13 Indemnification: Contractor shall defend, indemnify and hold harmless ETP along with its Panel, officers, employees or agents from and against any and all claims, complaints, demands, actions, causes of action, liabilities, losses, damages, judgments, awards, fines, settlements, costs or expenses including reasonable attorney's fees arising under this Agreement (Claim). The provisions of this section shall apply to any Claim based on the action or omission of Contractor or its officers, employees, agents or vendors, whether joint or several. ETP shall provide Contractor reasonable assistance in the defense of any Claim. However, ETP reserves the right to defend against a Claim or settle a Claim on its own behalf. Contractor shall not defend or settle in the name of ETP without prior written consent by the signatory of this Agreement for ETP. The parties shall give each other prompt written Notice of any Claim.
- 5.14 Governing Laws: This Agreement shall be governed by the laws of the State of California. Contractor shall comply with all applicable federal, state and local laws.
- 5.15 Forum State: The parties agree that any legal action arising under this Agreement,

including mediation or arbitration, shall take place in Sacramento, California.

- 5.16 Survival: The following provisions of this Agreement shall survive its termination: Relocation, ETP Name, Audits, Rosters, Indemnification, Governing Laws, Forum State, Successor Corporation, and Notices.
- 5.17 Waiver: No delay or failure by either party to exercise or enforce provision of this Agreement shall be considered a waiver thereof. In order to be valid, a waiver must be in writing. A single waiver shall not constitute a continuing or subsequent waiver.
- 5.18 Other Funds: Contractor shall immediately serve ETP with Notice of any other government funding that is or may be applied to the cost of training under this Agreement. Cost reimbursement by ETP under this Agreement cannot displace, but must supplement, any other government funding. ETP reserves the right to reduce payments or demand the return of overpayments that result from said displacement.
- 5.19 Assignment: Contractor shall not assign any rights in, nor delegate any obligations under this Agreement or any portion hereof, without prior written consent by ETP.
- 5.20 Successor Corporation: This Agreement shall be binding on and inure to the benefit of the surviving corporation or other business entity in the event of Contractor's merger. (Corporations Code Section 1107.) This Agreement shall be binding on and inure to the benefit of the surviving person or entity in the event a controlling interest in its assets or operations is purchased, acquired or transferred, in which case ETP may require the survivor to enter a written Assumption of Liability.
- 5.21 Entire Agreement: This is the entire Agreement between the parties and it supersedes any prior or contemporaneous communication or understanding between them (written or oral).
- 5.22 Modifications: Certain terms and conditions of this Agreement may be modified at the request of Contractor with the written approval of ETP so long as there is no increase in the approved amount of funding, and no change in the scope or intent of training.

Modifications are restricted to the following:

- a) Add or delete a Job Number except for Apprentices;
- b) Expand or reduce the Estimated Number of Trainees in a Job Number;
- c) Change the trainee Occupations in a Job Number except for Apprentices;
- d) Redistribute the Estimated Number of Trainees funding between Job Numbers;
- e) Add to or delete training courses identified in the Exhibit B, Menu Curriculum;
- f) Change or extend the term dates;
- g) Revise range of hours so long as there is no change to the per-trainee cap on hours;
- h) Add health benefits to wages or change the amount of health benefits to be included in wages;
- i) Correct a material discrepancy between the text of this Agreement and Exhibit A, Chart 1. (See Party Intent in Section 5)

If ETP approves a Modification pursuant to (a) through (i) above, it will prepare a written Modification indicating the effective date, and transmit a copy of same to Contractor. Modifications cannot be made after termination of this Agreement.

5.23 Amendment: With the exception of Modifications as provided for above, this Agreement may not be amended except in a writing that is signed by both parties. An Amendment or Modification can only be made based on the mutual agreement of the parties. Amendments cannot be made after termination of this Agreement.

5.24 Notices: All Notices in connection with this Agreement must be in writing, and shall be effective upon receipt. Notice of termination or material breach and final notice of overpayment must be delivered by certified U.S. Mail with return receipt requested, or by a commercial courier with receipt. Otherwise, Notices may be delivered by U.S. Mail, commercial courier, FAX or email. All Notices to ETP must be addressed to the manager of a regional office or the Sacramento headquarters office, as appropriate to the subject matter.

All Notices to Contractor must be addressed to the authorized representative identified below. This same representative is designated as the contact person for general inquiries by ETP.

The parties agree to keep each other informed as to any change in the contact information for their representatives.

Name and job title:

Email address:

Mailing address with zip code:

Phone number:

Fax number:

Contractor and ETP agree to the terms and conditions in this Agreement by signature of their authorized representatives set forth below:

Contractor

ETP

Signature/Date

Signature/Date

Printed Name/Title

Stewart Knox, Executive Director

Printed Name/Title

Exhibit B: Menu Curriculum

Class/Lab Hours

00-000 Trainees may receive any of the following:

Productive Lab Hours

00-000

E-Learning Hours

00-000

CBT Hours

00-000

AT Hours

00-000

Note: Reimbursement for retraining is capped at 200 total training hours per trainee, regardless of the method of delivery. Reimbursement for new hire training is capped at 260 total training hours per trainee.

Exhibit C: Subcontracts

1. The Employment Training Panel (ETP) is not a party to this Agreement. ETP is not obligated in any manner for any liability that may arise out of this Agreement. No third party relationship is intended or created with ETP under this Agreement.
2. Consultant agrees that ETP has the right, during normal business hours, to examine or audit any and all records, books, papers and documents related to the delivery of services, including all accounting source payroll documents, under this Agreement to the extent ETP deems necessary.
3. Consultant agrees that ETP has the right, during normal business hours, to freely observe and monitor the delivery of services under this Agreement with or without the Consultant's presence. In particular, Consultant agrees that ETP has the right to interview trainees, trainers and training personnel.
4. Consultant agrees to maintain all records and other writings that pertain to the delivery of services under this Agreement for a period of no less than 4 years from termination or 3 years from Fiscal Closeout, whichever is later. This does not relieve Contractor of its responsibility under the ETP Agreement.
5. This Agreement shall be governed by the laws of the State of California. If ETP is named as a party in litigation, arbitration or other proceedings in connection with this Agreement, the exclusive venue and place of jurisdiction will be the County of Sacramento in the State of California.
6. In the event of any conflict or inconsistency between the terms of this Agreement and the ETP Agreement, the latter shall govern and prevail.
7. In no event shall the administrative fees paid under this Agreement with ETP funds exceed 13% of payment earned for Retraining or 20% of payment earned for New-Hire Training. As used herein, "payment earned" means the amount of reimbursement the Contractor is entitled to retain based on ETP Fiscal Closeout. [Section 4400(r).]

Note: These provisions must be incorporated into any Agreement (subcontract) between Contractor and a consultant for administration of the ETP-funded training project. These provisions need not be used verbatim, but any variation must be approved by the ETP Legal Office. Contractor means the party that holds the contract and Consultant means the party that is responsible for administrative services.

Exhibit D: Definitions

The parties agree that the following definitions shall govern performance under this Agreement. These terms are used in this Agreement, or may be referred to in the course of program administration by ETP.

Some definitions include references to regulations in Title 22 of the California Code of Regulations or to the Unemployment Insurance (UI) Code, as shown in brackets. The regulations and UI Code are available for review at the ETP website (www.etp.ca.gov).

Actual Cost-per-Trainee: The amount of reimbursement payable on a per-trainee basis at Progress Payment 2 (P2) and the Final Payment (F), based on the actual number of training hours completed.

Approved Amount: The maximum amount of funding approved by the Panel. This amount is distinct from Payment Earned.

Average Cost-per-Trainee: The average cost of training for each trainee enrolled in a given Job Number based on the planned hours of training and the fixed fee rate. This cost is used to calculate the first Progress Payment (P1) at the time of enrollment.

Classroom Training: Formal instruction in a classroom setting that is removed from the trainee's usual work environment, and provided on a regular basis under the constant and direct guidance of a trainer. [Section 4400(y)(1).]

CNA to LVN: Training designed to upgrade the skills of a Certified Nurse Assistant or similar caregiver under a Licensed Vocational Nurse program, leading to LVN licensure. [UI Code Section 10214.9.]

Computer-Based Training (CBT): Instruction provided through computer systems or software and delivered through an electronic medium such as the Internet, Intranet, LAN or CD-ROM. Trainees must participate from a suitable location in California. [Section 4400(ff).]

Curriculum: A list of approved training courses or modules under the Menu as shown in Exhibit B.

E-Learning: Instruction provided by a live trainer via a web-based system in real-time using interactive communication. This includes videoconference training. [Section 4400(y)(4).]

Eligible Employers: Employers are eligible for ETP funding if they are subject to payment of the Employment Training Tax. Employers that have elected an alternate method of financing liability for the payment of Unemployment Insurance benefits can only be eligible for the "incidental placement" of new hire trainees. There are other eligibility standards such as out-of-state competition, to be determined by the Panel on a case-by-case basis. [UI Code Section 10201(b).]

Enrollment: The process of registering a trainee with ETP as an eligible participant in ETP-funded training, once the first eight hours of training have been completed. Trainees are enrolled by Job Number. Once enrolled, they can participate in more than one approved course for that Job Number, on a sequential basis. [Section 4400(dd).]

Entrepreneurial Training: Training in business management and related skills for the owner of a business with 9 or fewer employees. [Section 4409.]

ETP Minimum Wage: The minimum hourly wage that must be paid to trainees at the end of the employment Retention period. [Section 4418.]

Final Payment: Final payment is the final 25% payment based on the number of training hours completed for each trainee. Final payments (F) may be authorized and paid for each trainee after completion of training and the required post-training retention period specified in the agreement. Each trainee must be employed full-time and must receive the minimum wage specified in the Agreement at the end of the employment retention period. Final Payments are reconciled with individual unearned progress payments and are not considered earned until the Fiscal Closeout of the Agreement.

Fiscal Closeout: The process by which ETP determines the actual amount of Payment Earned for all trainees, reconciling the Final Payment with the first two Progress Payments. ETP will give Contractor written Notice of any overpayment that results from Fiscal Closeout within a reasonable time after the term of this Agreement.

Frontline Worker: These are employees who directly produce goods or deliver services. In general they are eligible for overtime compensation, regardless of job title. Managers and Supervisors as defined below are not Frontline Workers. [Section 4400(ee).]

Full-time: Employment of at least 35 hours a week, with exceptions for special programs. [Section 4400(h).]

Funding Limitations: These are industries and occupations identified by the Panel as its lowest priority for funding, and thereby precluded from participation in an ETP funded program, as identified by the Panel on the ETP website Funding Limitations, as of the effective date of this Agreement.

High Unemployment Area: A county or other distinct region of California where the unemployment rate exceeds the state average rate by a given factor, based on data from the Labor Market Information Division (LMID) of the Employment Development Department. The trainees in a High Unemployment Area (HUA) may qualify for a lower minimum wage, a modified Retention period, and/or the waiver of other requirements on a case-by-case basis. [Section 4429.]

Incidental Placement: New Hire trainees may be placed with public, non-profit or other employers who are not subject to payment into the Employment Training Fund on an “incidental” basis not to exceed 20% of the total trainee population under a Multiple Employer Contract, as determined by the Panel case-by-case. New Hire trainees may also be placed with Temporary Staffing agencies, not to exceed 20% of total New Hire population. [UI Code Section 10201(b) and Section 4427.]

In-Kind Contributions: The cost incurred by an employer or participating employer under an ETP-funded project. These costs may be monetary, such as wages paid to trainees during the hours of training. Or, they may be non-monetary, such as the rental value of a facility or room that is made available for instructional purposes. [Sections 4400(l) and 4401.1.]

Job Number: The designation used to differentiate between categories of trainees, and types of training. By way of example, distinguishing factors include the minimum hours of training, the approved type of training, and the minimum post-retention wages.

Literacy Training: Basic, job-related skills including math, reading, and language skills necessary for the trainee's job performance and employment retention in a job with definite career potential and long-term security. [Section 4400(n).]

Managers and Supervisors: These are employees who primarily perform exempt job duties within the meaning of the federal Fair Labor Standards Act and state Labor Code Section 515, where "primarily" means more than one-half of the work time. In performing these duties, Managers and Supervisors must also: exercise discretion and independent judgment; influence policy; supervise at least two employees with the right to hire and fire; and earn no less than two times the state minimum wage.

Mandatory Training: Training is mandatory when the employer leads trainees to believe their continued employment would be adversely affected by not attending; the subject matter is directly related to the job duties; and the trainee does not produce goods or deliver services during training. Trainees must be paid their usual wages during mandatory training. This training is usually conducted during regular working hours. [See *Division of Labor Standards Enforcement Manual* at Section 46.6.5, at www.dir.ca.gov.]

Multiple Barriers (MB): Two or more barriers to full participation in the workforce. The barriers may include mental or physical disabilities, illiteracy, limited English proficiency, limited math skills or some similar impediment.

Net New Jobs: For purposes of funding under the Retrainee-Job Creation program, this means the number of permanent-full-time positions on the Contractor's payroll must be higher by at least the number of Job Creation trainees who complete retention, as it was at start-of-term for the ETP Agreement.

New Hire: Training in new vocational skills for persons who are unemployed at the start of training. The vocational skills may include job-related literacy training. [UI Code Section 20201(g); Section 4406.]

Out-of-State Competition: The Panel will not fund any retraining project, with the exception of Special Employment Training, unless it first determines that the trainee jobs are threatened by out-of-state competition. This determination is made on a case-by-case basis, using factors such as location of the corporate headquarters and revenue stream, except that a training project in manufacturing and certain other industry sectors classified under the North American Industrial Classification System, are deemed to meet this requirement. [Section 4416.]

Payment Earned: The amount of Reimbursement the Contractor is entitled to retain based on performance, and compliance with all other requirements set forth in this Agreement, as reconciled at the time of Fiscal Closeout. [Section 4400(r).]

Post-Retention Wage: The minimum hourly wage that must be paid to trainees at the end of the employment Retention period. [Section 4418.]

Preceptor Training: In "preceptor training" the trainee observes hands-on skills as performed by a licensed LVN, RN or other practitioner (i.e., preceptor). The trainer to trainee ratio is generally 1:1. During the second phase, the trainee performs the skills under the preceptor's close supervision.

Priority Industry: Industry sectors that are "targeted" for training funds. Manufacturing, aerospace, biotechnology, high technology and agriculture are typical Priority Industries. They are identified in the Panel's annual Strategic Plan. [UI Code Sections 10200(b) and 10205(d).]

Productive Lab Training: A type of practical Retraining whereby the instructor oversees an employee's use of special equipment or application of particular skills, in the actual work environment, resulting in the production of goods or delivery of services for profit. A Productive Lab Training Plan must be approved in advance by ETP. Productive Lab is more suitable to production than service delivery, and would only be approved for New Hire training on a case-by-case basis.

Program Costs: This means training costs and administrative costs, before the addition of Support Costs. The Support Costs are calculated as a percentage of training costs only.

Progress Payments: Progress payments are unearned cash flow payments authorized and paid at selected training and contract performance benchmarks. Progress payments may be paid after a trainee is enrolled and has completed 8 hours of training (P1), after a trainee has completed training (P2) and when a trainee is placed in qualifying employment with an eligible employer (P3) [New Hire participants only]. Progress payments may not exceed 75% of the cost per trainee based on the hours of training documented at completion of training. Progress payments are not considered earned until the completion of all contract performance requirements and reconciliation of payments at the Fiscal Closeout of the Agreement.

Reimbursement Rate: The flat rate per hour payable for different methods and types of training. In general, the rate differs between Class/Lab, Advanced Technology and Computer-Based Training, although special rates also apply to Priority Industry and Small Business training. There is a further distinction between rates for New Hire and Retraining. Rates include the cost of training and administration of the ETP-funded project. Rates are consolidated in a Job Number to determine the average cost per-trainee, and for other purposes related to payment disbursement. With a Multiple Employer Contract, the consolidated rate also includes Support Costs as applicable. [UI Code Section 10206(a) and Section 4411 (g).]

Retention: The period of full-time employment required for a trainee or group of trainees after the end of training. Typically, Retention is for 90 consecutive days, although this period may be modified on a case-by-case basis. [Sections 4400(v), 4429.]

Retraining: Job-related vocational training provided to existing employees.

Roster: The hard-copy record that must be signed by each trainee and instructor to demonstrate attendance. For CBT, the supervisor must also sign a hard-copy roster. ETP must approve the format of all Rosters.

Seasonal Industry: This industry must hire at least 50% of its workers on a cyclical basis, as in agricultural crop production. To be eligible for retraining reimbursement by ETP, employers and participating employers in this industry must have retained at least 50% of the same seasonal employees for at least one season. [UI Code Section 10214.5(d).]

Simulated Lab Training: A type of practical training whereby the instructor oversees the use of special equipment or application of particular skills in a simulated work environment. This type of training does not require a special training plan, as compared to Productive Lab Training.

Small Business: For purposes of the Small Business Reimbursement Rate and other special considerations, a small business means 100 or fewer full-time employees in California, but no more than 250 worldwide. The business must be domiciled in California, and independently owned and operated. [Section 4400(w).]

Special Employment Training: Certain types of training designed to satisfy the Panel's funding priorities are funded as Special Employment Training (SET) projects. There is no out-of-state competition requirement for SET. There are different wage requirements for the trainees who are eligible to participate in SET. There may be modifications to Retention, and/or waivers of other requirements for eligible trainees, on a case-by-case basis. [Section 4409.]

Statutory Interest: Interest assessed on overpayments. An adjusted annual rate charged from the first day of the month after Contractor received the overpayment from ETP. [Section 4447.]

Support Costs: Costs associated with recruiting participants and participating employers for training under a Multiple Employer Contact. These costs may also include assessment of eligibility, job search and placement. In general, these costs may not exceed 8% of the training costs. [Section 4411.]

Trainee Eligibility: In general, trainees are only eligible to participate in ETP-funded training if they are unemployed (New-Hire training), or employed by an Eligible Employer with wages reported in California (Retraining). There may be other eligibility standards, such as "multiple barriers" for special funding, to be determined by the Panel on a case-by-case basis. [UI Code Section 10201(c).]

Turnover Rate: Average annual turnover for full-time employees in the prior calendar year, used to measure job security. Not all separations from employment are included in calculating turnover (i.e., retirements are not included). [Section 4417.]

Variable Reimbursement: Flexible reimbursement based on a minimum and maximum number of training hours, per-trainee. Trainees may complete any number of hours within the range set forth under the Menu for a given Job Number. Trainees may be trained in one or all courses under the Menu, within the constraints of funding.

Videoconference Training: Classroom instruction provided by a live trainer that is broadcast to two or more locations in real time and interactive with interactive communication between each location through video, data, and audio. The standard trainer-to-trainee ratio (1:20) applies to each location. This training is paid at the class/lab rate as a form of E-Learning.

Voluntary Training: When training is voluntary on the part of employees, they are not required to be paid their usual wages during the hours of training. See definition of "mandatory training" above.