LENDER PARTICIPATION AGREEMENT

Department of Commerce Contract #YY-51-NACS-[INTITALS OF LENDER]

Native American Collateral Support (NACS) Program
Lender Participation Agreement

EXAMPLE

THIS LENDER PARTICIPATION AGREEMENT (hereinafter referred to as the "Agreement") is made by and between the Montana Department of Commerce (hereinafter referred to as the "Department") and [Name of Lender, address, city, state, zip] (hereinafter referred to as the "Lender").

WHEREAS, the Montana Department of Commerce ("Department") is an agency of the State of Montana; and

WHEREAS, the Department and the State of Montana recognize that Native American-owned businesses in Montana often face challenges in obtaining access to sources of finance and capital due to shortfalls in collateral and equity; and

WHEREAS, the Department recognizes that "but for" a gap or shortfall in collateral and equity, lenders would otherwise make loans available to eligible Native American-owned business; and

WHEREAS, the Legislature provided funding for the Gap Financing program in the General Appropriations Act of 2015, passed by the 64th Legislature and as signed into law by Governor Bullock on May 5, 2015 (Chapter 400, Laws 2015); and

WHEREAS, the Department has created the Native American Collateral Support Program ("NACS" or "Program") to address this issue by providing access to capital through a collateral support program to encourage lenders to make loans to Native American-owned businesses that only lack sufficient collateral/equity resources; and

WHEREAS, the Department has created and adopted the NACS Program Application Guidelines for the administration of the Program;

NOW THEREFORE, in consideration of the foregoing, the parties hereto agree and covenant as follows:

1. Definitions

a) "Accepted Loan" means a Loan accepted as eligible under the NACS Program pursuant to Section 4.

b) "Application Guidelines" means the guidelines for the NACS Program as established by Department and provided to Lender by Department, as amended from time to time.
c) "Borrower" means an Eligible Borrower which is the recipient of a Loan which is, has been, or will be applied for by the Lender under the NACS Program for collateral support through a Collateral Deposit Agreement.
d) "Collateral Deposit Account" means the interest bearing account opened with Lender in the name of the State of Montana pursuant to Section 4(e) hereof.
e) "Collateral Deposit Agreement" means the NACS Program Collateral Deposit Agreement ("Deposit Agreement") to be executed by the Department and the Lender and in the form set forth in the Application Guidelines.
f) "Department" means the Montana Department of Commerce.
g) "Eligible Borrower" means a Native American-owned business with a structure that is a recognized entity under Montana or tribal law that is registered with the Montana Secretary of State's Office or under respective tribal ordinances. A Native American Business Owner Certification Form shall be completed by the Borrower as set forth in the Application Guidelines.
h) "Eligible Loan" means a Loan that meets the criteria under the NACS Program Application Guidelines in effect at the time the Loan is applied for and for which each of the representations and warranties set forth in Section 3 is true and correct.
i) "Lender" means any bank, community development financial institution, tribal revolving loan institution, certified regional development corporation, microbusiness development corporation, credit union, local development corporation authorized to conduct business in the State of Montana.
j) "Loan" means any advance of money to a Borrower by the Lender under the NACS Program that is evidenced by a promissory note or other instrument that obligates the Borrower to repay the advance.
k) "NACS" means the Native American Collateral Support Program.
l) "Program" means the Native American Collateral Support (NACS) Program

EXAMPLE

2. Representations and Warranties of the Lender

At the execution and delivery of this Agreement and as of the time of the acceptance of any Loan as eligible by NACS, the Lender represents and warrants:

a) Due Organization and Qualification. The Lender is an Eligible Lender duly organized and authorized to make loans in the State of Montana and with an office and business operations in Montana.
b) Due Authorization, Enforceability, No Violation. The Lender has all necessary power and has duly taken all action on its part to authorize, execute and deliver this Agreement. This Agreement when executed shall be valid, binding and enforceable against the Lender in accordance with its terms. The execution and performance of this Agreement by the Lender will not violate or conflict with any instrument, agreement, order or decree by which the Lender is bound.
c) Examination of Books and Records.
    i. The Lender shall permit the Department, Montana Legislative Auditor, or their authorized agents to visit the Lender and any other location where the books and records of the Lender are normally kept to inspect the books and records, including financial records and all other information and data, relevant to the Loan, the Loan documents and terms of this Agreement;
    ii. The Lender shall permit the Department, Montana Legislative Auditor, or their authorized agents to make copies or extracts from information and to discuss the

affairs, finances and accounts of the Lender and Borrower related to the Loan, the Loan documents and this Agreement;

iii. The Lender shall cooperate with the Department, Montana Legislative Auditor, or their authorized agents, if contacted; and

iv. The Lender agrees to create and retain records for a period of three (3) years after either the completion date of the Agreement or the conclusion of any claim, litigation, or exception relating to the Agreement taken by the State of Montana or third party, whichever is later.

d) Qualified Financial Institution. The Lender meets the requirements for the definition of "Lender" under this Agreement.

e) Underwriting. The Lender agrees to underwrite each Loan using its normal underwriting criteria and will perform a credit analysis of the Borrower for each Loan, assuming full responsibility for credit and ongoing security of the Loan. The Lender agrees to follow prudent industry loan underwriting processes and will determine that the collateral support to be provided under NACS is necessary in order for the Lender to make the Loan. The Lender will also determine that the amount required for deposit to the Collateral Deposit Account does not exceed the amount necessary to provide sufficient collateral for the Loan.

f) Real Estate Ownership. All real estate financed by a Loan is owned for a business and is owner occupied by a Native American.

g) Other Loans by Lender and Stipulation for a Draw Against Cash Collateral from the Collateral Deposit Account.

i. The Department acknowledges that the Lender may have other existing loans with a Borrower, and may, in the future, make additional loans to such Borrower. The Lender has no obligation to attempt to collect Loan payments in preference over the collection or enforcement of any other loan with a Borrower.

ii. The Lender, shall, however, first take control (via foreclosure, deed-in-lieu of foreclosure, possession or other similar action) of any and all collateral securing the Loan (all such collateral, other than the Cash Collateral under the Collateral Deposit Agreement and other than any guarantees securing the Loan, is referred to as the "Additional Collateral") and the Lender shall sell or liquidate the Additional Collateral and apply the gross proceeds thereof to the Loan prior to drawing any Cash Collateral from the Collateral Deposit Account under the Collateral Deposit Agreement to repay the Loan. If, and only to the extent that, the proceeds from the sale or liquidation of all of the Additional Collateral are not sufficient to repay in full the amount due under the Loan, then the Lender may draw Cash Collateral from the Collateral Deposit Account to repay the Loan up to the amount of any such shortfall in accordance with the procedures set forth in the Collateral Deposit Agreement.

EXAMPLE

3. Representations and Warranties of the Lender Made at Each Loan Registration

With respect to any Loan that the Lender requests be accepted by NACS hereunder, the Lender represents and warrants as of the time of each such request:

a) Representations Obtained from Borrower. The Lender has obtained from the Borrower the following representations and warranties and, to its actual knowledge, the Lender has no reason to believe based on information available to it that any such representation or warranty is not true:

i. The Borrower is duly organized, validly existing and in good standing under Montana or tribal law.
ii. The Borrower is an Eligible Borrower
iii. The Loan is an Eligible Loan and all of the net proceeds of the Loan will be applied to support a Montana Native American-owned business.
iv. The Borrower has not been promised or told by the Lender, its employees or agents that it has any legal, beneficial or equitable interest in any payment or other funds credited to the Collateral Deposit Account.
v. The Loan must be used for a "business purpose". A business purpose includes, but is not limited to, start-up costs, working capital, business acquisitions and expansions, franchise fees, equipment, inventory, as well as the purchase, construction, renovation or tenant improvements of an owner-occupied eligible place of business.
vi. The Loan will not be used for any prohibited purposes or activities as listed in the Application Guidelines.
vii. The Borrower is not:
    a. A Board member, Loan Committee member, officer, or employee of the Lender;
    b. An entity owned more than 20% or controlled by individuals listed in a., above and c., below;
    c. Immediate family (parents siblings, children, spouses, or equivalent) of individuals in a., above; or
    d. A Borrower who has defaulted on a Department contract (NACS Program will verify)

b) Lender Representations and Warranties.
i. The Lender shall have reaffirmed all representations, warranties and covenants set forth in Section 3 and elsewhere in this Agreement.
ii. The Lender has complied in all material respects with all federal and state laws, statutes, and governmental rules and regulations pertaining to the making of the Loan.
iii. The Lender shall service each Accepted Loan and shall proceed to recover against the Borrower and all collateral securing an Accepted Loan in the event of a default by the Borrower in accordance with its standard policies and procedures, and in accordance with the standard of loan servicing employed by the Lender for its commercial loan portfolio generally.
iv. Immediately upon making the Loan, to the Lender's actual knowledge, neither the Borrower nor any affiliate of the Borrower will be in material violation of any term of any mortgage, loan agreement or indenture with the Lender.
v. The Lender has determined that the Loan is an Eligible Loan and the Lender has completed all documents required to be filed with Department to register the Loan in accordance with the terms of this Agreement.
vi. The Loan is not being made to benefit a Lender Insider or an affiliate of the Lender.
vii. The Loan is made in accordance with the Application Guidelines currently in effect.
viii. The Collateral Deposit Account has been established in accordance with this Agreement and the Application Guidelines and a Collateral Deposit Account Agreement in the form set forth in the Application Guidelines has been entered into.

EXAMPLE

ix. Upon closing of the Loan, the Lender shall have good and marketable title to the Loan subject to no encumbrance or disability, and except as created by the Collateral Deposit Agreement and the Loan documents, to the actual or constructive knowledge of the Lender, no party to the Loan shall have any defense or claim against the Lender arising out of the Loan.

x. The Loan shall be in accordance with applicable Federal and State laws, including but not limited to, laws governing types of loans, interest rates and priority of security.

xi. To the extent required under the law, the security documents for the Loan shall be properly recorded in order to validly perfect and maintain a security interest in the collateral securing the Loan, and the Lender shall take whatever additional actions may be necessary to validly perfect and maintain a security interest in all collateral securing the Loan.

xii. The Lender has followed prudent industry loan underwriting processes in underwriting the loan and that the deposit to the Collateral Deposit Account was necessary in order for the Lender to make the Loan. The Lender has also determined that the amount required for deposit to the Collateral Deposit Account does not exceed the amount necessary to provide sufficient collateral for the Loan.

4. Acceptance of Loans in NACS

a) Loan Terms. Although the execution of this Agreement does not require Lender to request that Department accept any Loans as eligible under NACS, a Loan must be accepted under NACS before a Collateral Deposit Agreement will be entered into and a Collateral Deposit Account will be established for such Loan and funds deposited therein. A Loan to be accepted as eligible under NACS may be made with such interest rate, fees, and other terms and conditions as the Lender and Borrower may lawfully agree, subject to the provisions of this Agreement to qualify the Loan as an Eligible Loan. Only Eligible Loans may be accepted by the Department as eligible under NACS.

b) Acceptance Procedure. In order to request acceptance of a Loan by the Department under NACS, the Lender shall satisfy the following requirements no later than the close of business on the fiftieth (50th) business day prior to the date on which any and all of Lender's required Loan documents are to be executed and delivered by the Borrower to the Lender. The Lender shall deliver to the Department a completed application in the form set forth in the Application Guidelines (or other form as specified by the Department from time to time), executed by an authorized officer of the Lender. For the purposes of this Agreement, the filing of an application for Loan acceptance shall be deemed to occur on the date on which the Department receives the fully and properly completed Collateral Support Application Form, which may be submitted by mail, e-mail, or fax. Please refer to the Application Guidelines for current submission information.

c) Acceptance of Loan as Eligible by Department. Upon the Department's determination that the Lender has satisfied the requirements set forth in this Agreement, which determination shall not be more than thirty (30) business days after receipt of the Collateral Support Application under 4(b), the Department shall send to the Lender a Reservation of Funds Letter in substantially the form set forth in the Application Guidelines. Said reservation of said Loan shall be valid for 90 days from the date of the said letter to Lender.

d) Loan Fees. There are no fees for the NACS Program.

e) Establishment of Collateral Deposit Account and Deposit of Funds by NACS. NACS will establish a Collateral Deposit Account with the Lender on or about the execution of loan closing

EXAMPLE

documents, including without limitation, the Collateral Deposit Agreement. Once the Collateral Deposit Account is established, then funds shall be deposited in accordance with the Collateral Deposit Agreement. Thereafter, as other Loans are accepted by NACS, an additional Collateral Deposit Account shall be established for each Loan and upon execution of a Collateral Deposit Agreement for such Loan, funds shall be deposited in such account under such agreement.

5. Amendments to the Agreement

The Agreement may not be enlarged, modified, amended, or altered except upon written agreement signed by all parties to the Agreement. Without specific written consent of the Lender, no amendment to this Agreement shall be applicable to Loans made prior to the effective date of the amendment and no such amendment shall diminish Lender's rights as of the effective date of the amendment with respect to funds in the Collateral Deposit Account(s) in existence prior to the effective date of the amendment.

6. Lender's Waiver of Set-Off Rights

Notwithstanding any express or implied right of set-off provided to the Lender by any depository agreement or any other agreement, the Lender hereby waives any and all rights to set-off against any funds held in the Collateral Deposit Account arising in connection with any claim against NACS whether arising under this Agreement or otherwise.

7. Lender's Right to Terminate Participation in the Program

The Lender, upon 30 days written notice, may terminate their right to participate in NACS. Any termination shall be prospective only and shall not apply to any existing Collateral Deposit Agreements already signed and shall not have any binding effect on the originally executed Lender Participation Agreement to the extent that its provisions apply to collateral deposits and the Collateral Deposit Agreements already entered into.

8. Term of Agreement

This Agreement shall be in full force and effect until terminated pursuant to Section 7, 14 or 15.

9. Reporting Requirements

The Lender agrees to provide the Program with an annual Business Impact & Loan Status Report for the lifetime of any loans the Lender maintains with the NACS Program. Reports are due on January 16th for the prior year. The most recent annualized numbers provided by the business to the Lender will be required as part of the reporting information. The Department reserves the right to request additional information if it deems necessary.

10. Liaisons

The contact persons for this Agreement are:

For the Department:

[Enter Name, Title Here]
301 S Park Ave
PO Box 200533
Helena, MT 59620-0533
[Enter Phone # Here]

For the Lender:

[Enter Name, Title Here]
[Enter Address Here]
[Enter Address Here]
[Enter City, State Zip Here]
[Enter Phone # Here]

EXAMPLE

11. Compliance with Applicable Laws

a) The Lender, must under this Agreement, fully comply with all applicable federal, state, or local laws, rules and regulations, including but not limited to the Montana Human Rights Act, the Civil Rights Act of 1964, the Age Discrimination Act of 1975, the Americans with Disabilities Act of 1990, and Section 504 of the Rehabilitation Act of 1973 and the Patient Protection and Affordable Care Act ("Affordable Care Act").
Compliance with the Affordable Care Act requires Lender to provide healthcare coverage for its employees, who provide services for the State, work for more than 29 hours per week and their dependents under the age of 26, and provide coverage that meets the minimum essential coverage, minimum value, and the affordability requirements of the employer responsibility provisions under Section 4980H of the Code (ACA), and would otherwise satisfy the requirements of the Code § 4980H (ACA) if provided by the State.
In accordance with Section 49-3-207, MCA the Lender agrees that all hiring will be made on the basis of merit and qualification and there will be no discrimination based upon race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin.

b) The Lender accepts responsibility for supplying the Department with proof of compliance with the Montana Workers' Compensation Act while performing work for the State of Montana. (Mont. Code Ann. §§ 39-71-401, 39-71-405, and 39-71-417.) Neither the Lender nor its employees are employees of the State. The proof of insurance/exemption must be in the form of workers' compensation insurance, an independent contractor exemption, or documentation of corporate officer status and must be received by the Department within 10 working days of the execution of this Agreement, and must be kept current for the entire term of the Agreement.
AGREEMENTS WILL BE TERMINATED PURSUANT TO THE PROVISIONS OF SECTION 14 TERMINATION OF AGREEMENT IF THE LENDER FAILS TO PROVIDE THE REQUIRED DOCUMENTATION WITHIN THE ALLOTTED TIME FRAME.
Coverage may be provided through a private carrier or through the State Compensation Insurance Fund (406) 444-6500. An exemption can be requested through the Department of Labor and Industry, Employment Relations Division (406) 444-1446. Corporate officers must provide documentation of their exempt status.

c) The Lender shall perform all of its obligations and duties as required under the Patriot Act of 2001, as amended, including without limitation, the provisions relating to the Customer Identification Program (CIP) and anti-terrorism, and the Department may so rely on the Lender's performance of any such requirements, including that the Lender is in compliance with the requirements of 31 CFR § 1020.210-1020.220 (relative to anti-money laundering programs); and Lender acknowledges the aforesaid obligations and duties, and further certifies it is in compliance thereunder, including relative to implementation of reasonable procedures to verify the identity of any person seeking to open an account, to the extent reasonable and practicable, maintain records of the information used to verify a person's identity and determine whether the person appears on any lists of known or suspected terrorist organizations provided to the Lender by any government agency.

EXAMPLE

12. Assignment

The Lender shall not assign or transfer any portion of the Agreement without the express written consent of the Department.

13. Hold Harmless and Indemnification

The Lender agrees to protect, defend, and save the State, its elected and appointed officials, agents, and employees, while acting within the scope of their duties as such, harmless from and against all claims, demands, causes of action of any kind or character, including the cost of defense thereof, arising in favor of the Lender's employees or third parties on account of bodily or personal injuries, death, or damage to property arising out of services performed or omissions of services or in any way resulting from the acts or omissions of the Lender and/or its agents, employees, representatives, assigns, subcontractors, except the sole negligence of the State, under the Agreement.

Claims under this provision also include those arising out of or in any way connected with Lender's breach of this Agreement, including any Claims asserting that any of Lender's employees are actually employees or common law employees of the State of any of its agencies, including but not limited to, excise taxes or penalties imposed on the State under Internal Revenue Code ("Code") §§ 4980H, 6055 or 6056.

14. Termination of Agreement

Unless otherwise state, the Department may, by written notice to the Lender, terminate the Agreement in whole or in part at any time the Lender fails to perform the Agreement.

15. Default

Failure on the part of either party to perform the provisions of the Agreement constitutes default. Default may result in the pursuit of remedies for breach of contract, including but not limited to damages and specific performance.

16. Severability

A declaration by any court, or any other binding legal source, that any provision of the Agreement is illegal and void shall not affect the legality and enforceability of any other provision of the Agreement, unless the provisions are mutually dependent.

17. Notice

All notices required under the provisions of the Agreement must be in writing and delivered to the parties' liaisons either by first class mail or personal service.

18. No Arbitration

Unless otherwise agreed to in writing or provided for by law, arbitration is not available to the parties as a method of resolving disputes that would arise under this Agreement.

19. No Waiver of Breach

No failure by the Department to enforce any provisions hereof after any events of breach shall be deemed a waiver of its rights with regard to that event, or any subsequent event. No express failure of any event or breach shall be deemed a waiver of any provision hereof. No such failure

EXAMPLE

or waiver shall be deemed a waiver of the right of the Department to enforce each and all of the provisions hereof upon any further or other breach on the part of the Lender.

20. Jurisdiction and Venue

This Agreement is governed by the laws of Montana. The parties agree that any litigation concerning this Agreement must be brought in the First Judicial District in and for the County of Lewis and Clark, State of Montana, and each party shall pay its own costs and attorney fees.

21. Integration

This Agreement, in conjunction with any Collateral Deposit Agreement(s) executed by the Lender for each loan enrolled in NACS, contains the entire agreement between the parties. No statements, promises or inducements of any kind made by either party, or the agents of either party, not contained herein or in an executed Collateral Deposit Agreement, or in a properly executed amendment hereto are valid or binding.

22. Miscellaneous

a) Funding Availability. Approval of a Collateral Support Application submitted to the Program is contingent upon availability of NACS funds.
b) Information. The Lender shall promptly provide NACS with such information regarding its participation in the program as it may reasonably require.
c) Limitation of Rights. This Agreement shall be for the exclusive benefit of the Lender and NACS and shall not be construed to give any person other than the parties hereto any legal or equitable right, remedy or claim under or in respect to this Agreement.

IN WITNESS OF THE TERMS SET OUT ABOVE, the parties hereto have caused this Agreement to be executed.

[Name of Lender]:

_____

[Name, Title] Date

Montana Department of Commerce:

_____

Marta Bertoglio, Director Date

EXAMPLE