

File No. 091437

Committee Item No. 1

Board Item No. _____

COMMITTEE/BOARD OF SUPERVISORS

AGENDA PACKET CONTENTS LIST

Committee: Land Use and Economic Development Date January 11, 2010

Board of Supervisors Meeting

Date _____

Cmte Board

☐	☐	Motion
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OTHER

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Completed by: Alisa Somera Date January 7, 2010

Completed by: _____ Date _____

An asterisked item represents the cover sheet to a document that exceeds 25 pages.
The complete document can be found in the file and the online version.

1 [Contract with Owners' Association for Administration/Management of Greater Union Square
2 Business Improvement District]

3 **Resolution approving an agreement with the nonprofit Owners' Association for**
4 **administration/management of the property-based business improvement district**
5 **known as the "Greater Union Square Business Improvement District," pursuant to**
6 **Section 36651 of the California Streets and Highways Code.**

7
8 WHEREAS, on June 2, 2009, acting pursuant to Article XIID of the California
9 Constitution, Section 53753 of the California Government Code, and the California Property
10 and Business Improvement District Law of 1994 (Part 7 of Division 18 of the California Streets
11 and Highways Code, commencing with Section 36600), as augmented by Article 15 of the
12 San Francisco Business and Tax Regulations Code, the Board of Supervisors adopted
13 Resolution No. 208-09 ("Resolution of Intention") declaring the Board's intention to renew and
14 expand a property-based business improvement district and to levy assessments on parcels
15 to be included within the district, setting the public hearing, initiating mail ballot majority
16 protest proceedings, approving the Greater Union Square Business Improvement District
17 Management District Plan (the "Management District Plan" or "Plan"), making various findings
18 and taking other legislative actions required to form the proposed district and levy the
19 proposed assessments (Board File No. 090569); and,

20 WHEREAS, on July 28, 2009, acting pursuant to the aforementioned legal authorities,
21 the Board of Supervisors adopted Resolution No. 320-09 ("Resolution of Formation"),
22 renewing and expanding the property-based business improvement district designated as the
23 "Greater Union Square Business Improvement District" and levying multi-year special
24 assessments on Identified Parcels (as defined in Section 53750(g) of the Government Code)
25 included within the District (the "Assessments") (Board File No. 090935); the Controller's

1 designation for the Assessments for the Greater Union Square Business Improvement District
2 is Special Assessment No. 57; and,

3 WHEREAS, pursuant to the aforementioned legal authorities and the Resolution of
4 Formation, the Assessments may only be used to fund property-related services,
5 "Improvements" (as defined in Section 36610 of the Streets and Highways Code) and
6 "Activities" (as defined in Section 36613 of the Streets and Highways Code) within the District
7 in accordance with the Management District Plan (collectively, such authorized services,
8 improvements and activities are referred to as "District Programs"); and,

9 WHEREAS, the District is not a governmental, corporate or separate legal entity, but is
10 a geographic area containing all of the Identified Parcels subject to the Assessments for
11 District Programs described in the Plan and included in the annual budgets submitted to and
12 approved by the Board of Supervisors.; the annual budget for District Programs for the first
13 year of operations is set forth in the Plan, and for subsequent years, shall be set forth in the
14 Annual Reports submitted to the Board of Supervisors as required by Section 36650 of the
15 Streets and Highways Code; and,

16 WHEREAS, pursuant to the Resolution of Formation and Sections 36614.5 and 36650
17 of the Streets and Highways Code, the Board of Supervisors may contract with a private
18 nonprofit entity referred to as an "Owners' Association" to administer the District Programs.
19 An Owners' Association may be an existing nonprofit entity or a newly formed nonprofit entity.
20 An Owners' Association is a private entity and may not be considered a public entity for any
21 purpose, nor may its board members or staff be considered to be public officials for any
22 purpose; provided, however, that an Owner's Association must comply with the Ralph M.
23 Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the
24 Government Code), at all times when its board of directors or any committee thereof hears,
25 considers or deliberates on matters concerning the District, and must comply with the

1 California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of
2 Title 1 of the Government Code), for purposes of providing public access to records relating to
3 the District; and,

4 WHEREAS, an Owners' Association is obligated to hold in trust all funds it receives
5 from the City that are derived from the City's levy and collection of the Assessments, and to
6 use such funds exclusively for the purposes of implementing the Management District Plan
7 and administering, managing and providing District Programs set forth in the Plan, Resolution
8 of Formation, and annual budgets submitted by the Owners' Association and approved by the
9 Board of Supervisors; and,

10 WHEREAS, pursuant to the Resolution of Formation, the Office of Economic and
11 Workforce Development is the City agency responsible for coordination between the City and
12 the Owners' Association for the District; and,

13 WHEREAS, the Office of Economic and Workforce Development has negotiated an
14 agreement with the owners' California nonprofit corporation that also uses the name Union
15 Square Business Improvement District, Inc., to, in good faith and with diligence as the
16 Owners' Association for the District, develop, implement, direct, manage, administer, operate
17 and ensure the timely provision of the District Programs ("Management Agreement" or
18 "Agreement"). The Management Agreement is on file with the Clerk of the Board of
19 Supervisors in File No. 091437 and is incorporated herein by reference; and,

20 WHEREAS, pursuant to the Property and Business Improvement District Law of 1994,
21 the Resolution of Formation and the express terms of the Management Agreement, the
22 Agreement shall not be binding unless the Board of Supervisors approves the Agreement by
23 Resolution; and,

24 WHEREAS, it is in the best interest of the City and the property owners within the
25 District for the City to enter into the Management Agreement with the owners' nonprofit

1 corporation Union Square Business Improvement District, Inc., according to the terms and
2 conditions set forth therein; now, therefore, be it

3 RESOLVED, that the Board of Supervisors declares as follows:

4 Section 1. AUTHORIZATION TO EXECUTE CONTRACT. The Office of Economic
5 and Workforce Development is duly authorized to execute the Management Agreement on
6 behalf of the City and County of San Francisco.

7 Section 2. APPROVAL OF AGREEMENT. The Board of Supervisors hereby
8 approves the Management Agreement on file with the Clerk of the Board of Supervisors in
9 File No. 091437, which is incorporated herein by reference.

10 Section 3. AUTHORIZATION FOR ACTIONS CONTEMPLATED IN AGREEMENT.
11 The Office of Economic and Workforce Development, Controller and all other Departments,
12 City Officers and Employees are authorized to take all actions, make determinations, exercise
13 discretion, grant or deny approval, and otherwise take all reasonable steps necessary for full
14 performance of the Management Agreement on behalf of the City and County of San
15 Francisco according to its terms.

16 Section 4. AUTHORIZATION FOR AMENDMENTS TO AGREEMENT. Subject to
17 disapproval by the Board of Supervisors within 30 days of submission to the Clerk of the
18 Board, the Office of Economic and Workforce Development may execute amendments to the
19 Agreement on behalf of the City and County of San Francisco that are consistent with the
20 Management District Plan, Resolution of Formation, official City policies and applicable law.

21 Section 5. DELIVERY. The Clerk of the Board of Supervisors shall cause certified
22 copies of this Resolution to be delivered to the owners' nonprofit corporation Union Square
23 Business Improvement District, Inc., and the Office of Economic and Workforce Development.
24
25

AGREEMENT FOR THE ADMINISTRATION OF THE "GREATER UNION SQUARE BUSINESS IMPROVEMENT DISTRICT"

This Agreement ("Agreement") is entered into this 1st day of July, 2009 by and between the **CITY AND COUNTY OF SAN FRANCISCO**, a municipal corporation ("City"), by and through the Office of Economic and Workforce Development ("OEWD") and subject to approval of the Board of Supervisors for the City and County of San Francisco (the "Board of Supervisors" or "Board") by resolution, and **UNION SQUARE BUSINESS IMPROVEMENT DISTRICT, INC.**, a California nonprofit corporation ("Corporation"), acting as the "Owners' Association" pursuant to Sections 36614.5 and 36651 of the California Streets and Highways Code, to implement, administer and provide the property-related services, improvements and activities to be funded by special assessments the City has levied on Identified Parcels of real property included within the property-based business improvement district known as the *Greater Union Square Business Improvement District* ("District"), with reference to the following:

RECITALS

WHEREAS, pursuant to Article XIIIID of the California Constitution ("Article XIIIID"), adopted by the California voters in November 1996 as Proposition 218, California Government Code Section 53753 ("Section 53753"), and other legal authorities, revenues from assessments on real property may only be used for the capital costs of public improvements, maintenance and operation expenses of public improvements, and costs of property-related services, that confer "special benefits" (as defined in Article XIIIID, Section 2(i)) upon the assessed parcels. The assessment on each assessed parcel may not exceed the proportional reasonable cost of the special benefits conferred on the parcel in relation to the total cost of the special benefits conferred on all parcels within a defined geographic area subject to assessment.

WHEREAS, on June 2, 2009, acting pursuant to the Property and Business Improvement District Law of 1994, Part 7 of Division 18 of the California Streets and Highways Code (commencing with Section 36600), as augmented by Article 15 of the San Francisco Business and Tax Regulations Code ("Article 15"), Article XIIIID and Section 53753, the Board of Supervisors adopted Resolution No. 208-09 ("Resolution of Intention") declaring the Board's intention to renew and expand a property-based business improvement district and to levy assessments on parcels to be included within the district, setting the public hearing, initiating mail ballot majority protest proceedings, approving the Union Square Business Improvement District Management District Plan (the "Management District Plan" or "Plan"), making various findings and taking other legislative actions required to form the proposed district and levy the proposed assessments (Board File No. 090569).

WHEREAS, on July 28, 2009, the Board of Supervisors, acting pursuant to the Property and Business Improvement District Law of 1994, as augmented by Article 15, adopted Resolution No. 320-09 ("Resolution of Formation"), renewing and expanding the property-based business improvement district designated as the *"Greater Union Square Business Improvement District"* and levying multi-year special assessments on Identified Parcels (as defined herein) included within the District ("Assessments") (Board File No. 090935) (Controller's Special Assessment No. 57).

WHEREAS, the District is not a governmental, corporate or separate legal entity, but is a geographic area containing all of the Identified Parcels subject to the Assessments the Board of Supervisors has levied for purposes authorized by the Property and Business Improvement District Law of 1994, Article 15, Resolution of Formation, Management District Plan and Annual Reports.

WHEREAS, pursuant to the Article XIID, Section 53753, the Property and Business Improvement District Law of 1994, Article 15 and the Resolution of Formation, the Assessments may only be used to fund property-related services, "Improvements" (as defined in Section 36610 of the Streets and Highways Code) and "Activities" (as defined in Section 36613 of the Streets and Highways Code) within the District in accordance with the Management District Plan (collectively, "District Programs"). The Board of Supervisors may amend the Plan from time to time in accordance with the Property and Business Improvement District Law of 1994.

WHEREAS, Corporation shall hold in trust all funds it receives from the City that are derived from the City's levy and collection of the Assessments exclusively for the purposes of implementing the Management District Plan, and administering, managing and providing District Programs, directly by Corporation's personnel or by third party providers contracting with Corporation, as set forth in the Management District Plan, Resolution of Formation, and annual budgets set forth in the Plan for the first Fiscal Year of operations and, in subsequent Fiscal Years, set forth in the Annual Reports approved by the Board of Supervisors and Corporation's board of directors pursuant to Streets and Highways Code Section 36650, subject to the terms, conditions and restrictions set forth in this Agreement.

WHEREAS, the District Programs are supplemental to the municipal services the City currently provides within the boundaries of the District. Were it not for the City's establishment of the District, the supplemental property-related services, Improvements and Activities to be funded by the Assessments could not or would not be performed by the City or by City employees. The interests of the City, the owners of Identified Parcels and businesses and other tenants occupying the Identified Parcels are better served by an agreement pursuant to Streets and Highways Code Section 36651 between the City and an Owners' Association to implement the Management District Plan and administer, manage and provide the District Programs, than by the performance of such tasks by the City. In addition:

A. The City currently intends that the level of municipal services that were being provided by the City within the District as of the date the Board approved the Resolution of Formation will not be affected by the City's establishment of the District or the collection and expenditure of the Assessments for the District Programs. The City will notify the Corporation if and when the City reduces the level of, or discontinues, such services.

B. The Board of Supervisors, by adopting a resolution approving this Agreement, authorizes OEWD, as the City agency responsible under the Resolution of Formation for coordination between the City and the Owners' Association of the District, to execute and administer this Agreement with Corporation.

C. Prior to the execution of this Agreement, Corporation has commenced tasks associated with this Agreement, including but not limited to: (i) forming the Corporation, (ii) obtaining approval of the officers and board of directors for the Corporation to enter into this Agreement and authorizing the execution hereof by the individual or individuals executing this Agreement on behalf of the Corporation, (iii) appointing an agent for service of process upon the Corporation, whose business address shall be in San Francisco and who shall accept service of process in San Francisco on behalf of the Corporation, (iv) establishing an account or accounts at a federally insured bank, a savings and loan, a credit union or other financial corporation acceptable to the City for the safekeeping of Assessments Funds the City disburses to or on behalf of the Corporation under this Agreement, and which Corporation shall authorize to disclose directly to the City all statements, records, and other information for all such accounts upon written request of the OEWD, Controller, City Attorney, Ethics Commission or Grand Jury, (v) submitting to City the Articles of Incorporation and Bylaws of the Corporation acceptable to the City, (vi) submitting to City copies of the Corporation's application for non-profit status under Subchapter F (commencing with Section 501) of Chapter 1 of Subtitle A of the Internal Revenue Code of 1986, as amended; (vii) obtaining a business registration certificate from the Tax Collector pursuant to Article 12 of the San Francisco Business and Tax Regulations Code, (viii) submitting to City a

certificate of good standing, and (ix) submitting to the City additional records and information as may have been requested by the Clerk of the Board of Supervisors, OEWD, Controller or City Attorney.

D. Corporation shall maintain insurance acceptable to the City's Risk Manager naming the City and related Indemnified Parties (as defined herein) as additional insured(s) or loss payee(s) as required in Article 10 of this Agreement, and provide copies of all documents, certificates and other records as may be required by City under this Agreement or applicable law prior to commencement of operations.

NOW, THEREFORE, City and Corporation, in consideration of the recitals, mutual promises, covenants, agreements, representations set forth below, and other valuable consideration the receipt of which is hereby acknowledged, hereby promise, covenant, agree and represent as follows:

ARTICLE 1

DEFINITIONS

Section 1.1 Specific Terms. Unless the context otherwise requires, the following capitalized terms (whether singular or plural) shall have the meanings set forth below:

(a) **"Activities"** shall, consistent with the definition set forth in Section 36613 of the Streets and Highways Code, mean, but is not limited to, all of the following:

- (1) Promotion of public events which benefit businesses or real property in the District.
- (2) Furnishing of music in any public place within the District.
- (3) Promotion of tourism within the District.
- (4) Marketing and economic development, and advocacy, including retail retention and recruitment.
- (5) Providing security, sanitation, graffiti removal, street and sidewalk cleaning, and other municipal services supplemental to those normally provided by the City.
- (6) Other activities which specially benefit businesses and real property located in the District.

(b) **"ADA"** means the Americans with Disabilities Act (including all rules and regulations thereunder) and all other applicable federal, state and local disability rights legislation, as the same may be amended, modified or supplemented from time to time.

(c) **"Annual Report"** means the annual report required under Section 36650 of the Streets and Highways Code (including all information required to be contained in such report and all other substantive and procedural requirements set forth in the Property and Business Improvement District Law of 1994 and other laws therein referenced), for each Fiscal Year, as such report may be amended, modified or supplemented by the Board of Supervisors pursuant to Sections 36650, 36635 and 36636. All references in this Agreement to budgets, District Programs, authorizations, descriptions, specifications or other matters set forth in the "Annual Report" for any given Fiscal Year means the Annual Report as finally approved by the Board of Supervisors pursuant to Section 36650.

(d) **"Assessments"** mean the special assessments levied by the Board of Supervisors on Identified Parcels of real property included within the District pursuant to the Resolution of Formation.

(e) "**Assessment Funds**" and "**Assessment Revenues**" mean any and all money collected by the City from the levy of the Assessments, including all amounts collected as penalties and interest for delinquent payment of Assessments, and including all interest, dividends, income and other increases or accumulations from the deposit or investment thereof by or on behalf of the City or Corporation.

(f) "**Charter**" means the Charter of the City and County of San Francisco.

(g) "**City Attorney**" means the City Attorney of the City and County of San Francisco.

(h) "**Controller**" means the Controller of City and County of San Francisco.

(i) "**Disbursement & Depository Certification**" means a writing bearing the original signatures of authorized officers of the Corporation requesting that the Controller disburse Assessment Funds to Corporation by direct deposit, electronic transfer, delivery of a negotiable instrument or other means acceptable to Controller, for deposit into an account or accounts held in the name of the Corporation at a bank, savings and loan, credit union or other financial institution or firm acceptable to the Controller, and containing all of the following: (1) the name, address and telephone number of the San Francisco branch of such bank, savings and loan, credit union or other financial institution or firm, (2) the specific account or accounts to which such funds are to be deposited for safekeeping, (3) the name and contact information of the branch manager or other senior management employee at the branch to whom the City should direct communications regarding disbursements of Assessment Funds, and to whom or from whom instructions may be made and received regarding electronic transfers or other means of transferring Assessment Funds from the City treasury for deposit into Corporation's account(s), and (4) such other information as may be required by the Controller or by the bank, savings and loan, credit union or other financial institution. The Disbursement & Depository Certification shall not be valid unless a certified copy of the resolution of Corporation's board of directors authorizing execution and delivery of such certification to the Controller, and containing all of the same information as must be specified in the certification, is affixed thereto and received by the Controller. The Controller may supplement, modify or waive any or all of the requirements for the Disbursement & Depository Certification set forth in this subsection (1) and Section 4.1 of this Agreement, in writing delivered to Corporation and the branch manager or other senior management employee specified in the certification. If no valid certification has been delivered to Controller, or such certification is no longer valid for any reason, the Controller's written supplement, modification or waiver may be delivered to the branch manager of the bank, savings and loan, credit union or other financial institution or firm at which Corporation maintains the account or accounts into which the Assessment Funds shall be deposited for safekeeping.

(j) "**Eligible Expenditures**" means expenditures of Assessments Funds for property-related services, Improvements and Activities included in the annual budget for the Fiscal Year in which the expenditure is made, as authorized by the Property and Business Improvement District Law of 1994 (as augmented by Article 15), Management District Plan, Resolution of Formation and Annual Reports for the relevant Fiscal Year.

(k) "**Event of Default**" shall have the meaning set forth in Section 11.1 of this Agreement.

(l) "**Fiscal Quarter**" means each period of three (3) calendar months commencing on July 1, October 1, January 1 and April 1, respectively.

(m) "**Fiscal Year**" means each period of twelve (12) calendar months commencing on July 1 and ending on June 30 during all or any portion of which this Agreement is in effect.

(n) "**HRC**" means the San Francisco Human Rights Commission.

(o) **"Improvement"** shall, consistent with the definition set forth in Section 36610 of the Streets and Highways Code, mean the acquisition, construction, installation, or maintenance of any tangible property with an estimated useful life of five years or more including, but not limited to, the following:

- (1) Parking facilities.
- (2) Benches, booths, kiosks, display cases, pedestrian shelters and signs.
- (3) Trash receptacles and public restrooms.
- (4) Lighting and heating facilities.
- (5) Decorations.
- (6) Parks.
- (7) Fountains.
- (8) Planting areas.
- (9) Closing, opening, widening, or narrowing of existing streets.
- (10) Facilities or equipment, or both, to enhance security of persons and property within the area.
- (11) Ramps, sidewalks, plazas, and pedestrian malls.
- (12) Rehabilitation or removal of existing structures.

(p) **"Indemnified Parties"** means: (1) the City, including the Board of Supervisors, OEWD, Controller, City Attorney and all other commissions, departments, agencies and other subdivisions of the City; (2) elected officials, directors, officers, employees, agents, successors and assigns of the City; and (3) all persons or entities acting on behalf of any of the foregoing.

(q) **"Identified Parcel"** shall, consistent with the definition in Government Code Section 53750(g), mean a parcel of real property included within the District, identified in the Management District Plan as having a special benefit or benefits conferred upon it, and upon which the Board of Supervisors has levied multi-year special assessments pursuant to Streets and Highways Code Sections 36625 and 36628.5, Article 15 and Resolution No. 320-09.

(r) **"Losses"** means any and all liabilities, obligations, losses, damages, penalties, claims, actions, suits, judgments, fees, expenses and costs of whatsoever kind and nature (including legal fees and expenses and costs of investigation, of prosecuting or defending any Loss described above) whether or not such Loss be founded or unfounded, of whatsoever kind and nature.

(s) **"Management District Plan"** and **"Plan"** mean the proposal submitted to the Board of Supervisors pursuant to Section 36622 of the Streets and Highways Code, designated as the "Union Square Business Improvement District Management District Plan" and approved by the Board of Supervisors by adoption on June 2, 2009 of Resolution No. 208-09, and adoption on July 28, 2009 of Resolution No. 320-09, as the Plan may be amended, modified, corrected, supplemented or superceded by the Board of Supervisors from time to time pursuant to the Property and Business Improvement District Law of 1994, and including any attachments and exhibits thereto.

(t) **"Owners' Association"** shall, consistent with Section 36614.5 of the Streets and Highways Code, mean a private nonprofit entity that is under contract with the City to administer or implement activities (as defined in Section 36613 of the Streets and Highways Code) and improvements (as defined in Section 36610 of the Streets and Highways Code) that are specified in the Management District Plan. An owners' association may be an existing nonprofit entity or a newly formed nonprofit entity. An owners' association is a private entity and may not be considered a public entity for any purpose, nor may its board members or staff be considered to be public officials for any purpose. Notwithstanding the previous sentence, an owners' association shall comply with the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code), at all times when matters concerning the District (including this Agreement, the Assessments, Annual Reports, District Programs, Management District Plan, contracts with third party providers and any other matter related to the District and the subject matter of this Agreement) are heard, discussed, or deliberated by Corporation's board of directors or any committee thereof, and with the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code), for all records relating to the District, this Agreement, the Assessments, Annual Reports, District Programs, Management District Plan, contracts with third party providers and any other matter related to the subject matter of this Agreement.

(u) **"Publication"** shall mean any report, article, educational material, handbook, brochure, pamphlet, press release, public service announcement, web page, audio or visual material or other communication for public dissemination, which relates to the District, all or any portion of the Management District Plan or is paid for in whole or in part using Assessments Funds.

Section 1.2 Additional Terms. The terms "as directed," "as required" or "as permitted" and similar terms shall refer to the direction, requirement, or permission of the OEWD, Board of Supervisors, Mayor, Controller, City Attorney, Risk Manager or other commission, department, agency, subdivision, elected official, director, officer, employee or agent of the City responsible for such direction, requirement, or permission, the case may be. The terms "sufficient," "necessary" or "proper" and similar terms shall mean sufficient, necessary or proper in the sole judgment of the department, person or body described in the preceding sentence authorized to exercise such judgment on behalf of the City. The terms "approval," "acceptable" or "satisfactory" or similar terms shall mean approved by, or acceptable to, or satisfactory to such department, person or body authorized to grant such approval, acceptance or determination of satisfaction on behalf of the City, as the case may be. The terms "include," "included" or "including" and similar terms shall be deemed to be followed by the words "without limitation". The use of the term "subcontractor," "successor" or "assign" herein refers only to a subcontractor, successor or assign expressly permitted by the City in writing.

Section 1.3 References to this Agreement. References to this Agreement include: (a) any and all appendices, exhibits, schedules, attachments hereto; (b) any and all statutes, ordinances, regulations or other documents expressly incorporated by reference herein; and (c) any and all amendments, modifications or supplements hereto made in accordance with this Agreement and applicable law. References to articles, sections, subsections or appendices refer to articles, sections or subsections of or appendices to this Agreement, unless otherwise expressly stated. Terms such as "hereunder," herein or "hereto" refer to this Agreement as a whole.

Section 1.4 Other References. References in this Agreement to the Management District Plan, Annual Reports, budgets, resolutions, statutes, ordinances, regulations, agreements and other documents or materials include: (a) any and all appendices, exhibits, schedules, attachments thereto; (b) any and all statutes, ordinances, regulations, resolutions or other documents expressly incorporated by reference therein; and (c) any and all amendments, modifications or supplements thereto.

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ARTICLE II

TERM OF AGREEMENT

Section 2.1 Period of Performance. Unless modified by mutual agreement of the parties through a written amendment to this Agreement, the period of performance under this Agreement shall be from the effective date of the Board of Supervisors resolution approving this Agreement to and including June 30, 2019; provided, that if the District is disestablished pursuant to the Property and Business Improvement District Law of 1994 or Article 15, expires prior to June 30, 2019 for any reason, the City exercises its right to terminate this Agreement as provided herein, or this Agreement is terminated for any other reason, the period of performance shall end on the date the last of the following events occurs: (i) the Controller accepts in writing the Corporation's final accounting of all Assessment Funds disbursed by the City, (ii) the Corporation submits written confirmation acceptable to the Controller that there is no outstanding and unpaid indebtedness incurred to accomplish any of the purposes of the District, and (iii) any and all claims against the Corporation and the City arising out of this Agreement or the Corporation's administration, management and provision of the District Programs has been settled or finally adjudicated and all obligations relating thereto have been fully satisfied; provided, further, that certain obligations of Corporation with respect to the preservation of records, City's access to books and records, audits, insurance and indemnification of City and Indemnified Parties arising from Corporation's performance of this Agreement, implementation of the Management District Plan and receipt of Assessment Funds, shall, as specified in this Agreement and applicable law, survive the period of performance set forth in this section.

ARTICLE III

CORPORATION RESPONSIBILITIES

Section 3.1 District Programs; Implementation of Plan; Nonprofit Status of Corporation. Corporation shall, in good faith and with diligence, develop, implement, direct, manage, administer, operate and ensure the timely provision of all property-related services, Improvements and Activities as described in the Management District Plan, attached hereto as Appendix A and incorporated herein by reference. Corporation acknowledges and expressly agrees that, for the duration of this Agreement, it will: (a) comply with all applicable federal, state and local laws and regulations, (b) continuously maintain its corporate status active and in good standing, and (c) continuously maintain nonprofit status under Section 501(c)(4) of Chapter 1 of Subtitle A of the Internal Revenue Code of 1986, as amended. Corporation's failure to obtain approval from the Internal Revenue Service of Corporation's application for such nonprofit status and all other approvals from any governmental agency as may be necessary to obtain such nonprofit status obtain within one (1) year of the effective date of the Board of Supervisors resolution approving this Agreement, or denial for any reason of Corporation's application for nonprofit status or request for other approvals as may be necessary therefor, if any, shall automatically terminate this Agreement. Corporation may ask City for an extension of the one-year period to obtain nonprofit status, and City in its discretion may grant the request if it determines that Corporation has exercised due diligence in seeking nonprofit status and that nonprofit status is reasonably expected. Corporation's abandonment of the application for nonprofit status or failure to promptly respond to requests for information or documents necessary to process the application shall constitute a material breach of this Agreement for which the City may exercise any of its remedies under this Agreement, including terminating this Agreement and entering into a contract with a different nonprofit entity to act as the Owners' Association for the District.

Section 3.2 Corporation's Personnel; Administration of Contracts with Third Parties; Accountability. The Management District Plan shall be implemented only by competent personnel under the direction and supervision of Corporation. Corporation shall be responsible for the oversight, administration and enforcement of any and all contracts with third parties to provide any property-

related service, Improvement or Activity paid or to be paid with Assessment Funds. The use of Assessment Funds for purposes other than Eligible Expenditures by any third party under contract with Corporation shall be attributable to Corporation and shall be deemed a material breach of this Agreement for which the City may exercise any of its remedies under this Agreement or applicable law, including terminating this Agreement and entering into a contract with a different nonprofit entity to act as the Owners' Association for the District.

Section 3.3 Corporation's Board of Directors. Corporation shall at all times be governed by a legally constituted and fiscally responsible board of directors. Such board of directors shall meet regularly and maintain appropriate membership, as established in Corporation's bylaws and other governing documents and shall adhere to applicable provisions of federal, state and local laws governing nonprofit corporations.

The 11 members of the Board will ensure broad representation and accountability. These 11 members will consist of the following representatives:

- (4) district property and/or business owners representing the retail stakeholders of the district,
- (4) district property and/or business owners representing the hotel stakeholders of the district,
- (3) district property and/or business owners representing the other stakeholders of the district (theater, parking, nightclub, social organizations, restaurant, gallery, etc.)

Of the recommended 11- member Board of Directors, a mix of large and small property and/or business owners will be sought within the following composition guidelines: at least 20% or three (3) members of the board must be business owners who do not own property within the BID boundaries.

Corporation's board of directors shall exercise such oversight responsibility as is necessary to ensure full and prompt performance by Corporation of its obligations under this Agreement and compliance with federal, state and local laws.

Section 3.4 Annual Reports. Corporation shall prepare and submit an Annual Report to the Clerk of the Board of Supervisors and the OEWD for each Fiscal Year for which the City collects and disburses the Assessments. Corporation also shall prepare an Annual Report for any Fiscal Year in which it expends Assessment Funds carried over from the prior Fiscal Year even if no additional Assessment Funds are to be collected and disbursed to Corporation during the Fiscal Year covered by the report. The Corporation shall prepare all Annual Reports in accordance with Section 36650 of the Streets and Highways Code, and shall include in such reports, at a minimum, the proposed annual budget for the upcoming Fiscal Year and all items of information required by Section 36650. Corporation shall include in the Annual Reports such additional information and/or supporting documentation as City may require. Not less than five percent (1%) of the revenues identified in the annual budgets for District Programs set forth in the Annual Reports shall be derived from sources other than the Assessments to cover the proportional share of the costs of general benefits conferred by the District Programs. The first Annual Report shall be submitted by July 31, 2010 and subsequent Annual Reports shall be submitted by July 31st of each subsequent Fiscal Year for the duration of this Agreement. The Operating Board of Directors will prepare the required annual report as called for in Streets and Highways Code Section 36650.

Section 3.5 Mid-Year Reports. In addition to the Annual Reports, Corporation shall submit mid-year reports to OEWD on Corporation's operations for the first and second Fiscal Quarters of the then-current Fiscal Year for the duration of this Agreement. The first mid-year report shall be submitted by January 31, 2010, and subsequent mid-year reports shall be submitted by January 31 of each year thereafter. The mid-year reports shall describe the status and progress of the various District Programs as described and referenced in the Management District Plan and the Annual Reports for the first and second Fiscal Quarters. The mid-year reports shall be written in narrative summary form, and include summary statistical and financial data, a description of the status of each contract Corporation has with third parties to provide or perform any of the District Programs, actual verses budgeted expenditures

corresponding to each line item in the corresponding annual budget set forth in the Annual Report, the amount of Corporation's revenues derived from sources other than the Assessments during the first and second Fiscal Quarters and a description of how the Corporation will make up for any shortfall thereof, any deviations from the annual budget or additional proposed expenditures for which approval by the Board of Supervisors and/or amendment of the Management District Plan is required under this Agreement or applicable law, changes within the District during the first and second Fiscal Quarters that will require correction or modification of the Plan or assessment database, any proposed amendments or modifications to the Annual Report or Plan, and such other information as OEWD may require.

Section 3.6 Coordination. Corporation shall render all services and perform all work in accordance with the Management District Plan and the terms of this Agreement, and shall cooperate with the City in the implementation of the Management District Plan and the performance of this Agreement. Corporation shall coordinate with the OEWD for the implementation of the Plan. Unless otherwise stated in the Agreement or required by the Charter, ordinance or other applicable law, OEWD shall be the agency of the City responsible for administration of this Agreement and for any acceptance, approval, permission or determination of the City required or permitted under this Agreement, all of which shall be in writing and delivered to Corporation by mail or personal delivery. Unless otherwise agreed to by the parties in a written amendment to this Agreement, electronic mail may not be used to communicate any acceptance, approval, permission or determination by the City.

Section 3.7 Support Services; Eligible Expenditures. Corporation assumes responsibility for contracting for support services as required, and paying for all such direct and indirect expenses as may be necessary or convenient for the timely completion of work. Any obligations or expenditures for items not budgeted in the Annual Report may not be paid through Assessments collected by the City for the District Programs. In administering contracts with third party providers as necessary for providing the property-related services, Improvements and Activities within the District, Corporation shall comply with all applicable federal, state and City laws and regulations.

Section 3.8 Community/Public Access. To foster effective working relationships and effectuate the goals of the District as set forth in the Management District Plan, Corporation's responsibilities under this Agreement shall include the following:

(a) **Annual Outreach/Informational Meetings.** Corporation shall organize and conduct, at a minimum, one annual informational meeting to be noticed in writing by Corporation to the owners of Identified Parcels located in the District. Such notice shall be in addition to the requirements of the Ralph M. Brown Act and additional open meeting requirements of this Section. Such meetings must be conducted at a location within the District in order to allow the property owners to familiarize themselves with the Corporation, its functions and its officers and directors. At these meetings property owners shall have the opportunity to express to Corporation their views relating to the District. Such meetings may, but are not required to be, consolidated with a regular meeting of the Corporation's board of directors for the transaction of Corporation's business.

In lieu of one informational meeting noticed to all owners of the Identified Parcels, Corporation may organize and conduct a series of informational meetings, each of which will be noticed to only some of the owners of the Identified Parcels so long as all owners of the Identified Parcels are invited to at least one meeting each year.

For purposes of providing notice of an annual information meeting to individuals and entities with a timeshare ownership interest in an Identified Parcel, written notice provided to the homeowner's association for such individuals and entities shall meet the requirements of this section.

(b) **Open Meetings; Compliance with Ralph M. Brown Act.** Actions of the Corporation shall be taken openly and deliberations shall be conducted openly in compliance with the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code), made applicable to Corporation pursuant to Section 36614.5 of the Streets and Highways Code and this Agreement. In addition to Corporation's obligation to comply with the Ralph M. Brown Act, all notices and agendas for regular and special meetings of Corporation's board of

directors and its committees shall be sent to the Government Information Center at the main branch of the San Francisco Public Library for posting. If Corporation establishes an internet website for the District, meeting notices and agendas shall be posted on Corporation's website no later than the time such notices and agendas must be posted under the Ralph M. Brown Act.

(c) **Public Access to District Related Records; Compliance with the California Public Records Act.** Corporation shall comply with the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code), for all records relating to the District, this Agreement, the Assessments, Annual Reports, District Programs, Management District Plan, contracts with third party providers and any other matter related to the District or the subject matter of this Agreement

(d) **Newsletters.** Corporation may prepare a District newsletter for distribution to the owners of Identified Parcels and businesses and community-based organizations operating from Identified Parcels. Every issue of any newsletter shall be submitted in duplicate to the OEWD for reference.

(e) **Other Events.** Corporation may organize at its discretion other events and programs that involve the owners of Identified Parcels, businesses and community-based organizations operating from Identified Parcels and the public that further the goals and objectives described in the Management District Plan; provided, that Assessment Funds may only be used for such events and programs if included in the annual budget set forth in the Management District Plan or Annual Report.

Section 3.9 Budget. Each property-related service, Improvement and Activity specified in the Management District Plan, and included in the budget therein during the first Fiscal Year of operations and in the corresponding Annual Report for subsequent Fiscal Years, shall be implemented by Corporation. Corporation and City agree that amounts shown in the Management District Plan or the Annual Reports were (or will be) the best estimates of the cost of those property-related services, Improvements and Activities at the time the estimates were (or will be) made. The parties anticipate that deviations from those estimates may occur and that some property-related services, Improvements and Activities may not be completed within the particular year budgeted, given normal delays that can be expected with these types of programs and changing circumstances. Corporation will use its best efforts to implement and complete all District Programs specified in the Management District Plan and Annual Reports; however, it is possible that Corporation may not expend the precise amount budgeted for any particular line item in Corporation's annual budget. A ten percent (10%) deviation in a budget line item set forth in the budget for the first year of operation in the Management District Plan or in the Annual Reports for subsequent years will not be considered significant so as to constitute a material breach of this Agreement. If deviation in a budget line item exceeds 10%, or if Corporation desires to make budget allocation changes that exceed 10% of the total budget for all District Programs for a given Fiscal Year, and such changes would, in the opinion of the OEWD, adversely impact the special benefits conferred on the Identified Parcels, Corporation will request that the Board of Supervisors to modify the Management District Plan pursuant to Section 36636 of the Streets and Highways Code. In no event may Corporation expend from Assessments Funds more than the total amount budgeted in the Management District Plan for the first year of operation, or in the Annual Report for subsequent years (including delinquent payments, interest income, and rollover funds) as finally approved by the Board of Supervisors.

Section 3.10 Assessment Records. Corporation shall maintain a complete database, in a format requested by the Controller and current to the most recent property tax year available, containing the following information: the Assessor Parcel Number and site address of all Identified Parcels; the name and address of the legal owner of each Identified Parcel; the amount of Assessments levied upon each Identified Parcel; the proportionate financial obligation of the Assessments levied upon each Identified Parcel in relation to the entire amount of the Assessments levied upon all Identified Parcels; and the Assessment calculation for each Identified Parcel, including all variables used for such calculation for each Identified Parcel. The database shall be updated at least once each year to reflect changed conditions such as merger of parcels, subdivision of parcels (including condominium

conversions), lot line adjustments, changed property usage, new construction, and to accurately reflect the status of the Identified Parcels and correct errors, if any, in the database for the Assessments. The OEWD may, at the OEWD's discretion, provide assistance in compiling or correcting data or information relative to the Assessments on Identified Parcels; however, the OEWD shall not be obligated to prepare, produce or correct such data or information. Corporation agrees to make such data available at the Corporation's office for public inspection during Corporation's normal business hours.

Section 3.11 Preparation Annual Assessment Database. Beginning July 1, 2009, and by July 1st of each subsequent year, Corporation shall provide the Controller and OEWD with Assessment data for placement on the tax roll for the subsequent tax year, in a format to be prescribed by the Controller. The Assessment database shall include the following: Assessor Parcel Numbers of all Identified Parcels; the amount of Assessments upon each parcel; exemption documentation acceptable to the City, the Assessments calculations for each Identified Parcel, including all variables used in the calculation of the Assessments, and such other information as the Controller or OEWD may require. Any corrections or adjustments to the annual Assessment database, as well as the accuracy of any such corrections or adjustments, shall be the responsibility of Corporation. Upon request of the City, Corporation shall promptly complete a written request for an investigation of discrepancies and make all reasonable efforts to obtain additional documentation related to the Assessments upon any or all of the Identified Parcels for which a correction or adjustment is requested. Corporation shall provide the Annual Assessment Database to OEWD and the Controller on CD-ROM or other electronic medium as requested.

Section 3.12 Prohibited Contracts with City Officers and Employees. Corporation may not employ or subcontract with any person where such employment or subcontract would constitute a violation of California Government Code Sections 1090 et seq.

Section 3.13 City Access to Records; Copies. All designs, plans, reports, files, invoices, investigations, materials, documents and other records that are prepared, acquired, owned, maintained or under the control or possession by Corporation, its agents or representatives, or other person under contract with Corporation, pursuant to this Agreement (including any duplicate copies), shall be made fully available to City by Corporation. Corporation agrees to exercise reasonable and due diligence in providing for the secure storage of all such materials and, upon request, to provide copies for City's use for any purpose.

Section 3.14 Digital Photographs of Streetscape Conditions. Within 30 days of execution of this Agreement, Corporation shall provide to City digital photographs of the conditions of streets, sidewalks and other streetscape, acceptable to OEWD, prior to the commencement of services to be funded by assessments for the 2008-2009 Fiscal Year as set forth in the Management District Plan.

ARTICLE IV

CITY RESPONSIBILITIES

Section 4.1 Collection and Disbursement of Assessments. Based upon the annual Assessments levied by the Resolution of Formation, as listed in the Management District Plan and, after the first Fiscal Year, the Annual Reports, and with the exception of recoverable City costs for supplemental City service fees, loans or advances, City shall include the Assessments on the property tax bills mailed to the owners of Identified Parcels. The City shall directly bill annual Assessments on Identified Parcels owned by entities exempt from property taxation. The City shall disburse to Corporation the actual revenues received from the Assessments, subject to the terms and conditions of this Agreement. The City shall be under no obligation to make any disbursement of Assessment Funds without a Disbursement & Depository Certification executed by Corporation containing the information

described in Section 1.1(j) of this Agreement. The City shall disburse Assessment Funds during each Fiscal Year for the duration of this Agreement according to the following schedule:

(a) **Disbursement of First Installment.** For Assessments the City receives with the first installment of secured property taxes which, if not paid on or before December 10th, are delinquent, the City shall disburse all Assessment Funds available for immediate disbursement on or before January 10th of the following calendar year.

(b) **Disbursement of Second Installment.** For Assessments the City receives with the second installment of secured property taxes which, if not paid on or before April 10th, are delinquent, the City shall disburse all Assessment Funds available for immediate disbursement on or before May 10th of the same calendar year.

(c) **Reconciliation; Delinquent Assessments and Other Special Disbursements.** In addition to the disbursements for the first and second installments described above, and subject to the terms and conditions of this Agreement, the City shall make at least one disbursement of Assessment Funds to Corporation during the last Fiscal Quarter of each Fiscal Year, and may make additional disbursement from time to time as determined by the Controller. Each disbursement of Assessment Funds shall include:

(1) Assessments paid and/or processed by the Office of the Treasurer/Tax Collector and posted to the special assessment account within the City's Treasury for the District (Controller's Special Assessment No. 57) after disbursement of the second installment;

(2) Assessments collected but not previously disbursed pending: (A) reconciliation of the City's books and records; (B) resolution of disputes resulting in withholdings from or suspension of disbursements under Section 4.4; or (C) cure of an Event of Default resulting in withholding of Assessment Funds under Section 11.2; and,

(3) Assessment Funds, including delinquent Assessments from prior Fiscal Years, not previously disbursed for any other reason that are available for disbursement.

(d) Disbursements made pursuant to subsection (c) shall be made as such intervals and under such conditions or assurances of Corporation's future compliance with this Agreement as the Controller deems appropriate. Assessment Funds not disbursed during the Fiscal Year in which received shall be carried over to the next Fiscal Year and disbursed with the first installment disbursement, unless disbursement would violate this Agreement or applicable law.

(e) City shall not be responsible for delays in disbursements to Corporation due to delays in transmittals of funds or payment delays by property owners, including other public entities, organizations or agencies, or delays caused by the resolution of disputes which, in the discretion of the Controller, warrant suspension of disbursements as set forth in this Article.

Section 4.2 Assistance. The City may assist with the resolution of any discrepancies in individual Assessments amounts, calculations or benefits. The City may:

(a) Make reasonable efforts to effect the timely collection of the annual Assessments, including City Assessments and direct billed Assessments, if any;

(b) Make reasonable efforts to pursue delinquent Assessments and remit such Assessments to Corporation, including interest and penalties subject to City's right to recover costs for pursuing such Assessments;

(c) Maintain a continual liaison with Corporation, including assisting with the coordination of services from various other City departments, bureaus, and agencies;

(d) Conduct reviews of existing primary data; verify Assessment data as compiled by any consultant or subcontractor hired by Corporation; perform field or site inspections to verify the accuracy of existing or secondary data, or to substantiate a claim made by a property owner subject to Assessments in the District, with the cooperation of Corporation; maintain confidentiality of certain City records as City deems appropriate;

(e) Direct the Corporation to recalculate the amount of the Assessments due and request the Controller to respond appropriately, or make such other arrangements with Corporation and the property owner to resolve an incorrect Assessment;

(f) Recalculate the amount of the Assessments due, or make such other arrangements with Corporation and the property owner to resolve the incorrect Assessments;

(g) Require a written request from Corporation to conduct an investigation or provide additional related documentation, such as a written request from the affected property owner. The City's costs associated with supplemental investigations may be recovered from the Assessments collected, subject to existing or future City policies and procedures regarding recoverable costs and expenses.

Section 4.3 Delinquent Assessments. The amount of delinquent Assessments, if any, and interest and penalties thereon, if any, that have been collected by City that are available for disbursement to Corporation for District Programs shall be disbursed in accordance with the disbursement schedule in Section 4.1. The City shall be under no obligation to make a special disbursements of delinquent Assessments except as provided in Section 4.1.

Section 4.4 Withholding; Suspension of Disbursements. The City may withhold either all or some portion of the actual revenues received from Assessments if, in the judgment of the Controller: (a) Corporation is not properly administering the budget in accordance with the Management District Plan, Annual Report, and this Agreement, (b) Corporation has failed to maintain proper records or follow generally accepted accounting principals, (c) Corporation has failed to diligently implement audit recommendations regarding the safekeeping or use of Assessment Funds, (d) based on advice from the City Attorney, Corporation is in violation of this Agreement or the Property and Business Improvement District Law of 1994, Article 15 or other applicable law. The City will notify Corporation and set forth the specific problems and issues the Controller determines warrant suspension of disbursements. The City and Corporation will immediately attempt to cure the problems if, at the City's discretion, a cure is appropriate. Assessments Funds will be released upon the implementation of an acceptable cure, subject to the approval of the Controller and possible modification of the disbursement schedule. This does not alter or diminish in any way City's right to proceed in a manner consistent with California Streets and Highways Code, Section 36670, Article 15 or other applicable law, or to invoke other appropriate remedies, including termination of this Agreement.

Section 4.5 Notification of Changed Status. If the Corporation is dissolved, dissolves itself, no longer has nonprofit status, or has its corporate powers suspended by the Secretary of State or otherwise fails to maintain in good standing its authority to conduct business or operate in the City or the State of California, prior to or upon the expiration of this Agreement, Corporation shall immediately transmit to City all unexpended Assessment Funds for distribution to the owners of Identified Parcels, less amounts City, in its sole discretion, may pay or agree to pay to Corporation's unpaid creditors for Eligible Expenses, unless Corporation makes arrangements for payment of creditors and return of excess Assessment Funds acceptable to City. Corporation will immediately notify the OEWD and Controller in writing of any such change in the status of the Corporation described in this Section or which constitutes a breach of this Agreement.

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ARTICLE V

APPROPRIATION AND CERTIFICATION OF ASSESSMENTS FUNDS;

LIMITATIONS ON CITY'S OBLIGATIONS

Section 5.1 Risk of Non-Appropriation of Assessments Funds. This Agreement is subject to the budget and fiscal provisions of the Charter. City shall have no obligation to make appropriations for this Agreement in lieu of appropriations for new or other agreements for administration of the District by Corporation or by a different nonprofit entity acting as the Owners' Association for the District. Corporation assumes all risk of possible non-appropriation or non-certification of funds, and such assumption is part of the consideration for this Agreement. Any Assessment Funds collected by the City that are not appropriated for implementation of the Management District Plan by an Owners' Association shall be refunded, on a proportional basis, to the owners of Identified Parcels who paid the Assessments, or on whose behalf the Assessments were paid.

Section 5.2 Certification of Controller; Guaranteed Maximum Costs. No Assessment Funds shall be available under this Agreement without prior written authorization certified by the Controller. In addition, as set forth in Section 21.10-1 of the San Francisco Administrative Code, and as required by other applicable law:

(a) City's obligations hereunder shall not at any time exceed the amount certified by the Controller for the purpose and period stated in such certification.

(b) Except as may be provided by City ordinances governing emergency conditions, City and its employees, officers agents and representatives may not request Corporation to perform services or to provide materials, equipment and supplies that would result in Corporation performing services or providing materials, equipment and supplies that are beyond the scope of this Agreement unless this Agreement is amended in writing and approved as required by law to authorize the additional services, materials, equipment or supplies. City may not disburse Assessment Funds to Corporation for purposes beyond the scope of the Management District Plan, Annual Report for the relevant Fiscal Year, or this Agreement, unless an amendment to the Plan, such Annual Report and/or this Agreement, as appropriate, has been made in accordance with applicable law, or that is beyond the scope of Activities and Improvements authorized by the Property and Business Improvement District Law of 1994, as augmented by Article 15.

(c) City and its employees and officers are not authorized to offer or promise to Corporation additional funding for this Agreement which would exceed the maximum amount of Assessment Funds provided for herein. Additional funding from any City funds for District Programs in excess of Assessment Funds actually collected under this Agreement shall require lawful approval and certification by the Controller. City is not required to honor any offered or promised additional funding which exceeds the maximum amount of Assessment Funds provided in this when the lawful approval and certification by the Controller has not been obtained.

(d) The Controller is not authorized to make disbursements on any agreement for which funds have not been certified as available in the budget or by supplemental appropriation.

Section 5.3 Automatic Termination for Nonappropriation of Funds. This Agreement shall automatically terminate, without penalty, liability or expense of any kind to City, at the end of any Fiscal Year if Assessment Funds are not appropriated for the next succeeding Fiscal Year. If Assessment Funds are appropriated for a portion of any Fiscal Year, this Agreement shall terminate,

without penalty, liability or expense of any kind to City, at the end of such portion of the Fiscal Year. All undisbursed Assessments Funds in the possession of the City or its agents upon termination of this agreement shall be refunded to the owners of Identified Parcels, in proportion to the amounts paid, as set forth in Section 11.4.

Section 5.4 SUPERSEDURE OF CONFLICTING PROVISIONS. IN THE EVENT OF ANY CONFLICT BETWEEN ANY OF THE PROVISIONS OF THIS ARTICLE 5 AND ANY OTHER PROVISION OF THIS AGREEMENT, OR ANY OTHER DOCUMENT OR COMMUNICATION RELATING TO THIS AGREEMENT, THE TERMS OF THIS ARTICLE 5 SHALL GOVERN.

ARTICLE 6

ADDITIONAL REPORTING AND ORGANIZATIONAL REQUIREMENTS; AUDITS; PENALTIES FOR FALSE CLAIMS

Section 6.1 Additional Reports. In addition to the Annual Reports and Mid-Year Reports described in Article 3 of this Agreement, Corporation shall provide, in a prompt and timely manner, financial, operational and other reports, as requested by the City, in form and substance satisfactory to the City. All reports required under this Agreement, including any copies, shall be submitted on recycled paper and printed on double-sided pages, to the maximum extent possible.

Section 6.2 Organizational Documents. On or before the effective date of this Agreement, Corporation shall provide to City the names of its officers and directors and certified copies of its Articles of Incorporation and Bylaws as well as satisfactory evidence of the valid nonprofit status described in Section 8.1. Notwithstanding the previous sentence, Corporation may submit satisfactory evidence that it has applied for and is diligently pursuing nonprofit status in conformity with applicable laws. Failure to provide proof of such valid nonprofit status satisfactory to City within one year of adoption of a resolution by the Board of Supervisors approving this Agreement shall constitute a material breach of this Agreement.

Section 6.3 Notification of Defaults or Changes in Circumstances. Corporation shall notify City immediately of (a) any Event of Default or event that, with the passage of time, would constitute an Event of Default; and (b) any change of circumstances that would cause any of the representations and warranties contained in Article 8 to be false or misleading at any time during the term of this Agreement.

Section 6.4 Financial Statements. Within thirty (30) days following the end of each Fiscal Year, Corporation shall deliver to City an unaudited balance sheet and the related statement of income and cash flows for such Fiscal Year, all in reasonable detail acceptable to City, certified by an appropriate financial officer of Corporation as accurately presenting the financial position of Corporation. Corporation shall also deliver to City no later than sixty (60) days following the end of any Fiscal Year, at no expense to the City, a balance sheet and the related statement of income and cash flows for each fiscal year, all in reasonable detail acceptable to City, reviewed by a Certified Public Accountant (CPA); this review shall include a statement of negative assurance from the CPA. In addition, or alternatively, the Controller or the Office of Economic and Workforce Development may in their discretion require Corporation to deliver, at no expense to the City, an annual independent audit report by a Certified Public Accountant of all such funds. The CPA review and/or audit may be funded from assessment proceeds as part of the general administration of the District. At all times the Board of Supervisors shall reserve full rights of accounting of these funds. The Office of Economic and Workforce Development shall be the City agency responsible for coordination between the City and the District.

Section 6.5 Books and Records. Corporation shall establish and maintain accurate files and records of all aspects of the Management District Plan and the matters funded in whole or in part with Assessment Funds during the term of this Agreement, and shall follow generally accepted accounting principals. Without limiting the scope of the foregoing, Corporation shall establish and maintain accurate financial books and accounting records relating to Eligible Expenses incurred and Assessment Funds received and expended under this Agreement, together with all invoices, documents, payrolls, time records and other data related to the matters covered by this Agreement, whether funded in whole or in part with Assessment Funds. Corporation shall maintain all of the files, records, books, invoices, documents, payrolls and other data required to be maintained under this Section in a readily accessible location and condition for a period of not less than five (5) years after final disbursement under this Agreement or until any final audit has been fully completed to the satisfaction of the Controller, whichever is later.

Section 6.6 Inspection and Audit. Corporation shall make available to City, its employees and authorized representatives, during regular business hours all of the files, records, books, invoices, documents, payrolls, tax returns and statements and other data required to be established and maintained by Corporation under this Agreement and applicable law. Corporation shall permit City, its employees and authorized representatives to inspect, audit, examine, make and retain duplicate copies, and make excerpts and transcripts from any of the foregoing. The rights of City pursuant to this Section shall remain in effect so long as Corporation has the obligation to maintain such files, records, books, invoices, documents, payrolls, tax returns and statements and other data under this Article 6.

Section 6.7 Submitting False Claims; Monetary Penalties. Corporation acknowledges and agrees that it is a "Corporation" under and is subject to San Francisco Administrative Code Section 21.35. Under such Section 21.35, any Corporation, subcontractor or consultant who submits a false claim shall be liable to City for three times the amount of damages which City sustains because of the false claim. A Corporation, subcontractor or consultant who submits a false claim shall also be liable to City for the costs, including attorney's fees, of a civil action brought to recover any of those penalties or damages, and may be liable to City for a civil penalty of up to ten thousand dollars (\$10,000) for each false claim. A Corporation, subcontractor or consultant will be deemed to have submitted a false claim to City if the Corporation, subcontractor or consultant: (a) knowingly presents or causes to be presented to an officer or employee of City a false claim or request for payment or approval; (b) knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by City; (c) conspires to defraud City by getting a false claim allowed or paid by City; (d) knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to City; or (e) is a beneficiary of an inadvertent submission of a false claim to City, subsequently discovers the falsity of the claim, and fails to disclose the false claim to City within a reasonable time after discovery of the false claim.

ARTICLE 7

TAXES

Section 7.1 Corporation to Pay All Taxes. Corporation shall pay to the appropriate governmental authority, as and when due, any and all taxes, fees, assessments or other governmental charges, including possessory interest taxes and California sales and use taxes, levied upon or in connection with this Agreement, the Management District Plan, the Assessment Funds or any of the activities contemplated by this Agreement.

Section 7.2 Use of City Real Property. If at any time this Agreement entitles Corporation to the possession, occupancy or use of City real property for private gain, the following provisions shall apply:

(a) Corporation, on behalf of itself and any subcontractors, successors and assigns, recognizes and understands that this Agreement may create a possessory interest subject to property taxation and Corporation, and any subcontractor, successor or assign, may be subject to the payment of such taxes.

(b) Corporation, on behalf of itself and any subcontractors, successors and assigns, further recognizes and understands that any assignment permitted hereunder and any exercise of any option to renew or other extension of this Agreement may constitute a change in ownership for purposes of property taxation and therefore may result in a revaluation of any possessory interest created hereunder. Corporation shall report any assignment or other transfer of any interest in this Agreement or any renewal or extension thereof to the Assessor within sixty (60) days after such assignment, transfer, renewal or extension.

(c) Corporation shall provide such other information as may be requested by City to enable City to comply with any reporting requirements under applicable law with respect to possessory interests.

Section 7.3 Earned Income Credit (EIC) Forms. Administrative Code section 12O requires that employers provide their employees with IRS Form W-5 (The Earned Income Credit Advance Payment Certificate) and the IRS EIC Schedule, as set forth below. Employers can locate these forms at the IRS Office, on the Internet, or anywhere that Federal Tax Forms can be found.

(a) Corporation shall provide EIC Forms to each Eligible Employee at each of the following times: (1) within thirty (30) days following the date on which this Agreement becomes effective (unless Corporation has already provided such EIC Forms at least once during the calendar year in which such effective date falls); (2) promptly after any Eligible Employee is hired by Corporation; and (3) annually between January 1 and January 31 of each calendar year during the term of this Agreement.

(b) Failure to comply with any requirement contained in subparagraph (a) of this Section shall constitute a material breach by Corporation of the terms of this Agreement. If, within thirty (30) days after Corporation receives written notice of such a breach, Corporation fails to cure such breach or, if such breach cannot reasonably be cured within such period of thirty (30) days, Corporation fails to commence efforts to cure within such period or thereafter fails to diligently pursue such cure to completion, the City may pursue any rights or remedies available under this Agreement or under applicable law.

(c) Any Subcontract entered into by Corporation shall require the subcontractor to comply, as to the subcontractor's Eligible Employees, with each of the terms of this section.

(d) Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Section 12O of the San Francisco Administrative Code.

ARTICLE 8

REPRESENTATIONS AND WARRANTIES

Corporation represents and warrants each of the following as of the date of this Agreement and at all times throughout the term of this Agreement:

Section 8.1 Organization; Authorization. Corporation is a nonprofit corporation, duly organized and validly existing and in good standing under the laws of the State of California. Corporation has applied for and shall diligently pursue, and once established, shall maintain valid

nonprofit status under Section 501(c)(4) of the United States Internal Revenue Code of 1986, as amended, and all rules and regulations promulgated under such Section. Corporation has duly authorized by all necessary action the execution, delivery and performance of this Agreement. Corporation has duly executed and delivered this Agreement and this Agreement constitutes a legal, valid and binding obligation of Corporation, enforceable against Corporation in accordance with the terms hereof.

Section 8.2 Location. Corporation's operations, offices and headquarters are located at the address for notices set forth in Section 15. All aspects of the Management District Plan will be implemented within the geographic boundaries of the District specified in the Management District Plan.

Section 8.3 No Misstatements. No document furnished or to be furnished by Corporation to City in connection with the this Agreement, Annual Report, any Disbursement Request or any other document relating to any of the foregoing, contains or will contain any untrue statement of material fact or omits or will omit a material fact necessary to make the statements contained therein not misleading, under the circumstances under which any such statement shall have been made.

Section 8.4 Conflict of Interest. Through its execution of this Agreement, Corporation acknowledges that it is familiar with the provision of Section 15.103 of the City's Charter, Article III, Chapter 2 of the City's Campaign and Governmental Conduct Code, and Section 87100 et seq. and Section 1090 et seq. of the Government Code of the State of California, and certifies that it does not know of any facts which constitutes a violation of said provisions and agrees that it will immediately notify the City if it becomes aware of any such fact during the term of this Agreement.

Section 8.5 No Other Agreements with City. Except as expressly itemized in an attachment to this Agreement, neither Corporation nor any of Corporation's affiliates, officers, directors or employees has any interest, however remote, in any other agreement with City including any commission, department or other subdivision thereof.

Section 8.6 Subcontracts. Corporation has not entered into any agreement, arrangement or understanding with any other person or entity pursuant to which such person or entity will implement or assist in implementing all or any portion of the Management District Plan, except as expressly itemized in an attachment to this Agreement, which attachment shall include true and correct copies of all contracts with such person or entity. By executing this Agreement, Corporation certifies that it has not and shall not enter into any subcontract unless the subcontracting party agrees in writing to the terms and conditions set forth in this Agreement applicable to Corporation.

Section 8.7 Eligibility to Receive Government Funds. By executing this Agreement, Corporation certifies that Corporation is not suspended, debarred or otherwise excluded from participation in federal assistance programs. Corporation further certifies that it is not suspended, debarred or otherwise excluded from being awarded contracts from the State of California or the City, or from participation in assistance programs funded by the State of California. Corporation acknowledges that this certification of eligibility to receive federal, state and local funds is a material term of the Agreement.

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ARTICLE 9

INDEMNIFICATION AND GENERAL LIABILITY

Section 9.1 Indemnification. Corporation shall indemnify and save harmless City and its officers, agents and employees from, and, if requested, shall defend them against any and all loss, cost, damage, injury, liability, and claims thereof for injury to or death of a person, including employees of Corporation or loss of or damage to property, arising directly or indirectly from Corporation's performance of this Agreement, including, but not limited to, Corporation's use of facilities or equipment provided by City or others, regardless of the negligence of, and regardless of whether liability without fault is imposed or sought to be imposed on City, except to the extent that such indemnity is void or otherwise unenforceable under applicable law in effect on or validly retroactive to the date of this Agreement, and except where such loss, damage, injury, liability or claim is the result of the active negligence or willful misconduct of City and is not contributed to by any act of, or by any omission to perform some duty imposed by law or agreement on Corporation, its subcontractors or either's agent or employee. The foregoing indemnity shall include, without limitation, reasonable fees of attorneys, consultants and experts and related costs and City's costs of investigating any claims against the City.

In addition to Corporation's obligation to indemnify City, Corporation specifically acknowledges and agrees that it has an immediate and independent obligation to defend City from any claim which actually or potentially falls within this indemnification provision, even if the allegations are or may be groundless, false or fraudulent, which obligation arises at the time such claim is tendered to Corporation by City and continues at all times thereafter.

Corporation shall indemnify and hold City harmless from all loss and liability, including attorneys' fees, court costs and all other litigation expenses for any infringement of the patent rights, copyright, trade secret or any other proprietary right or trademark, and all other intellectual property claims of any person or persons in consequence of the use by City, or any of its officers or agents, of articles or services to be supplied in the performance of this Agreement.

Section 9.2 Incidental and Consequential Damages. Losses covered under this Article 9 shall include any and all incidental and consequential damages resulting in whole or in part from Corporation's acts or omissions. Nothing in this Agreement shall constitute a waiver or limitation of any rights that any Indemnified Party may have under applicable law with respect to such damages.

Section 9.3 LIMITATION ON LIABILITY OF CITY. CITY'S OBLIGATIONS UNDER THIS AGREEMENT SHALL BE LIMITED TO THE AGGREGATE AMOUNT OF ASSESSMENT FUNDS ACTUALLY DISBURSED HEREUNDER. NOTWITHSTANDING ANY OTHER PROVISION CONTAINED IN THIS AGREEMENT, OR ANY OTHER DOCUMENT OR COMMUNICATION RELATING TO THIS AGREEMENT, IN NO EVENT SHALL CITY BE LIABLE, REGARDLESS OF WHETHER ANY CLAIM IS BASED ON CONTRACT OR TORT, FOR ANY SPECIAL, CONSEQUENTIAL, INDIRECT OR INCIDENTAL DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOST PROFITS, ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, THE ASSESSMENT FUNDS, THE MANAGEMENT DISTRICT PLAN OR ANY SERVICES, IMPROVEMENTS OR ACTIVITIES PERFORMED IN CONNECTION WITH THIS AGREEMENT.

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ARTICLE 10

INSURANCE

Section 10.1 Types and Amounts of Coverage. Without limiting Corporation's liability pursuant to Article 9, Corporation shall maintain in force, during the full term of this Agreement, insurance in the following amounts and coverages:

- (a) Workers' Compensation, in statutory amounts, with Employers' Liability Limits not less than one million dollars (\$1,000,000) each accident, injury or illness, at all times during which Corporation employs any individual as an "employee" as defined in California Labor Code Section 3351.
- (b) Commercial General Liability Insurance with limits not less than one million dollars (\$1,000,000) each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Contractual Liability, Personal Injury, Products and Completed Operations.
- (c) Commercial Automobile Liability Insurance with limits not less than one million dollars (\$1,000,000) each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Owned, Non-Owned and Hired auto coverage, as applicable.
- (d) Crime Insurance Requirement: A blanket fidelity bond or crime policy coverage of all officers and employees in an amount not less than one half of the annual Community Benefit District's assessment budget, including the City as additional obligee or loss payee as its interest may appear.

Section 10.2 Additional Requirements for General and Automobile Coverage. Commercial General Liability and Commercial Automobile Liability insurance policies shall:

- (a) Name as additional insured City and its officers, agents and employees.
- (b) Provide that such policies are primary insurance to any other insurance available to the Additional Insureds, with respect to any claims arising out of this Agreement, and that insurance applies separately to each insured against whom claim is made or suit is brought, except with respect to limits of liability.

Section 10.3 Additional Requirements for All Policies. All policies shall provide at least thirty (30) days' advance written notice to City of cancellation or reduction in coverage mailed to City's address for notices pursuant to Article 15.

Section 10.4 Required Post-Expiration Coverage. Should any of the insurance required hereunder be provided under a claims-made form, Corporation shall maintain such coverage continuously throughout the term of this Agreement and, without lapse, for a period of three (3) years beyond the expiration or termination of this Agreement, to the effect that, should occurrences during the term hereof give rise to claims made after expiration or termination of the Agreement, such claims shall be covered by such claims-made policies.

Section 10.5 General Annual Aggregate Limit/Inclusion of Claims Investigation or Legal Defense Costs. Should any of the insurance required hereunder be provided under a form of coverage that includes a general annual aggregate limit or provides that claims investigation or legal defense costs be included in such general annual aggregate limit, such general annual aggregate limit shall be double the occurrence or claims limits specified above.

Section 10.6 Evidence of Insurance. Before commencing any operations under this Agreement, Corporation shall do the following: (a) furnish to City certificates of insurance and additional insured policy endorsements with insurers with ratings comparable to A-, VIII or higher, that are authorized to do business in the State of California, and that are satisfactory to City, in form evidencing all coverages set forth above, and (b) furnish complete copies of policies promptly upon City request. Failure to maintain insurance shall constitute a material breach of this Agreement.

Section 10.7 Effect of Approval. Approval of any insurance by City shall not relieve or decrease the liability of Corporation hereunder.

Section 10.8 Adjustments to Types and Amounts of Coverage. The City may require Corporation to provide types of insurance coverage different than as set forth in this Article 10, and insurance coverage in amounts higher than as set forth in this Article 10, as may be required by the City's Risk Manager. City shall provide written notice of such changes in types and amounts of coverage not less than ninety (90) days before Corporation's obligation to obtain and thereafter maintain such additional type(s) of coverage, or coverage in amounts higher than as set forth herein, becomes effective.

ARTICLE 11

EVENTS OF DEFAULT AND REMEDIES

Section 11.1 Events of Default. The occurrence of any one or more of the following events shall constitute an "Event of Default" under this Agreement. City will provide Corporation with written notice of any such Event of Default and Corporation will have 14 calendar days from the date of the written notice to cure or contest any identified Event of Default, before City may proceed with any Remedies Upon Event of Default as provided in Section 11.2. Corporation may request additional time to cure any identified default, which City in its discretion may grant. During any initial or additional period to cure or contest, under this Article 11 or any other part of this Agreement, City in its discretion may require that performance be stopped pending completion of cure. Before issuing any such requirement that performance be stopped, City will consider Corporation's views and circumstances.

(a) **False Statement.** Any statement, representation or warranty contained in this Agreement, in the Application Documents, in any Disbursement Request or in any other document submitted to City under this Agreement is found by City to be intentionally false or misleading. For purposes of this Article, "intentionally" means that Corporation, with respect to any such statement, representation or warranty, does any of the following: (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information. Proof of specific intent is not required, and reliance by the City is not required.

(b) **Failure to Provide Insurance.** Corporation fails to provide or maintain in effect any policy of insurance required in Article 10.

(c) **Failure to Comply with Applicable Laws.** Corporation fails to perform or breaches any of the terms or provisions of Article 16.

(d) **Failure to Perform Other Covenants.** Corporation fails to perform or breaches any other agreement or covenant of this Agreement to be performed or observed by Corporation as and when performance or observance is due and such failure or breach continues for a period of ten (10) days after the date on which such performance or observance is due.

(e) **Cross Default.** Corporation defaults under any other agreement between Corporation and City (after expiration of any grace period expressly stated in such agreement).

(f) **Voluntary Insolvency.** Corporation (a) is generally not paying its debts as they become due, (b) files, or consents by answer or otherwise to the filing against it of, a petition for relief or reorganization or arrangement or any other petition in bankruptcy or for liquidation or to take advantage of any bankruptcy, insolvency or other debtors' relief law of any jurisdiction, (c) makes an assignment for the benefit of its creditors, (d) consents to the appointment of a custodian, receiver, trustee or other officer with similar powers of Corporation or of any substantial part of Corporation's property or (e) takes action for the purpose of any of the foregoing.

(g) **Involuntary Insolvency.** Without consent by Corporation, a court or government authority enters an order, and such order is not vacated within ten (10) days, (a) appointing a custodian, receiver, trustee or other officer with similar powers with respect to Corporation or with respect to any substantial part of Corporation's property, (b) constituting an order for relief or approving a petition for relief or reorganization or arrangement or any other petition in bankruptcy or for liquidation or to take advantage of any bankruptcy, insolvency or other debtors' relief law of any jurisdiction or (c) ordering the dissolution, winding-up or liquidation of Corporation.

Section 11.2 Remedies Upon Event of Default. Upon and during the continuance of an Event of Default, subject to the written notice of Event of Default and cure provisions of Section 11.1, above, City may do any of the following, individually or in combination with any other remedy:

(a) **Termination.** City may terminate this Agreement by giving a written termination notice to Corporation and, on the date specified in such notice, this Agreement shall terminate and all rights of Corporation hereunder shall be extinguished. In the event of such termination, Corporation shall not be entitled to receive any further disbursement of Assessment Funds.

(b) **Withholding of Assessment Funds.** City may withhold all or any portion of Assessment Funds not yet disbursed hereunder, regardless of whether the Controller previously approved the disbursement of the Assessment Funds. Any Assessment Funds withheld pursuant to this Section and subsequently disbursed to Corporation after cure of applicable Events of Default may be disbursed without interest.

(c) **Offset.** City may offset against all or any portion of undisbursed Assessment Funds hereunder or against any payments due to Corporation under any other agreement between Corporation and City the amount of any outstanding Loss incurred by any Indemnified Party, including any Loss incurred as a result of the Event of Default.

(d) **Return of Assessment Funds.** City may demand the immediate return of any previously disbursed Assessment Funds that have been claimed or expended by Corporation in breach of the terms of this Agreement, together with interest thereon from the date of disbursement at the maximum rate permitted under applicable law.

Section 11.3 Remedies Nonexclusive. Each of the remedies provided for in this Agreement may be exercised individually or in combination with any other remedy available hereunder or under applicable laws, rules and regulations. The remedies contained herein are in addition to all other remedies available to City at law or in equity by statute or otherwise and the exercise of any such remedy shall not preclude or in any way be deemed to waive any other remedy.

Section 11.4 Use of Assessments and Refunds Upon Disestablishment of District or Termination of Agreement.

(a) Upon the disestablishment of the District, any remaining revenues, after all outstanding debts are paid, derived from the levy of the Assessments, or derived from the sale of assets acquired

with Assessment Funds, shall be refunded to the owners of the Identified Parcels who paid the Assessment, or on whose behalf the Assessment was paid, applying the same method and basis that was used to calculate the Assessments in the fiscal year in which the District is disestablished. All outstanding Assessment Funds collected after disestablishment shall be spent on Improvements and Activities specified in the Management District Plan in accordance with Section 36671 of the Streets and Highways Code.

(b) If the disestablishment occurs before the Assessments are included on the property tax bills or billed directly, sent to the owners of Identified Parcels for the Fiscal Year in which the District is disestablished, the method and basis that was used to calculate the Assessments in the immediate prior Fiscal Year shall be used to calculate the amount of any refund to the owners of the Identified Parcels who paid the Assessment, or on whose behalf the Assessment was paid.

(c) The City shall refund and dispose of Assessment Funds as set forth in subsections (a) and (b) of this Section if this Agreement is terminated for any reason and either of the following occurs: (1) the Board of Supervisors determines, in its sole discretion, not to enter into an agreement with a different nonprofit entity as the Owners' Association for purposes of implementing the Management District Plan, or (2) the Board of Supervisors initiates disestablishment proceedings under Section 36670 of the Streets and Highways Code or Section 1511(e) of the San Francisco Business and Tax Regulations Code, which provides:

"Notwithstanding Streets & Highways Code Section 36670 or any other provision of state law, the Board of Supervisors may, by a supermajority vote of eight or more members, notice a hearing and initiate proceedings to disestablish for any reason a district formed after the effective date of this section. Where the Board of Supervisors seeks to disestablish a district in circumstances not authorized under Streets & Highways Code Section 36670, both the resolution of intention to disestablish the district and any final resolution to disestablish the district shall be subject to a supermajority vote of eight or more members. This paragraph shall not be applicable where the district has outstanding bonded indebtedness."

ARTICLE 12

DISCLOSURE OF INFORMATION AND DOCUMENTS

Section 12.1 Proprietary or Confidential Information of City. Corporation understands and acknowledges that, in the performance of this Agreement or in contemplation thereof, Corporation may have access to private or confidential information that may be owned or controlled by City and that such information may contain proprietary or confidential information, the disclosure of which to third parties may be damaging to City. Corporation agrees that all private or confidential information to which City allows access to Corporation in the performance of this Agreement shall be held in confidence and used only in the performance of this Agreement. Corporation shall exercise the same standard of care to protect such information as a reasonably prudent nonprofit entity would use to protect its own proprietary or confidential data.

Section 12.2 Sunshine Ordinance. Corporation acknowledges and agrees that this Agreement is subject to Section 67.24(e) of the San Francisco Administrative Code. All information provided by Corporation that is covered by such Section 67.24(e) and not exempt from disclosure pursuant to applicable law will be made available to the public upon request. The requirements of this section are in addition to Corporation's obligation to comply with the California Public Records Act.

ARTICLE 13

ASSIGNMENTS AND SUBCONTRACTING

Section 13.1 No Assignment by Corporation. Corporation shall not, either directly or indirectly, assign, transfer, hypothecate, subcontract or delegate all or any portion of this Agreement or any rights, duties or obligations of Corporation hereunder without the prior written consent of City. This Agreement shall not, nor shall any interest herein, be assignable as to the interest of Corporation involuntarily or by operation of law without the prior written consent of City. A change of control of Corporation or a sale or transfer of substantially all of the assets of Corporation shall be deemed an assignment for purposes of this Agreement.

Section 13.2 Agreement Made in Violation of this Article. Any agreement made in violation of Section 13.1 shall confer no rights on any person or entity and shall automatically be null and void.

Section 13.3 Subcontracting. Corporation shall have the right to subcontract for the provision of District Programs and administrative, professional and related services necessary or convenient for the implementation of the Management District Plan only on the terms set forth in this Section.

(a) **Limitations.** In no event may Corporation subcontract or delegate for the implementation of the whole of the Management District Plan. Corporation may subcontract with any person or entity acceptable to the City; provided, however, that Corporation shall not thereby be relieved from any liability or obligation under this Agreement and, as between City and Corporation, Corporation shall be responsible for the acts, defaults and omissions of any subcontractor or its agents or employees as fully as if they were the acts, defaults or omissions of Corporation. Corporation shall ensure that its subcontractors comply with all of the terms of this Agreement, insofar as they apply to the subcontracted portion of the Management District Plan. All references herein to duties and obligations of Corporation shall be deemed to pertain also to all subcontractors to the extent applicable. A default by any subcontractor shall be deemed to be an Event of Default hereunder. Nothing contained in this Agreement shall create any contractual relationship between any subcontractor and City.

(b) **Terms of Subcontract.** Each subcontract shall be in form and substance acceptable to City and shall expressly provide that it may be assigned to City without the prior consent of the subcontractor. In addition, each subcontract shall incorporate all of the terms of this Agreement, insofar as they apply to the subcontracted portion of the Management District Plan. Without limiting the scope of the foregoing, each subcontract shall provide City, with respect to the subcontractor, the audit and inspection rights set forth in Article 6. Upon the request of City, Corporation shall promptly furnish to City true and correct copies of each subcontract permitted hereunder.

Section 13.4 Corporation Retains Responsibility. Corporation shall in all events remain liable for the performance by any assignee or subcontractor of all of the covenants, terms and conditions contained in this Agreement.

ARTICLE 14

INDEPENDENT CORPORATION STATUS

Section 14.1 Nature of Agreement. Corporation shall be deemed at all times to be an independent Corporation and is solely responsible for the manner in which Corporation implements the Management District Plan and uses the Assessment Funds. Corporation shall at all times remain solely liable for the acts and omissions of Corporation, its officers and directors, employees and agents. Nothing in this Agreement shall be construed as creating a partnership, joint venture, employment or agency relationship between City and Corporation.

Section 14.2 Direction. Any terms in this Agreement referring to direction or instruction from the City or any Indemnified Party shall be construed as providing for direction as to policy and the result of Corporation's work only, and not as to the means by which such a result is obtained.

Section 14.3 Consequences of Recharacterization.

(a) Should City, in its discretion, or a relevant taxing authority such as the Internal Revenue Service or the State Employment Development Division, or both, determine that any officer, employee, agent or representative of Corporation is an employee of City for purposes of collection of any employment taxes, the amounts payable under this Agreement shall be reduced by amounts equal to both the employee and employer portions of the tax due (and offsetting any credits for amounts already paid by Corporation which can be applied against this liability). City shall subsequently forward such amounts to the relevant taxing authority.

(b) Should a relevant taxing authority determine a liability for past services performed by Corporation for City, upon notification of such fact by City, Corporation shall promptly remit such amount due or arrange with City to have the amount due withheld from future payments to Corporation under this Agreement (again, offsetting any amounts already paid by Corporation which can be applied as a credit against such liability).

(c) A determination of employment status pursuant to either subsection (a) or (b) of this Section 14.3 shall be solely for the purposes of the particular tax in question, and for all other purposes of this Agreement, any officer, employee, agent or representative of Corporation shall not be considered an employee of City. Notwithstanding the foregoing, if any court, arbitrator, or administrative authority determine that any officer, employee, agent or representative of Corporation is an employee for any other purpose, Corporation agrees to a reduction in City's financial obligation hereunder such that the aggregate amount of Assessment Funds under this Agreement does not exceed what would have been the amount of such Assessment Funds had the court, arbitrator, or administrative authority had not determined that any officer, employee, agent or representative of Corporation was an employee of City.

ARTICLE 15

NOTICES AND OTHER COMMUNICATIONS

Section 15.1 Requirements. Unless otherwise specifically provided herein, all notices, consents, directions, approvals, instructions, requests and other communications hereunder shall be in writing, shall be addressed to the person and address set forth below and shall be (a) deposited in the U.S. mail, first class, certified with return receipt requested and with appropriate postage, or (b) hand delivered.

If to the City:

Office of Economic and Workforce Development
City Hall, Room 448
1 Dr. Carlton B. Goodlett Place,
San Francisco, CA 94102
Attn: Director

If to Corporation:

Union Square Business Improvement District, Inc.
c/o Mr. James C. Flood
Flood Corporation

870 Market Street, Suite 1100
San Francisco, CA 94102

Section 15.2 Effective Date. All communications sent in accordance with Section 15.1 shall become effective on the date of receipt. Such date of receipt shall be determined by: (a) if mailed, the return receipt, completed by the U.S. postal service; (b) if sent via hand delivery, a receipt executed by a duly authorized agent of the party to whom the notice was sent; or (c) if sent via facsimile, the date of telephonic confirmation of receipt by a duly authorized agent of the party to whom the notice was sent or, if such confirmation is not reasonably practicable, the date indicated in the facsimile machine transmission report of the party giving such notice.

Section 15.3 Change of Address. From time to time any party hereto may designate a new address for purposes of this Article by notice to the other party.

ARTICLE 16

COMPLIANCE

Section 16.1 Local Business Enterprise Utilization; Liquidated Damages. If Corporation enters into an agreement for construction or construction-related services with any person ("Contractor") that would be subject to the Local Business Enterprise and Non-Discrimination in Contracting Ordinance set forth in Chapter 14B of the San Francisco Administrative Code, Corporation shall include in its agreement with such Contractor provisions requiring Contractor to comply with such ordinance, substantially as follows:

(a) **The LBE Ordinance.** Contractor shall comply with all the requirements of the Local Business Enterprise Ordinance set forth in Chapter 14B of the San Francisco Administrative Code as it now exists or as it may be amended in the future (collectively the "LBE Ordinance"), provided such amendments do not materially increase Contractor's obligations or liabilities, or materially diminish Contractor's rights, under the agreement. Such provisions of the LBE Ordinance are incorporated by reference and made a part of the agreement as though fully set forth in this section. Contractor's willful failure to comply with any applicable provision of the LBE Ordinance is a material breach of Contractor's obligations under this Agreement and shall entitle City, subject to any applicable notice and cure provisions set forth in this Agreement, to exercise any of the remedies provided for under the agreement, under the LBE Ordinance or otherwise available at law or in equity, which remedies shall be cumulative unless the agreement expressly provides that any remedy is exclusive. In addition, Contractor shall comply fully with all other applicable local, state and federal laws prohibiting discrimination and requiring equal opportunity in contracting, including subcontracting.

(b) **Compliance and Enforcement.**

(1) **Enforcement.** If Contractor willfully fails to comply with any of the provisions of the LBE Ordinance, the rules and regulations implementing the LBE Ordinance, or the provisions of the agreement pertaining to LBE participation, Contractor shall be liable for liquidated damages in an amount equal to Contractor's net profit on the agreement, or 10% of the total amount of the agreement, or \$1,000, whichever is greatest. The Director of the City's Human Rights Commission or any other public official authorized to enforce the LBE Ordinance (separately and collectively, the "Director of HRC") may also impose other sanctions against Contractor authorized in the LBE Ordinance, including declaring the Contractor to be irresponsible and ineligible to contract with the City for a period of up to five years or revocation of the Contractor's LBE certification. The Director of HRC will determine the sanctions to be imposed, including the amount of liquidated damages, after investigation pursuant to Administrative Code §14B.17.

By entering into the agreement, Contractor acknowledges and agrees that any liquidated damages assessed by the Director of the HRC shall be payable to City upon demand. Contractor further acknowledges and agrees that any liquidated damages assessed may be withheld from any monies due to Contractor on any contract with City.

Contractor agrees to maintain records necessary for monitoring its compliance with the LBE Ordinance for a period of three years following termination or expiration of the agreement, and shall make such records available for audit and inspection by the Director of HRC or the Controller upon request.

(2) **Subcontracting Goals If Contractor Will Use Subcontractors.** The LBE subcontracting participation goal for this contract shall be established by HRC. Contractor shall fulfill the subcontracting commitment made in its bid or proposal. Each invoice submitted to City for payment shall include the information required in the HRC Progress Payment Form and the HRC Payment Affidavit. Failure to provide HRC Progress Payment Form and the HRC Payment Affidavit with each invoice submitted by Contractor shall entitle City to withhold 20% of the amount of that invoice until HRC Progress Payment Form and the HRC Payment Affidavit are provided by Contractor.

Contractor shall not participate in any back contracting to the Contractor or lower-tier subcontractors, as defined in the LBE Ordinance, for any purpose inconsistent with the provisions of the LBE Ordinance, its implementing rules and regulations, or this Section.

(3) **Subcontract Language Requirements.** Contractor shall incorporate the LBE Ordinance into each subcontract made in the fulfillment of Contractor's obligations under this Agreement and require each subcontractor to agree and comply with provisions of the ordinance applicable to subcontractors.

Contractor shall include in all subcontracts with LBEs made in fulfillment of Contractor's obligations under this Agreement, a provision requiring Contractor to compensate any LBE subcontractor for damages for breach of contract or liquidated damages equal to 5% of the subcontract amount, whichever is greater, if Contractor does not fulfill its commitment to use the LBE subcontractor as specified in the bid or proposal, unless Contractor received advance approval from the Director of HRC and the Office of Economic Development to substitute subcontractors or to otherwise modify the commitments in the bid or proposal. Such provisions shall also state that it is enforceable in a court of competent jurisdiction.

Subcontracts shall require the subcontractor to maintain records necessary for monitoring its compliance with the LBE Ordinance for a period of three years following termination of this contract and to make such records available for audit and inspection by the Director of HRC or the Controller upon request.

(4) **Payment of Subcontractors.** Contractor shall pay its subcontractors within three working days after receiving payment from the City unless Contractor notifies the Director of HRC in writing within ten working days prior to receiving payment from the City that there is a bona fide dispute between Contractor and its subcontractor and the Director waives the three-day payment requirement, in which case Contractor may withhold the disputed amount but shall pay the undisputed amount.

Contractor further agrees, within ten working days following receipt of payment from the City, to file the HRC Payment Affidavit with the Controller, under penalty of perjury, that the Contractor has paid all subcontractors. The affidavit shall provide the names and addresses of all subcontractors and the amount paid to each. Failure to provide such affidavit may subject Contractor to enforcement procedure under Administrative Code §14B.17.

Section 16.2 Nondiscrimination; Penalties.

(a) **Corporation Shall Not Discriminate.** In the performance of this Agreement, Corporation agrees not to discriminate against any employee, City and County employee working with such Corporation or subcontractor, applicant for employment with such Corporation or subcontractor, or against any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations, on the basis of the fact or perception of a person's race, color, creed, religion, national origin, ancestry, age, height, weight, sex, sexual orientation, gender identity, domestic partner status, marital status, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status), or association with members of such protected classes, or in retaliation for opposition to discrimination against such classes.

(b) **Subcontracts.** Corporation shall incorporate by reference in all subcontracts the provisions of Sections 12B.2(a), 12B.2(c)-(k), and 12C.3 of the San Francisco Administrative Code and shall require all subcontractors to comply with such provisions, if, depending on the subject matter and terms and conditions of such subcontract, such provisions would be apply to Corporation if the subcontract was a contract to which the City was a party. Corporation's failure to comply with the obligations in this subsection shall constitute a material breach of this Agreement.

(c) **Non-Discrimination in Benefits.** Corporation does not as of the date of this Agreement and will not during the term of this Agreement, in any of its operations in San Francisco or where the work is being performed for the City or elsewhere within the United States, discriminate in the provision of bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits, as well as any benefits other than the benefits specified above, between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of such employees, where the domestic partnership has been registered with a governmental entity pursuant to state or local law authorizing such registration, subject to the conditions set forth in Section 12B.2(b) of the San Francisco Administrative Code.

(d) **Condition to Contract.** As a condition to this Agreement, Corporation shall execute the "Chapter 12B Declaration: Nondiscrimination in Contracts and Benefits" form (Form HRC-12B-101) with supporting documentation and secure the approval of the form by the San Francisco Human Rights Commission.

(e) **Incorporation of Administrative Code Provisions by Reference.** The provisions of Chapters 12B and 12C of the San Francisco Administrative Code are incorporated in this Section by reference and made a part of this Agreement as though fully set forth herein. Corporation shall comply fully with and be bound by all of the provisions that apply to this Agreement under such Chapters of the Administrative Code, including the remedies provided in such Chapters. Without limiting the foregoing, Corporation understands that pursuant to Section 12B.2(h) of the San Francisco Administrative Code, a penalty of fifty dollars (\$50) for each person for each calendar day during which such person was discriminated against in violation of the provisions of this Agreement may be assessed against Corporation and/or deducted from any payments due Corporation.

Section 16.3 MacBride Principles--Northern Ireland. Pursuant to San Francisco Administrative Code Section 12F.5, City urges companies doing business in Northern Ireland to move towards resolving employment inequities, and encourages such companies to abide by the MacBride Principles. City urges San Francisco companies to do business with corporations that abide by the MacBride Principles. By signing below, the person executing this agreement on behalf of Corporation acknowledges and agrees that he or she has read and understood this section

Section 16.4 Tropical Hardwood and Virgin Redwood Ban. Pursuant to Section 804(b) of the San Francisco Environment Code, City urges all Corporations not to import, purchase, obtain, or use for any purpose, any tropical hardwood, tropical hardwood wood product, virgin redwood or virgin redwood wood product.

Section 16.5 Drug-Free Workplace Policy. Corporation acknowledges that pursuant to the Federal Drug-Free Workplace Act of 1989, the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited on City premises. Corporation and its employees, agents or assigns shall comply with all terms and provisions of such Act and the rules and regulations promulgated thereunder.

Section 16.6 Resource Conservation; Liquidated Damages. Chapter 5 of the San Francisco Environment Code (Resource Conservation) is incorporated herein by reference. Failure by Corporation to comply with any of the applicable requirements of Chapter 5 will be deemed a material breach of contract. If Corporation fails to comply in good faith with any of the provisions of Chapter 5, Corporation shall be liable for liquidated damages in an amount equal to Corporation's net profit under this Agreement, or five percent (5%) of the total contract amount, whichever is greater. Corporation acknowledges and agrees that the liquidated damages assessed shall be payable to City upon demand and may be offset against any monies due to Corporation from any contract with City.

Section 16.7 Compliance with ADA. Corporation acknowledges that, pursuant to the Americans with Disabilities Act (ADA), programs, services and other activities provided by a public entity to the public, whether directly or through a contractor, must be accessible to the disabled public. Corporation shall not discriminate against any person protected under the ADA in connection with all or any portion of the Management District Plan and shall comply at all times with the provisions of the ADA.

Section 16.8 Requiring Minimum Compensation for Employees.

a. Corporation agrees to comply fully with and be bound by all of the provisions of the Minimum Compensation Ordinance (MCO), as set forth in San Francisco Administrative Code Chapter 12P (Chapter 12P), including the remedies provided, and implementing guidelines and rules. The provisions of Chapter 12P are incorporated herein by reference and made a part of this Agreement as though fully set forth. The text of the MCO is available on the web at www.sfgov.org/olse/mco. A partial listing of some of Corporation's obligations under the MCO is set forth in this Section. Corporation is required to comply with all the provisions of the MCO, irrespective of the listing of obligations in this Section.

b. The MCO requires Corporation to pay Corporation's employees a minimum hourly gross compensation wage rate and to provide minimum compensated and uncompensated time off. The minimum wage rate may change from year to year and Corporation is obligated to keep informed of the then-current requirements. Any subcontract entered into by Corporation shall require the subcontractor to comply with the requirements of the MCO and shall contain contractual obligations substantially the same as those set forth in this Section. It is Corporation's obligation to ensure that any subcontractors of any tier under this Agreement comply with the requirements of the MCO. If any subcontractor under this Agreement fails to comply, City may pursue any of the remedies set forth in this Section against Corporation.

c. Corporation shall not take adverse action or otherwise discriminate against an employee or other person for the exercise or attempted exercise of rights under the MCO. Such actions, if taken within 90 days of the exercise or attempted exercise of such rights, will be rebuttably presumed to be retaliation prohibited by the MCO.

d. Corporation shall maintain employee and payroll records as required by the MCO. If Corporation fails to do so, it shall be presumed that the Corporation paid no more than the minimum wage required under State law.

e. The City is authorized to inspect Corporation's job sites and conduct interviews with employees and conduct audits of Corporation.

f. Corporation's commitment to provide the Minimum Compensation is a material element of the City's consideration for this Agreement. The City in its sole discretion shall determine whether such a breach has occurred. The City and the public will suffer actual damage that will be impractical or extremely difficult to determine if the Corporation fails to comply with these requirements. Corporation agrees that the sums set forth in Section 12P.6.1 of the MCO as liquidated damages are not a penalty, but are reasonable estimates of the loss that the City and the public will incur for Corporation's noncompliance. The procedures governing the assessment of liquidated damages shall be those set forth in Section 12P.6.2 of Chapter 12P.

g. Corporation understands and agrees that if it fails to comply with the requirements of the MCO, the City shall have the right to pursue any rights or remedies available under Chapter 12P (including liquidated damages), under the terms of the contract, and under applicable law. If, within 30 days after receiving written notice of a breach of this Agreement for violating the MCO, Corporation fails to cure such breach or, if such breach cannot reasonably be cured within such period of 30 days, Corporation fails to commence efforts to cure within such period, or thereafter fails diligently to pursue such cure to completion, the City shall have the right to pursue any rights or remedies available under applicable law, including those set forth in Section 12P.6(c) of Chapter 12P. Each of these remedies shall be exercisable individually or in combination with any other rights or remedies available to the City.

h. Corporation represents and warrants that it is not an entity that was set up, or is being used, for the purpose of evading the intent of the MCO.

i. If Corporation is exempt from the MCO when this Agreement is executed because the cumulative amount of agreements with this department for the fiscal year is less than \$25,000, but Corporation later enters into an agreement or agreements that cause Corporation to exceed that amount in a fiscal year, Corporation shall thereafter be required to comply with the MCO under this Agreement. This obligation arises on the effective date of the agreement that causes the cumulative amount of agreements between the Corporation and this department to exceed \$25,000 in the fiscal year.

Section 16.9 Limitations on Contributions.

Through execution of this Agreement, Corporation acknowledges that it is familiar with section 1.126 of the City's Campaign and Governmental Conduct Code, which prohibits any person who contracts with the City for the rendition of personal services, for the furnishing of any material, supplies or equipment, for the sale or lease of any land or building, or for a grant, loan or loan guarantee, from making any campaign contribution to (1) an individual holding a City elective office if the contract must be approved by the individual, a board on which that individual serves, or a board on which an appointee of that individual serves, (2) a candidate for the office held by such individual, or (3) a committee controlled by such individual, at any time from the commencement of negotiations for the contract until the later of either the termination of negotiations for such contract or six months after the date the contract is approved. Corporation acknowledges that the foregoing restriction applies only if the contract or a combination or series of contracts approved by the same individual or board in a fiscal year have a total anticipated or actual value of \$50,000 or more. Corporation further acknowledges that the prohibition on contributions applies to each prospective party to the contract; each member of Corporation's board of directors; Corporation's chairperson, chief executive officer, chief financial officer and chief operating officer; any person with an ownership interest of more than 20 percent in Corporation; any subcontractor listed in the bid or contract; and any committee that is sponsored or controlled by Corporation. Additionally, Corporation acknowledges that Corporation must inform each of the persons described in the preceding sentence of the prohibitions contained in Section 1.126.

Section 16.10 First Source Hiring Program.

(a) **Incorporation of Administrative Code Provisions by Reference.** The provisions of Chapter 83 of the San Francisco Administrative Code are incorporated in this Section by reference and made a part of this Agreement as though fully set forth herein. Corporation shall comply fully with, and be bound by, all of the provisions that apply to this Agreement under such Chapter, including but not limited to the remedies provided therein. Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Chapter 83.

(b) **First Source Hiring Agreement.** As an essential term of, and consideration for, any contract or property contract with the City, not exempted by the FSHA, the Corporation shall enter into a first source hiring agreement ("agreement") with the City, on or before the effective date of the contract or property contract. Corporation shall also enter into an agreement with the City for any other work that it performs in the City. Such agreement shall:

(1) Set appropriate hiring and retention goals for entry level positions. The employer shall agree to achieve these hiring and retention goals, or, if unable to achieve these goals, to establish good faith efforts as to its attempts to do so, as set forth in the agreement. The agreement shall take into consideration the employer's participation in existing job training, referral and/or brokerage programs. Within the discretion of the FSHA, subject to appropriate modifications, participation in such programs maybe certified as meeting the requirements of this Chapter. Failure either to achieve the specified goal, or to establish good faith efforts will constitute noncompliance and will subject the employer to the provisions of Section 83.10 of this Chapter.

(2) Set first source interviewing, recruitment and hiring requirements, which will provide the San Francisco Workforce Development System with the first opportunity to provide qualified economically disadvantaged individuals for consideration for employment for entry level positions. Employers shall consider all applications of qualified economically disadvantaged individuals referred by the System for employment; provided however, if the employer utilizes nondiscriminatory screening criteria, the employer shall have the sole discretion to interview and/or hire individuals referred or certified by the San Francisco Workforce Development System as being qualified economically disadvantaged individuals. The duration of the first source interviewing requirement shall be determined by the FSHA and shall be set forth in each agreement, but shall not exceed 10 days. During that period, the employer may publicize the entry level positions in accordance with the agreement. A need for urgent or temporary hires must be evaluated, and appropriate provisions for such a situation must be made in the agreement.

(3) Set appropriate requirements for providing notification of available entry level positions to the San Francisco Workforce Development System so that the System may train and refer an adequate pool of qualified economically disadvantaged individuals to participating employers. Notification should include such information as employment needs by occupational title, skills, and/or experience required, the hours required, wage scale and duration of employment, identification of entry level and training positions, identification of English language proficiency requirements, or absence thereof, and the projected schedule and procedures for hiring for each occupation. Employers should provide both long-term job need projections and notice before initiating the interviewing and hiring process. These notification requirements will take into consideration any need to protect the employer's proprietary information.

(4) Set appropriate record keeping and monitoring requirements. The First Source Hiring Administration shall develop easy-to-use forms and record keeping requirements for documenting compliance with the agreement. To the greatest extent possible, these requirements shall utilize the employer's existing record keeping systems, be nonduplicative, and facilitate a coordinated flow of information and referrals.

(5) Establish guidelines for employer good faith efforts to comply with the first source hiring requirements of this Chapter. The FSHA will work with City departments to develop employer good faith effort requirements appropriate to the types of contracts and property contracts handled by each

department. Employers shall appoint a liaison for dealing with the development and implementation of the employer's agreement. In the event that the FSHA finds that the employer under a City contract or property contract has taken actions primarily for the purpose of circumventing the requirements of this Chapter, that employer shall be subject to the sanctions set forth in Section 83.10 of this Chapter.

(6) Set the term of the requirements.

(7) Set appropriate enforcement and sanctioning standards consistent with this Chapter.

(8) Set forth the City's obligations to develop training programs, job applicant referrals, technical assistance, and information systems that assist the employer in complying with this Chapter.

(9) Require the developer to include notice of the requirements of this Chapter in leases, subleases, and other occupancy contracts.

(c) **Hiring Decisions.** Corporation shall make the final determination of whether an Economically Disadvantaged Individual referred by the System is "qualified" for the position.

(d) **Exceptions.** Upon application by Employer, the First Source Hiring Administration may grant an exception to any or all of the requirements of Chapter 83 in any situation where it concludes that compliance with this Chapter would cause economic hardship.

(e) **Liquidated Damages.** Corporation agrees:

(1) To be liable to the City for liquidated damages as provided in this section;

(2) To be subject to the procedures governing enforcement of breaches of contracts based on violations of contract provisions required by this Chapter as set forth in this section;

(3) That the Corporation's commitment to comply with this Chapter is a material element of the City's consideration for this contract; that the failure of the Corporation to comply with the contract provisions required by this Chapter will cause harm to the City and the public which is significant and substantial but extremely difficult to quantify; that the harm to the City includes not only the financial cost of funding public assistance programs but also the insidious but impossible to quantify harm that this community and its families suffer as a result of unemployment; and that the assessment of liquidated damages of up to \$5,000 for every notice of a new hire for an entry level position improperly withheld by Corporation from the first source hiring process, as determined by the FSHA during its first investigation of Corporation, does not exceed a fair estimate of the financial and other damages that the City suffers as a result of the Corporation's failure to comply with its first source referral contractual obligations.

(4) That the continued failure by Corporation to comply with its first source referral contractual obligations will cause further significant and substantial harm to the City and the public, and that a second assessment of liquidated damages of up to \$10,000 for each entry level position improperly withheld from the FSHA, from the time of the conclusion of the first investigation forward, does not exceed the financial and other damages that the City suffers as a result of Corporation's continued failure to comply with its first source referral contractual obligations;

(5) That in addition to the cost of investigating alleged violations under this Section, the computation of liquidated damages for purposes of this section is based on the following data:

A. The average length of stay on public assistance in San Francisco's County Adult Assistance Program is approximately 41 months at an average monthly grant of \$348 per month, totaling approximately \$14,379; and

B. In 2004, the retention rate of adults placed in employment programs funded under the Workforce Investment Act for at least the first six months of employment was 84.4%. Since qualified individuals under the First Source program face far fewer barriers to employment than their counterparts in programs funded by the Workforce Investment Act, it is reasonable to conclude that the average length of employment for an individual whom the First Source Program refers to an employer and who is hired in an entry level position is at least one year;

Therefore, liquidated damages that total \$5,000 for first violations and \$10,000 for subsequent violations as determined by FSHA constitute a fair, reasonable, and conservative attempt to quantify the harm caused to the City by the failure of Corporation to comply with its first source referral contractual obligations.

(6) That the failure of Corporation to comply with this Chapter, except property contractors, may be subject to the debarment and monetary penalties set forth in Sections 6.80 et seq. of the San Francisco Administrative Code, as well as any other remedies available under the contract or at law; and

(7) That in the event the City is the prevailing party in a civil action to recover liquidated damages for breach of a contract provision required by this Chapter, Corporation will be liable for the City's costs and reasonable attorneys fees.

Violation of the requirements of Chapter 83 is subject to an assessment of liquidated damages in the amount of \$5,000 for every new hire for an Entry Level Position improperly withheld from the first source hiring process. The assessment of liquidated damages and the evaluation of any defenses or mitigating factors shall be made by the FSHA.

(f) **Subcontracts.** Any subcontract entered into by Corporation shall require the subcontractor to comply with the requirements of Chapter 83 and shall contain contractual obligations substantially the same as those set forth in this Section.

Section 16.11 Administrative Code Chapter 12.G. In the event Corporation is appropriated any City funds during the term of this Agreement that are subject to San Francisco Administrative Code Chapter 12.G, Corporation will acknowledge and observe the requirements of Chapter 12.G., to the extent legally applicable.

Section 16.12 Preservative-Treated Wood Containing Arsenic. Corporation may not purchase preservative-treated wood products containing arsenic in the performance of this Agreement unless an exemption from the requirements of Chapter 13 of the San Francisco Environment Code is obtained from the Department of the Environment under Section 1304 of the Code. The term "preservative-treated wood containing arsenic" shall mean wood treated with a preservative that contains arsenic, elemental arsenic, or an arsenic copper combination, including, but not limited to, chromated copper arsenate preservative, ammoniacal copper zinc arsenate preservative, or ammoniacal copper arsenate preservative. Corporation may purchase preservative-treated wood products on the list of environmentally preferable alternatives prepared and adopted by the Department of the Environment. This provision does not preclude Corporation from purchasing preservative-treated wood containing arsenic for saltwater immersion. The term "saltwater immersion" shall mean a pressure-treated wood that is used for construction purposes or facilities that are partially or totally immersed in saltwater.

Section 16.13. Left Blank.

Section 16.14 Protection of Private Information. Corporation has read and agrees to the terms set forth in San Francisco Administrative Code Sections 12M.2, "Nondisclosure of Private Information," and 12M.3, "Enforcement" of Administrative Code Chapter 12M, "Protection of Private Information," which are incorporated herein as if fully set forth. Corporation agrees that any failure of Corporation to comply with the requirements of Section 12M.2 of this Chapter shall be a material breach of the Agreement. In such an event, in addition to any other remedies available to it under equity or law,

the City may terminate the Agreement, bring a false claim action against Corporation pursuant to Chapter 6 or Chapter 21 of the Administrative Code, or debar Corporation.

Section 16.15 Requiring Health Benefits for Covered Employees.

Unless exempt, Corporation agrees to comply fully with and be bound by all of the provisions of the Health Care Accountability Ordinance (HCAO), as set forth in San Francisco Administrative Code Chapter 12Q, including the remedies provided, and implementing regulations, as the same may be amended from time to time. The provisions of Chapter 12Q are incorporated by reference and made a part of this Agreement as though fully set forth herein.. The text of the HCAO is available on the web at <http://www.sfgov.org/olse>. Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Chapter 12Q.

(a) For each Covered Employee, Corporation shall provide the appropriate health benefit set forth in Section 12Q.3 of the HCAO. If Corporation chooses to offer the health plan option, such health plan shall meet the minimum standards set forth by the San Francisco Health Commission.

(b) Notwithstanding the above, if the Corporation is a small business as defined in Section 12Q.3(d) of the HCAO, it shall have no obligation to comply with part (a) above.

(c) Corporation's failure to comply with the HCAO shall constitute a material breach of this agreement. City shall notify Corporation if such a breach has occurred. If, within 30 days after receiving City's written notice of a breach of this Agreement for violating the HCAO, Corporation fails to cure such breach or, if such breach cannot reasonably be cured within such period of 30 days, Corporation fails to commence efforts to cure within such period, or thereafter fails diligently to pursue such cure to completion, City shall have the right to pursue the remedies set forth in 12Q.5(f)(1-5). Each of these remedies shall be exercisable individually or in combination with any other rights or remedies available to City.

(d) Any Subcontract entered into by Corporation shall require the Subcontractor to comply with the requirements of the HCAO and shall contain contractual obligations substantially the same as those set forth in this Section. Corporation shall notify City's Office of Contract Administration when it enters into such a Subcontract and shall certify to the Office of Contract Administration that it has notified the Subcontractor of the obligations under the HCAO and has imposed the requirements of the HCAO on Subcontractor through the Subcontract. Each Corporation shall be responsible for its Subcontractors' compliance with this Chapter. If a Subcontractor fails to comply, the City may pursue the remedies set forth in this Section against Corporation based on the Subcontractor's failure to comply, provided that City has first provided Corporation with notice and an opportunity to obtain a cure of the violation.

(e) Corporation shall not discharge, reduce in compensation, or otherwise discriminate against any employee for notifying City with regard to Corporation's noncompliance or anticipated noncompliance with the requirements of the HCAO, for opposing any practice proscribed by the HCAO, for participating in proceedings related to the HCAO, or for seeking to assert or enforce any rights under the HCAO by any lawful means.

(f) Corporation represents and warrants that it is not an entity that was set up, or is being used, for the purpose of evading the intent of the HCAO.

(g) Corporation shall maintain employee and payroll records in compliance with the California Labor Code and Industrial Welfare Commission orders.

(h) Corporation shall keep itself informed of the current requirements of the HCAO.

(i) Corporation shall provide reports to the City in accordance with any reporting standards

promulgated by the City under the HCAO, including reports on Subcontractors and Subtenants, as applicable.

(j) Corporation shall provide City with access to records pertaining to compliance with HCAO after receiving a written request from City to do so and being provided at least five business days to respond.

(k) Corporation shall allow City to inspect Corporation's job sites and have access to Corporation's employees in order to monitor and determine compliance with HCAO.

(l) City may conduct random audits of Corporation to ascertain its compliance with HCAO. Corporation agrees to cooperate with City when it conducts such audits.

(m) If Corporation is exempt from the HCAO when this Agreement is executed because its amount is less than \$25,000 (\$50,000 for nonprofits), but Corporation later enters into an agreement or agreements that cause Corporation's aggregate amount of all agreements with City to reach \$75,000, all the agreements shall be thereafter subject to the HCAO. This obligation arises on the effective date of the agreement that causes the cumulative amount of agreements between Corporation and the City to be equal to or greater than \$75,000 in the fiscal year.

Section 16.16 Graffiti Removal. Graffiti is detrimental to the health, safety and welfare of the community in that it promotes a perception in the community that the laws protecting public and private property can be disregarded with impunity. This perception fosters a sense of disrespect of the law that results in an increase in crime; degrades the community and leads to urban blight; is detrimental to property values, business opportunities and the enjoyment of life; is inconsistent with the City's property maintenance goals and aesthetic standards; and results in additional graffiti and in other properties becoming the target of graffiti unless it is quickly removed from public and private property. Graffiti results in visual pollution and is a public nuisance. Graffiti must be abated as quickly as possible to avoid detrimental impacts on the City and County and its residents, and to prevent the further spread of graffiti.

Corporation shall remove all graffiti from any real property owned or leased by Corporation in the City and County of San Francisco within forty eight (48) hours of the earlier of Corporation's (a) discovery or notification of the graffiti or (b) receipt of notification of the graffiti from the Department of Public Works. This section is not intended to require a Corporation to breach any lease or other agreement that it may have concerning its use of the real property. The term "graffiti" means any inscription, word, figure, marking or design that is affixed, marked, etched, scratched, drawn or painted on any building, structure, fixture or other improvement, whether permanent or temporary, including by way of example only and without limitation, signs, banners, billboards and fencing surrounding construction sites, whether public or private, without the consent of the owner of the property or the owner's authorized agent, and which is visible from the public right-of-way. "Graffiti" shall not include: (1) any sign or banner that is authorized by, and in compliance with, the applicable requirements of the San Francisco Public Works Code, the San Francisco Planning Code or the San Francisco Building Code; or (2) any mural or other painting or marking on the property that is protected as a work of fine art under the California Art Preservation Act (California Civil Code Sections 987 et seq.) or as a work of visual art under the Federal Visual Artists Rights Act of 1990 (17 U.S.C. §§ 101 et seq.).

Any failure of Corporation to comply with this section of this Agreement shall constitute an Event of Default of this Agreement.

16.17. Food Service Waste Reduction Requirements

Corporation agrees to comply fully with and be bound by all of the provisions of the Food Service Waste Reduction Ordinance, as set forth in San Francisco Environment Code Chapter 16, including the remedies provided, and implementing guidelines and rules. The provisions of Chapter 16 are incorporated herein by reference and made a part of this Agreement as though fully set forth. This

provision is a material term of this Agreement. By entering into this Agreement, Corporation agrees that if it breaches this provision, City will suffer actual damages that will be impractical or extremely difficult to determine; further, Corporation agrees that the sum of one hundred dollars (\$100) liquidated damages for the first breach, two hundred dollars (\$200) liquidated damages for the second breach in the same year, and five hundred dollars (\$500) liquidated damages for subsequent breaches in the same year is reasonable estimate of the damage that City will incur based on the violation, established in light of the circumstances existing at the time this Agreement was made. Such amount shall not be considered a penalty, but rather agreed monetary damages sustained by City because of Corporation's failure to comply with this provision.

16.18 [Left blank by agreement of the parties.]

Section 16.19 Compliance with Other Laws. Without limiting the scope of any of the preceding sections of this Article 16, Corporation shall keep itself fully informed of City's Charter, codes, ordinances and regulations and all state, and federal laws, rules and regulations affecting the performance of this Agreement and shall at all times comply with such Charter codes, ordinances, and regulations rules and laws.

ARTICLE 17

MISCELLANEOUS

Section 17.1 No Waiver. No waiver by the City of any default or breach of this Agreement shall be implied from any failure by the City to take action on account of such default if such default persists or is repeated. No express waiver by the City shall affect any default other than the default specified in the waiver and shall be operative only for the time and to the extent therein stated. Waivers by City of any covenant, term or condition contained herein shall not be construed as a waiver of any subsequent breach of the same covenant, term or condition. The consent or approval by the City of any action requiring further consent or approval shall not be deemed to waive or render unnecessary the consent or approval to or of any subsequent similar act.

Section 17.2 Modification. This Agreement may not be modified, nor may compliance with any of its terms be waived, except by written instrument executed and approved in the same manner as this Agreement.

Section 17.3 Administrative Remedy for Agreement Interpretation. Should any question arise as to the meaning or intent of this Agreement, the question shall, prior to any other action or resort to any other legal remedy, be referred to the Director of the Office of Economic Development who shall decide the true meaning and intent of the Agreement. Such decision shall be final and conclusive.

Section 17.4 Governing Law; Venue. The formation, interpretation and performance of this Agreement shall be governed by the laws of the State of California, without regard to its conflict of laws principles. Venue for all litigation relative to the formation, interpretation and performance of this Agreement shall be in San Francisco.

Section 17.5 Headings. All article and section headings and captions contained in this Agreement are for reference only and shall not be considered in construing this Agreement.

Section 17.6 Entire Agreement. This Agreement and the documents set forth as appendices hereto constitute the entire Agreement between the parties, and supersede all other oral or written provisions. If there is any conflict between the terms of this Agreement and other documents, the terms of this Agreement shall govern. The following appendices are attached to and a part of this Agreement:

Appendix A, Management District Plan; and,

Appendix B, Resolution of Formation.

Section 17.7 Certified Resolution of Signatory Authority. Upon request of City, Corporation shall deliver to City a copy of the corporate resolution(s) authorizing the execution, delivery and performance of this Agreement, certified as true, accurate and complete by the secretary or assistant secretary of Corporation.

Section 17.8 Severability. Should the application of any provision of this Agreement to any particular facts or circumstances be found by a court of competent jurisdiction to be invalid or unenforceable, then (a) the validity of other provisions of this Agreement shall not be affected or impaired thereby, and (b) such provision shall be enforced to the maximum extent possible so as to effect the intent of the parties and shall be reformed without further action by the parties to the extent necessary to make such provision valid and enforceable.

Section 17.9 Successors; No Third-Party Beneficiaries. Subject to the terms of Article 13, the terms of this Agreement shall be binding upon, and inure to the benefit of, the parties hereto and their successors and assigns. Nothing in this Agreement, whether express or implied, shall be construed to give any person or entity (other than the parties hereto and their respective successors and assigns and, in the case of Article 9, the Indemnified Parties) any legal or equitable right, remedy or claim under or in respect of this Agreement or any covenants, conditions or provisions contained herein.

Section 17.10 Survival of Terms. The obligations of Corporation and the terms of the following provisions of this Agreement shall survive and continue following expiration or termination of this Agreement: Sections 6.4 through 6.8, Articles 7 and 9, Section 10.4, Article 12, Section 13.4, Section 14.3 and this Article 17.

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Section 17.11 Further Assurances. From and after the date of this Agreement, Corporation agrees to do such things, perform such acts, and make, execute, acknowledge and deliver such documents as may be reasonably necessary or proper and usual to complete the transactions contemplated by this Agreement and to carry out the purpose of this Agreement in accordance with this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first specified herein.

CITY

**OFFICE OF ECONOMIC AND
WORKFORCE DEVELOPMENT**

By: _____
MICHAEL COHEN
Director

CORPORATION:

By signing this Agreement, I certify that I comply with the requirements of the Minimum Compensation Ordinance, which entitle Covered Employees to certain minimum hourly wages and compensated and uncompensated time off.

I have read and understood paragraph 16.3, the City's statement urging companies doing business in Northern Ireland to move towards resolving employment inequities, encouraging compliance with the MacBride Principles, and urging San Francisco companies to do business with corporations that abide by the MacBride Principles.

**UNION SQUARE BUSINESS
IMPROVEMENT DISTRICT, INC.**

Approved as to Form:

Dennis J. Herrera
City Attorney

By: _____

Board of Directors

By: _____
MARIE CORLETT BLITS
Deputy City Attorney

Federal Tax ID No. 943159152

City Vendor No. _____