Original Agreement No. May 11, 2014
Resolution No. 19-014

AMENDMENT NO. 2
to
CITY OF HERCULES AGREEMENT WITH DAVID BIGGS FOR CITY MANAGER/EXECUTIVE DIRECTOR SERVICES

1. Parties. The Parties to this Contract Amendment are the City of Hercules, a California municipal corporation and the City of Hercules as Successor Agency to the Redevelopment Agency (hereinafter "City"), and David Biggs, Hercules City Manager (hereinafter "Biggs").

The Parties to this Contract Amendment do mutually agree and promise as follows:

2. Purpose. This Amendment No. 2 is being entered into to amend the existing contract between City and Biggs which was approved by the City Council of the City of Hercules on June 10, 2014 by Resolution No. 14-037, and as amended on October 23, 2018, as Amendment No. 1 by Resolution 18-064. Said contract including Amendment No. 1 shall hereinafter be referred to as the "Original Agreement" and is incorporated herein by reference.

3. Original Agreement Provisions. The Parties hereto agree to continue to abide by those terms and conditions of the Original Agreement, which except for the express amendments contained herein, are unaffected by this Amendment No. 2.

4. Amendment. This Amendment No. 2 is intended to amend the Original Agreement to provide for the following:

A. Extend the term of the Original Agreement to December 31, 2021, with two additional one year options to extend, each one year option to extend requiring approval by Council pursuant to the Annual Performance Evaluation process established in Section 7 of the Original Agreement based on Biggs' anniversary date of June 30th. In the event the City Council does not complete the annual evaluation process on or before September 30th, then the one year option shall be deemed to be effective.

B. Effective July 1, 2019, Biggs shall be provided with the same benefit provided to all Executive Level employees in Article 2, Section 13.2 of the Pay & Benefits Plan for Executive Level Employees and shall receive an employer contribution equivalent to 5% of his salary on a one-to-one match deposited into his ICMA 457 Deferred Compensation Plan through payroll deduction subject to the limits, policies and conditions established by the ICMA and Federal Tax laws.

C. Effective July 1, 2019, increase Biggs' adjusted annual salary of $224,400 by 10%, for an annual salary of $246,840.

D. Section 6 D of the Original Agreement – Incentive, is amended to require the retention incentive to be deposited into the VantageCare Retiree Health Savings (RHS) Program.

E. Waive for 2019 the Annual Performance Evaluation required pursuant to Section 7 of the Original Agreement. The Annual Performance Evaluation will be required pursuant to Section 7 of the Original Agreement for all subsequent years during the term of this Amendment No 2, unless expressly waived by the City Council.

5. Severability. If any provision or portion of this Amendment No. 2 is held to be invalid or unenforceable, this Amendment, including all of the remaining terms, will remain in full force and effect as if such invalid or unenforceable provision(s) or portion(s) had never been included.

6. Independent Review. Biggs acknowledges that he has had the opportunity to obtain independent review of the financial and legal effects of this Amendment No. 2, and acknowledges that he has made an independent judgment regarding this Amendment No. 2 and has not relied upon any representation of City, its officers, agents or employees, other than the terms expressly set forth in this Amendment No. 2.

7. Counterparts. This Amendment No. 2 may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same Amendment.

8. Effective Date. This Amendment No. 2 will become effective on the date of approval by the City Council at a duly noticed regular meeting of the Council.

9. Signatures. These signatures attest the parties' agreement hereto:

City of Hercules

By _____
Dan Romero, Mayor

Date: 6-12-2019

By _____
David Biggs, City Manager

Date: 6/12/19

Approved as to Form:

By _____
J. Patrick Tang, City Attorney

ATTEST:

Lori Martin

Lori Martin, Administrative Services Director/City Clerk

Amendment Approval: This Amendment No. 2 to the Original Agreement has been approved by Resolution No. 19-014 of the City Council of the City of Hercules at a regular meeting of the Council on the 26th day of March, 2019.

Exhibit A

CITY OF HERCULES
AGREEMENT WITH DAVID BIGGS FOR
CITY MANAGER/EXECUTIVE DIRECTOR SERVICES

This Agreement is made and entered into at Hercules, California this 11th day of May, 2014, by and between the City of Hercules, a California municipal corporation, and the City of Hercules as Successor Agency to the Redevelopment Agency (hereinafter "City"), and David Biggs ("Biggs"), an individual.

RECITALS

WHEREAS, the City requires the services of a person with proven executive and administrative qualifications to fill the position of City Manager; and

WHEREAS, the City, acting by and through its City Council, desires to employ the services of David Biggs as City Manager, and to appropriately compensate him for such services; and

WHEREAS, the Parties acknowledge that the City Manager must be committed to the ideals of the International City Management Association ("ICMA"), and that the City Manager shall be subject to and shall comply with the ICMA Code of Ethics, incorporated herein by reference; and

WHEREAS, David Biggs desires to accept employment as City Manager of the City of Hercules under the terms and conditions of employment as set forth herein.

NOW, THEREFORE, in consideration of this Agreement, and the mutual promises, terms and conditions contained herein, the parties agree as follows:

1. Appointment. The City agrees to employ and appoint Biggs to the position of City Manager, and Biggs agrees to accept employment as City Manager, subject to successful completion of all required background checks and a pre-employment physical. Biggs will commence providing services to the City of Hercules on June 30, 2014, or upon successful completion of all required background checks and a pre-employment physical, whichever occurs later. Upon Biggs' commencement of services, City shall confer upon and delegate to Biggs all of the duties, powers, and responsibilities of City Manager as the same are set forth in the City of Hercules Municipal Code, and the ordinances, resolutions, policies, rules and regulations existing thereunder ("the Services").

2. Term. This Agreement shall be for a three year term ("Initial Term"), unless services are otherwise terminated pursuant to Sections 4, 5 or 6 of this Agreement. Upon expiration of the three year Initial Term, Biggs shall continue as City Manager on a year-to-year basis, with the year-to-year service subject to the same terms and conditions specified in this Agreement, including the termination provisions in Sections 4, 5 and 6, and subject to the Incentive provisions in Section 6(D).

3. Duties.

A. Biggs covenants that he presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of his services pursuant to this Agreement. Biggs further covenants that he shall be subject to and abide by the applicable provisions of the Political Reform Act, and all City ordinances, regulations, and policies related to conflict of interest, including but not limited to Resolution No. 12-059A, prohibiting nepotism and cronyism in contracting and employment, a copy of which has been provided to Biggs.

B. As full time City Manager of the City, Biggs accepts employment subject to the terms and conditions of this Agreement and agrees (1) to perform the duties and functions identified in Hercules Municipal Code Title 2, Chapter 3, Article 1, and other duties and functions as the Council assigns either orally or in writing and (2) to devote all of his productive time, attention and energies to performing all such duties and functions in a professional and ethical manner to the best of his skill and ability and (3) to use his best efforts to promote and advance the interests of the City. Biggs further agrees that he has no authority to bind the City or any of its elected or appointed officials or commit the City to any course of action without the duly authorized written consent of the City. Biggs acknowledges that the position of City Manager is a position of high visibility before the public and agrees that he shall conduct himself before the public and City staff, both during and outside of regular working hours, in a manner that reflects favorably on the City. Biggs agrees to use his best efforts to pursue and realize Council goals and objectives.

C. Full Time. Biggs understands and agrees that the position of City Manager is not a part time position and will require Biggs to work greater than a customary forty hour week. Although City Hall is generally open to the public during regular set work hours, Biggs shall perform his obligations as full time City Manager during regular work hours and on such evenings, weekends and other times as are necessary.

D. Vacation Notice. Vacation and other leave susceptible to advance scheduling shall be scheduled with the City Council in advance.

E. No Other Employment. Biggs agrees not to undertake any other employment during the term of this Agreement. Biggs further agrees to obtain Council approval before undertaking any non-paid projects for organizations or other non-City work which may require a substantial time commitment by Biggs.

Biggs agrees not to engage in any activity, consulting service, or enterprise, for compensation or otherwise, which is actually or potentially in conflict with or inimical to, or which materially interferes with, his duties and responsibilities to the City.

4. Termination by Biggs. Biggs may terminate this Agreement and resign as City Manager at any time, for any reason, upon sixty (60) days prior written notice to the City. Upon receipt of written notice from Biggs, the City may elect to immediately remove Biggs from his position as City Manager or allow Biggs to remain as City Manager for all or any part of the sixty day notice period. If the City removes Biggs from his position as City Manager prior to the expiration of the sixty day notice period, the City will pay Biggs an amount equal to the salary and benefits that Biggs would have received if he had remained in the City Manager position until the expiration of the sixty day notice period, less legally required withholdings. If the City advises Biggs that he should continue to perform his duties and functions as City Manager during the sixty day notice period, and Biggs fails to do so, Biggs will receive no salary or benefits after the last date on which he actually performs his City Manager duties and functions.

5. Termination by City.

A. Termination With Cause. The City Manager may be discharged with cause. Cause as determined in the reasonable discretion of the City, shall mean only any of the following: (1) insubordination, (2) dishonesty, (3) embezzlement, (4) violation of Federal, State, local, or common law requirements pertaining to conflict of interest, (5) conviction of a criminal act, (6) involvement in any act involving moral turpitude that would compromise Biggs' effective performance as City Manager, (7) taking a position adverse to the interests of the City without the City's prior written consent, (8) violation of any fiduciary duty owed to the City, (9) failure to abide by the employment restrictions under Sec. 3(C) of this Agreement, (10) failure to observe or perform any of his duties and obligations under this Agreement, if that failure continues for a period of thirty (30) days after Biggs receives written notice from the City Council specifying the acts or omissions deemed to constitute that failure.

If the City elects to terminate this Agreement with cause, it will pay Biggs for all earned pay and accrued, unused vacation benefits at the time it notifies Biggs of the termination decision, less legally required withholdings. Biggs will be entitled to no pay or benefits after the date that the City notifies him that this Agreement and his employment by the City are being terminated with cause. If the City elects to terminate this Agreement with cause, it will provide Biggs with a written explanation for that decision sent to Biggs' last known home address. Biggs shall have the right to meet

with the City Council in closed session for the purpose of discussing the basis for his proposed termination with cause prior to a final vote on his termination with cause. In order to exercise that right, he must provide a written request to meet in closed session to the Mayor of the City and the City Attorney within fifteen days of the effective date of his termination with cause. Failure to timely provide such written notice shall constitute a waiver of the right to be heard.

If Biggs is convicted of a crime involving an abuse of his office or position, all of the following shall apply:

1. If Biggs is provided with administrative leave pay pending an investigation, Biggs shall be required to fully reimburse City such amounts paid;

2. If City pays for the criminal legal defense of Biggs (which would be in its sole discretion, as it is generally not obligated to pay for a criminal defense), Biggs shall be required to fully reimburse City such amounts paid; and

3. If this Agreement is terminated, any severance pay and severance benefits related to the termination that Biggs may receive from City shall be fully reimbursed to City or shall be void if not yet paid to Biggs. For purposes of this Section, abuse of office or position means either: a) an abuse of public authority, including waste, fraud, and violation of the law under color of authority; or b) a crime against public justice.

B. Termination Without Cause. Notice of Termination Without Cause shall be provided in writing sent to Biggs' last known home address. If Biggs' employment is terminated without cause, City shall not be required to provide any reasons for that decision to Biggs or anyone else. If the City elects to terminate this Agreement and Biggs' employment without cause within the first two years of this Agreement, then as of the effective date of termination the term of this Agreement shall be deemed to have a remaining duration of nine months. If the City elects to terminate this Agreement and Biggs' employment without cause during the last year of this Agreement or during the year-to-year extension beyond the last year of this Agreement, then as of the effective date of termination the term of this Agreement shall be deemed to have a remaining duration of the lesser of six months or until the end of the remaining year. The City will pay Biggs for all earned pay and accrued, unused vacation benefits up to but not including the effective date of termination, less legally required withholdings. Additionally, the City will, within thirty (30) days of the effective date of termination, pay Biggs for the remaining duration specified in this Section 5B of this Agreement the amount of salary and benefits he is earning on the date he is given notice that this Agreement and his employment are being terminated, less legally required withholdings.

C. Inability To Perform Essential Duties and Functions. Biggs agrees that if he is unable to perform the essential duties and functions of the City Manager position for any reason for more than thirty (30) consecutive calendar days, the City may terminate this Agreement. If the City elects to terminate this Agreement based on Biggs' inability

to perform the essential duties and functions of the City Manager position, it will so advise Biggs in writing sent to Biggs' last known home address. At the time the City provides such notice, it will pay Biggs for all earned pay and accrued, unused vacation benefits, less legally required deductions.

If termination of this Agreement is the result of the death of Biggs, this Agreement shall be considered terminated effective upon his death, and City shall pay all salary and benefits then due to Biggs at the time of death to his legal heir(s).

D. Statement Upon Termination. In the event City terminates Biggs for any reason or no reason, the City and Biggs agree that no member of the City Council, the City Management staff, or Biggs, shall make any written, oral or electronic statement to any member of the public, the press, or any city employee concerning Biggs' termination except in the form of a joint press release or statement, the content of which is mutually agreeable to the City and Biggs. The joint press release or statement shall not contain any text or information that is disparaging to either party. Either party may verbally repeat the substance of the joint press release or statement in response to any inquiry.

6. Compensation.

A. Salary.

The City agrees to pay Biggs for the performance of his duties and functions an annual salary of $220,000.00, less legally required deductions.

Salary will be paid in installments at the same time that other employees of the City are paid. Any adjustment to Biggs' salary must be pursuant to a resolution of the Council. Biggs shall not be entitled to receive payment or credit for, and City shall not pay or credit Biggs for, overtime, compensated time off in lieu of overtime, or other compensation except as expressly provided in this Agreement. Biggs acknowledges that the position of City Manager is exempt from the provisions of the Fair Labor Standards Act (FLSA).

B. Benefits.

During the Term of this Agreement and his employment hereunder, Biggs shall be entitled to receive benefits on the same terms and conditions as other senior management employees of the City, as provided for in the Senior Management Employment Agreement. In addition, Biggs shall receive:

1. Vacation accrual at the 20 year rate level, and a one- time bank of ten (10) vacation days upon commencement of employment.

2. A one-time bank of five (5) additional sick days upon commencement of employment.

Some benefits may change during the course of Biggs' employment. Employees are noticed regarding any changes in benefits. Except as expressly set forth in this Agreement, Biggs shall be entitled to the same benefits as those provided to senior management employees generally, but shall not be entitled to or be paid for any other benefits available to certain non-senior management employees of the City; for example, uniform allowances for police officers and public works employees.

C. One Time Moving Allowance.

Biggs shall be provided a one time moving allowance to be applied to relocation expenses incurred within the three year Term of this Agreement. Biggs shall provide the City with three estimates for the cost of relocation and moving expenses, and City shall reimburse Biggs within thirty (30) days for such costs the amount equal to the lowest estimate provided by Biggs, or $15,000, whichever is lowest.

D. Incentive.

As a retention incentive, if after the end of the three year Term of this Agreement, Biggs continues as City Manager on a year-to-year basis for two full years, City agrees to pay Biggs, in addition to an annual salary of $220,000.00, a 10% bonus for each of years four and five, for a total bonus of $44,000.00, less legally required withholdings, to be paid within thirty (30) days after the conclusion of his fifth year as City Manager. The bonus is not part of his annual salary and no portion of the bonus shall be awarded to Biggs unless he has completed his fifth year as City Manager, except that Biggs would receive a pro rata portion of the bonus if the City were to terminate Biggs without cause at any time during years four or five.

7. Performance Evaluations. The City shall review and evaluate Biggs' performance as City Manager in closed session as close as reasonably possible to the expiration of each twelfth month of this Agreement. The City shall conduct an additional mid-year review at the expiration of the first six months of the first year of this Agreement. Performance Reviews shall be discussed with Biggs and reduced to writing. In addition to the evaluation schedule provided in this section, Council may schedule additional review and evaluation of Biggs' performance for closed session at any time.

To assist the Council in measuring the City Manager's performance, within thirty (30) days of commencing his tenure as City Manager, Biggs shall propose for Council approval a Performance Evaluation Plan that will form the basis for the initial Performance Review. Biggs shall revise the Plan at the start of each successive year of service. The Plan shall specify actions to be taken until the next Performance Review, and shall contain specific and measurable criteria, with specified milestones.

8. Confidential Information. Biggs agrees that he will not reveal attorney-client privileged, or any other confidential information about the City or City employees that he learns while performing the duties and functions of City Manager.

9. City Property. Biggs agrees that all materials, regardless of their form, that he receives, creates or produces in connection with this Agreement and/or his employment as City Manager are and will remain the exclusive property of the City. Biggs will immediately deliver all originals and all copies of such materials to the City that are in his possession or control upon termination of this Agreement or upon any request from the Mayor and/or the City.

10. Assistance in Litigation. Biggs agrees that he will furnish information and proper assistance to the City as it may reasonably require with any litigation in which it is or may become involved, either during or after the termination of this Agreement. Biggs further agrees that he will not discuss, reveal or convey any information or documents pertaining to the City to any person or entity, or to any attorney for or representative of any person or entity, with actual or potential claims adverse to the City except pursuant to duly issued legal process or as otherwise authorized by the City. Biggs agrees to notify the City immediately upon receipt of any legal process pertaining to the City.

11. Governing Law. This Agreement will be construed and enforced in accordance with the laws of the State of California.

12. Headings. The headings used in this Agreement are provided for convenience only and may not be used to construe meaning or intent.

13. Assignment. Neither this Agreement nor any interest in this Agreement may be assigned by Biggs without the prior express written approval of the City.

14. Severability. If any provision or portion of this Agreement is held to be invalid or unenforceable, this Agreement, including all of the remaining terms, will remain in full force and effect as if such invalid or unenforceable provision(s) or portion(s) had never been included.

15. Notices. Notices pursuant to this Agreement will be deposited with the United States Postal Service, postage prepaid and addressed as follows:

City:
City Clerk
City of Hercules
111 Civic Center Drive
Hercules, CA 94547

Biggs:
Last Known Home Address
Official City Hall Address

16. Modification. This Agreement may only be modified by Resolution at a duly noticed meeting of the City Council. The City Council may fix other terms and conditions of employment, as it may determine from time to time, relating to the performance of the City Manager, provided such terms and conditions are not inconsistent with or in conflict with the provisions of this Agreement or applicable law.

17. Entire Agreement. This Agreement supersedes any and all other agreements, either oral or in writing, and contains all agreements between Biggs and the City regarding his employment as City Manager. Biggs and the City agree that no representations, inducements, promises or agreements, oral or otherwise, have been made to either party, or anyone acting on behalf of either party, which are not stated herein, and that no agreement, statement, or promise not contained in this Agreement will be valid or binding on either party.

18. Effective Date. This Agreement will become effective on the date of approval by the City Council at a duly noticed meeting of the Council.

19. Independent Review. Biggs acknowledges that he has had the opportunity and has conducted an independent review of the financial and legal effects of this Agreement, and acknowledges that he has made an independent judgment regarding this Agreement and has not relied upon any representation of City, its officers, agents or employees, other than those expressly set forth in this Agreement.

20. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same Agreement.

City of Hercules

By: _____
Myrna L. deVera, Mayor

_____
David Biggs

ATTEST:

_____
Margaret Roberts
Administrative Services Director

Approved as to Form:

_____
J. Patrick Tang
City Attorney

Doc. No. 140523-F

Resolution No. 18-064
Original Contract Date: May 11, 2014

AMENDMENT NO. 1 TO CITY MANAGER CONTRACT

Pursuant to action taken by the City Council at the Regular City Council Meeting of October 23, 2018, Section 6 of the City of Hercules Agreement with David Biggs for City Manager/Executive Director Services is hereby amended to include a new Subsection 6(B)(3) to read as follows:

6. Compensation.

A. Salary.

The City agrees to pay Biggs for the performance of his duties and functions an annual salary of $220,000.00, less legally required deductions.

Salary will be paid in installments at the same time that other employees of the City are paid. Any adjustment to Biggs' salary must be pursuant to a resolution of the Council. Biggs shall not be entitled to receive payment or credit for, and City shall not pay or credit Biggs for, overtime, compensated time off in lieu of overtime, or other compensation except as expressly provided in this Agreement. Biggs acknowledges that the position of City Manager is exempt from the provisions of the Fair Labor Standards Act (FLSA).

B. Benefits.

During the Term of this Agreement and his employment hereunder, Biggs shall be entitled to receive benefits on the same terms and conditions as other senior management employees of the City, as provided for in the Senior Management Employment Agreement. In addition, Biggs shall receive:

1. Vacation accrual at the 20 year rate level, and a one- time bank of ten (10) vacation days upon commencement of employment.

2. A one-time bank of five (5) additional sick days upon commencement of employment.

3. **In accordance with revised Pay Plans for senior management employees adopted by the City Council on October 23, 2018, Biggs shall pay 3% of the Employer CalPERS contribution offset by an additional 2% wage increase effective upon implementation.**

Some benefits may change during the course of Biggs' employment. Employees are noticed regarding any changes in benefits. Except as expressly set forth in this Agreement, Biggs shall be entitled to the same benefits as those provided to senior management employees generally, but shall not be entitled to or be paid for any other benefits available to certain non-senior management employees of the City; for example, uniform allowances for police officers and public works employees.

C. One Time Moving Allowance.

Biggs shall be provided a one-time moving allowance to be applied to relocation expenses incurred within the three year Term of this Agreement. Biggs shall provide the City with three estimates for the cost of relocation and moving expenses, and City shall reimburse Biggs within thirty (30) days for such costs the amount equal to the lowest estimate provided by Biggs, or $15,000, whichever is lowest.

D. Incentive.

As a retention incentive, if after the end of the three year Term of this Agreement, Biggs continues as City Manager on a year-to-year basis for two full years, City agrees to pay Biggs, in addition to an annual salary of $220,000.00, a 10% bonus for each of years four and five, for a total bonus of $44,000.00, less legally required withholdings, to be paid within thirty (30) days after the conclusion of his fifth year as City Manager. The bonus is not part of his annual salary and no portion of the bonus shall be awarded to Biggs unless he has completed his fifth year as City Manager, except that Biggs would receive a pro rata portion of the bonus if the City were to terminate Biggs without cause at any time during years four or five.

City of Hercules

By: _____
Chris Kelley, Mayor

_____
David Biggs

ATTEST:

_____
Lori Martin, MMC
Administrative Services Director/City Clerk

Approved as to Form:

_____
J. Patrick Tang
City Attorney