

PREDEVELOPMENT AGREEMENT

by and between

THE CITY AND COUNTY OF SAN FRANCISCO

acting by and through the

SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY

and

POTRERO NEIGHBORHOOD COLLECTIVE LLC

Potrero Yard Modernization Project

November 2, 2022

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## PREDEVELOPMENT AGREEMENT

This Predevelopment Agreement (this “**Agreement**”) dated for reference purposes only as of November 2, 2022, is by and between the **CITY AND COUNTY OF SAN FRANCISCO** (“**City**”), a municipal corporation acting by and through the **SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY** (“**SFMTA**”), and **POTRERO NEIGHBORHOOD COLLECTIVE LLC**, a limited liability company organized under the laws of the State of Delaware (“**Lead Developer**” or “**LD**”). City and Lead Developer are also each referred to as a “**Party**” and together referred to as the “**Parties**” below.

### RECITALS

**A.** City, under the jurisdiction of the SFMTA, owns the real property commonly known as 2500 Mariposa Street in San Francisco, California, which is a 4.4-acre site comprised of Assessor’s Block No. 3971-001, bounded by Bryant Streets, 17<sup>th</sup> Street, Hampshire Street, and Mariposa Street, and fully described on the attached Appendix A (the “**Project Site**”).

**B.** The Project Site is currently improved with a two-story structure used for electric trolley bus parking, operations, and maintenance services and an open trolley bus storage yard, which do not have the capacity to meet current needs, expected future needs, or modern safety and maintenance standards. City policy also promotes using public lands to build affordable housing to the greatest extent possible.

**C.** On August 21, 2020, San Francisco Public Works issued a Request for Qualifications on behalf of the SFMTA (together with all its addenda, the “**RFQ**”) to invite interested parties to submit a statement of qualifications to design, build, finance and maintain the Infrastructure Facility (as defined in Article 1 (Definitions)) at the Project Site and design, build, finance, operate and maintain the Housing and Commercial Component (as defined in Article 1 (Definitions)) at the Project Site.

**D.** City determined Lead Developer and two other respondents to the RFQ were the three most qualified respondents to the RFQ and invited those three respondents to respond to a Request for Proposals for the development of the Project, which was issued by City on April 9, 2021 (the “**Initial RFP**”). The Initial RFP and all addenda to the Initial RFP shall be collectively referred to in this Agreement as the “**RFP**”.

**E.** On December 30, 2021, Lead Developer submitted a proposal to City in response to the RFP (the “**Original Proposal**”) offering to perform predevelopment services and negotiate the form of the Project Agreement, the Housing and Commercial Component Agreement with respect to the Housing and Commercial Component (as defined in Article 1 (Definitions)) to develop and deliver the Project.

**F.** On May 26, 2022, City issued Addendum #30 to the RFP requesting proposal revisions from eligible proposers.

**G.** On July 20, 2022, Lead Developer submitted its revised response to the RFP, which was clarified through the request for clarifications process set forth in the RFP. The Original Proposal and the revised response to the RFP, as clarified, are collectively referred to as (the “**Proposal**”).



**H.** On September 12, 2022, Lead Developer was selected by City as the preferred respondent with the best-value proposal to the RFP.

**I.** Lead Developer and City wish to enter into this Agreement to provide for terms and conditions of the following predevelopment activities needed for timely delivery of the Project (as defined in Article 1 (Definitions)): (i) negotiating and finalizing agreements that are necessary for the Project, (ii) preparing and obtaining design documents, due diligence materials, and other development materials and analyses, (iii) preparing the analysis for any early works to prepare the Project Site for the Project during the PDA Term and if approved by City, performing that early work, (iv) negotiating and finalizing the MME Construction Agreement (as defined in Article 1 (Definitions)), (v) developing the commercial and financing structure for the Project and negotiating and finalizing the related financing documents, (v) procuring a design-build contract for the construction of the Infrastructure Facility, (vi) procuring a facility maintenance contract for certain elements of the Infrastructure Facility, and (vii) any other predevelopment activities necessary to develop the Project and Project Documents to timely reach Commercial Close (as defined in Article 1 (Definitions)) and IF Financial Close and HCC Financial Close (each as defined in Article 1 (Definitions) below).

**J.** This Agreement addresses predevelopment activities only and does not commit City to any definite course of action with respect to approval of the Project or any portion of the Project. City will not consider approval of the Project until the City has completed environmental review with respect to the Project in compliance with the CEQA (as defined in Article 1 (Definitions) below) and City's CEQA procedures, as set forth in San Francisco Administrative Code Chapter 31. Accordingly, notwithstanding this Agreement, City and any other public agencies with jurisdiction over any part of the Project each shall have the absolute discretion to (a) require modifications to the Project and/or implementation of specific measures to mitigate significant adverse environmental impacts; (b) select feasible alternatives that avoid significant adverse impacts of the Project, including the "no project" alternative; (c) reject all or part of the Project if the economic and social benefits of the Project do not outweigh otherwise unavoidable significant adverse impacts of the Project; (d) approve the Project upon a finding that the economic and social benefits of the Project outweigh otherwise unavoidable significant adverse environmental impact of the Project; and (e) deny the Project.

## **AGREEMENT**

### **1. DEFINITIONS**

**1.1.** "100% SD Package" is described in Section 3.2 (100% SD Package) of Appendix B-2.

**1.2.** "50% SD Package" is described in Section 3.1 (50% SD Package) of Appendix B-2.

**1.3.** "Access Agreement" is defined in Section 6.3 (Due Diligence Investigation).

**1.4.** "Additional HCC Materials" is defined in Section 6.9(h) (Additional HCC Materials).

**1.5.** "Affiliate" means any of the following: (a) any Equity Member; (b) any Person that directly or indirectly through one or more intermediaries controls, or is controlled by, or is under common control with Lead Developer or any Equity Member; and (c) any Person owned in whole or in part by (i) Lead Developer, (ii) any Equity Member, or (iii) any Affiliate of Lead Developer under clause (b) of this definition, whether the ownership interest is direct or indirect,

beneficial or of record, provided that ownership of less than 10% of the equity interest in a Person shall not give rise to Affiliate status. For the purpose of this definition, “control” means the power to direct the management of a Person, whether through voting, nomination, or other selection rights, by contract, through family relationship, or by other means.

**1.6. “Affordable Housing Developer”** means each of Mission Economic Development Agency, Young Community Developers, Inc., and Tabernacle Community Development Corp.

**1.7. “Affordable Units”** means the affordable units in the Proposed HCC, which are comprised of three low income projects (senior housing facing Bryant Street and two family housing projects along the southwestern corner of the Facility, with each containing between 80-110 units), and one moderate income project (containing approximately 284 units), subject to any modification pursuant to Section 9.2 (HCC Change) or Section 9.3 (Changes Proposed by City).

**1.8. “Agreement”** means this Predevelopment Agreement, including all appendices and attachments, as such agreement may be modified from time to time.

**1.9. “Allowance”** means any of the items identified in FS Form D of the Financial Proposal.

**1.10. “Applicable Law”** means all federal, state, local, and administrative laws, ordinances, resolutions, regulations, requirements, proclamations, orders, or decrees of any municipal, county, state, or federal government or other governmental or regulatory authority, board of fire underwriters, or any directive or occupancy certificate issued under any law by any public officer or officers acting in their regulatory capacity, in each case having the force of law and applicable to either of the Parties, the Project or any element of the Project, or the Project Site or any portion of the Project Site.

**1.11. “Area Median Income” or “AMI”** means median income as published annually by the San Francisco Mayor’s Office of Housing and Community Development for the City and County of San Francisco, derived in part from the income limits and area median income determined by United States Department of Housing and Urban Development for the San Francisco area, adjusted solely for household size, but not high housing cost area.

**1.12. “Asset Management Program”** means a plan that describes all the management, engineering, repairs and maintenance, and other activities needed to provide a best-value level of service for the Facility as a whole during its operational life-cycle, and allocates responsibility for those activities between the Principal Project Company, the Housing Project Company, and City during the Infrastructure Facility Term and the Housing Term.

**1.13. “Asset Management Program Development Plan”** is described in Section 2.2.2.4 (Asset Management Program Development Plan) of Appendix B-2.

**1.14. “Availability Payment”** means the payments to be made by City to the Principal Project Company during the Infrastructure Facility Term in consideration for the Principal Project Company’s services under the Project Agreement. The amount and timing of each Availability Payment will be established in the Project Agreement.

**1.15. “Base Date”** means July 20, 2022.

**1.16. “Base License Rights”** is defined in Section 11.2 (Lead Developer IP).

**1.17. “BEB Charging Equipment”** is described in Article 1 (Introduction) of Division 5 (Battery-Electric Bus Supplemental Criteria) of the Technical Requirements.

**1.18. “BEB Charging Infrastructure”** is described in Article 1 (Introduction) of Division 5 (Battery-Electric Bus Supplemental Criteria) of the Technical Requirements.

**1.19. “BIM Execution Plan” or “BEP”** is described in Section 2.2.2.2 (BIM Execution Plan) of Appendix B-2.

**1.20. “Board of Supervisors”** means the Board of Supervisors of the City and County of San Francisco.

**1.21. “Building Automation System” or “BAS”** means a computer-based system installed in buildings to control and monitor mechanical and electrical plants, including HVAC (heating, ventilation, air conditioning), lighting, power systems, fire systems, and security systems.

**1.22. “Building Information Modeling” or “BIM”** means a three-dimensional, digital, model-based process that gives owners, architects, engineers, contractors, and facility maintenance managers the insight and tools to more efficiently plan, design, construct, operate, and maintain buildings and infrastructure.

**1.23. “Business Day”** means any day that is not a Saturday or Sunday, a City public holiday, a State of California public holiday, or a federal public holiday.

**1.24. “Bus Yard Component” or “BYC”** means the Facility’s transit component, which (a) will include the spaces needed for City’s operation and maintenance activities at the Facility after Substantial Completion of the Infrastructure Facility, (b) must meet the Bus Yard Component criteria in the Technical Requirements except as otherwise approved by City in writing, which approval shall be at its sole discretion, and (c) will not be used for the Common Infrastructure.

**1.25. “CEQA”** is defined in Article 13 (Final Action Subject to Environmental Review).

**1.26. “CEQA and General Regulatory Approvals Plan”** is described in Section 2.2.3.2 (Entitlements and General Regulatory Approvals Plan) of Appendix B-2.

**1.27. “Change of Control”** means any Equity Transfer, transfer of an interest, direct or indirect, in an Equity Member, or other assignment, sale, financing, grant of security interest, hypothecation, conveyance, transfer of interest or transaction of any type or description, including by or through voting securities, asset transfer, contract, merger, acquisition, succession, dissolution, liquidation, bankruptcy or otherwise, that results, directly or indirectly, in a change in possession of the power to direct or control or cause the direction or control of the management of Lead Developer or a material aspect of its business. A change in possession of the power to direct or control or cause the direction or control of the management of an Equity Member may constitute a Change in Control of Lead Developer if such Equity Member possesses, immediately prior to such Change in Control, the power to direct or control or cause the direction or control of the management of Lead Developer. Notwithstanding the foregoing, the following shall not constitute a Change in Control:

(a) a change in possession of the power to direct or control the management of Lead Developer or a material aspect of its business due solely to bona fide open market transactions in securities effected on a recognized public stock exchange, including such transactions involving an initial public offering;



(b) an upstream reorganization or transfer of indirect interests in Lead Developer so long as no change occurs in the entity with ultimate power to direct or control or cause the direction or control of the management of Lead Developer;

(c) a change in possession of the power to direct or control the management of Lead Developer or a material aspect of its business due solely to a bona fide transaction involving a beneficial interest in the ultimate parent organization of an Equity Member (but not if the Equity Member is the ultimate parent organization) if the references, experience or financial statements of the ultimate parent organization were not considered or evaluated in the statement of qualifications or proposal, provided, however, that this exception shall not apply if at the time of the transaction the transferee is suspended or debarred from bidding, proposing or contracting with the City or any federal or State department or agency, or is subject to a suspension or debarment proceeding;

(d) an Equity Transfer, where the transferring Equity Member and the transferee are under the same ultimate parent organization ownership, management and control before and after the transfer; or

(e) a transfer of interests (i) between managed funds that are under common ownership, management or control or (ii) by an Equity Member to a fund, investment vehicle or other entity managed by or under common control of such Equity Member, except, in each case, a change in the management or control of a fund, investment vehicle or other entity, as applicable, that manages or controls; and

(f) the exercise of minority veto or voting rights (whether pursuant to applicable Law, by Lead Developer's organizational documents or by related member or shareholder agreements or similar agreements) over major business decisions of Lead Developer, provided that if such minority veto or voting rights are exercised pursuant to shareholder or similar agreements, City received copies of such agreements on or before the date of the Agreement.

**1.28. "City"** is defined in the Preamble.

**1.29. "City Agents"** means, collectively, employees, officers, members, managers, directors, agents, contractors, subcontractors, and consultants of City.

**1.30. "City Data"** means any information, data, or document, whether or not protectable Intellectual Property, which is created, developed, or collected by, or on behalf of, City related to transportation operations, national infrastructure planning and Personal Information of the City employees, vendors and consumers. For the avoidance of doubt, City Data shall include, but not be limited to, (a) all "nonpublic information," as defined by the Gramm-Leach-Bliley Act (15 USC § 6801 et seq.), (b) personal information as defined by California Civil Code §§ 1798.29, 1798.82, and 1798.140 (California Consumer Privacy Act of 2018, effective January 1, 2020), as amended and supplemented by the California Privacy Rights Act of 2020 (effective December 16, 2020; operative January 1, 2023), (c) protected health information or individually identifiable health information as defined by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the Health Information Technology for Economic and Clinical Health (HiTECH) Act or as defined by the Code of Federal Regulations (45 CFR § 160.103), and/or (d) personal data as defined by the EU General Data Protection Regulation (Regulation (EU) 2016/679). For the further avoidance of doubt, City Data is not limited to proprietary or confidential information, and need not constitute trade secret information.

**1.31. "City Event of Default"** is defined in Section 19.2 (City Event of Default).

**1.32. “City IP”** means all Intellectual Property owned by, or sufficiently licensed to, City (other than pursuant to any license granted by the Lead Developer, any Lead Developer Related Entity or any owner of any Third Party IP under or as required by this Agreement).

**1.33. “City Predevelopment Cost”** is defined in Section 2.3(c) (*City Predevelopment Cost*).

**1.34. “City Project Director”** is defined in Section 7.3(b) (*For City*).

**1.35. “City Project Manager”** is defined in Section 7.3(b) (*For City*).

**1.36. “City Proposed Change”** is defined in Section 9.3(a).

**1.37. “claims”** means all claims, demands, rights, and causes of action.

**1.38. “COTS”** (or, “Commercially Available Off-the-Shelf Software”) means Software (i) sold in substantial quantities, (ii) readily available to City without Lead Developer or third party participation, (iii) provided without modification in the same form in which it is sold in the commercial marketplace, and (iv) for which there are at least two (2) readily available alternative solutions or items with the same or substantially similar design, use or function as the proposed COTS. For the avoidance of doubt, COTS does not include so-called open source software or sole-source software.

**1.39. “Commencement Date”** means the date that City delivers Notice to Proceed #1 to Lead Developer under Section 4.2(a) (*Notice to Proceed #1*).

**1.40. “Commercial Close”** means the concurrent, full execution and delivery of both the Project Agreement and the HCC Agreement.

**1.41. “Common Infrastructure”** means the physical infrastructure component of the Facility that is shared by the Bus Yard Component and the Housing and Commercial Component, as further described in the Technical Requirements, and the criteria for which are set forth in the Technical Requirements, except as otherwise approved by City in writing, which approval shall be at its sole discretion.

**1.42. “Common Infrastructure Costs”** is defined in Section 2.6 (*Allocation of Common Infrastructure Costs*).

**1.43. “Conference/Media Summary”** is defined in Section 7.6(i) (*Press Conference or Media Activity*).

**1.44. “Construction Permitting Plan”** is described in Section 2.2.2.6 (*Construction Permitting Plan*) of Appendix B-2.

**1.45. “Contractor Procurement Plan”** is described in Section 2.2.4.1 (*Contractor Procurement Plan*) of Appendix B-2.

**1.46. “Cost and Risk Management Plan”** is described in Section 2.2.2.3 (*Cost and Risk Management Plan*) of Appendix B-2.

**1.47. “Cost Management”** is defined in Section 2.2.2.3 (*Cost and Risk Management Plan*) of Appendix B-2.

**1.48. “Covered Services”** is defined in Section 24.4(a) (*Covered Services*).

1.49. “DB” means design-build.

1.50. “Debt Financing Plan” is defined in Section 2.2.1.2 (Financing Management Plan) of Appendix B-2.

1.51. “Design Deliverables” is referenced in Appendix B-2.

1.52. “Design-Build Contract” is defined in Section 6.11 (Design-Build Contract).

1.53. “Design-Build RFP” means the request for proposals for the Design-Build Contract.

1.54. “Design-Build RFQ” means the request for qualifications for the Design-Build Contract.

1.55. “Design Management Plan” is described in Section 2.2.2.1 (Design Management Plan) of Appendix B-2.

1.56. “Design Quality Management” is defined in Section 2.1.2.1 (Design Quality Management) of Appendix B-2.

1.57. “Design Reviews” is defined in Section 2.2.2.1 (Design Management Plan) of Appendix B-2.

1.58. “Developed IP” means Intellectual Property that is authored, created, invented or reduced to practice under or for the purposes of the Agreement, the Work or the Project, whether or not such Intellectual Property is incorporated into the Project IP but excluding any adaptation, continuation or derivative work that constitutes Lead Developer IP.

1.59. “Development Team Member” and “Development Team” are defined in Section 7.1 (Development Team).

1.60. “Director of Transportation” means the SFMTA’s Director of Transportation.

1.61. “Discontinuation Notice” is defined in Section 4.2(c) (Decision Not to Proceed).

1.62. “Dispute” means any dispute, disagreement or controversy between City and Lead Developer concerning their respective rights and obligations under the Agreement, including concerning any claim, alleged breach or failure to perform and remedies.

1.63. “Draft EIR” is defined in Section 6.20(a) (Project Sponsor).

1.64. “Early Works” means, to the extent approved by City, any physical work required at the Project Site, or off-site utility work, or physical work associated with relocating the Potrero Division bus fleet and all relevant operations out of the Project Site, during the PDA Term to enable Substantial Completion of the Infrastructure Facility by the Outside Delivery Date. The MME Expansion Project is not an Early Work.

1.65. “Early Works Agreement” means an agreement entered into by City and Lead Developer for the performance of Early Works by Lead Developer during the PDA Term.

1.66. “Early Works Plan” is described in Section 2.2.5.1 (Early Works Plan) of Appendix B-2.

**1.67. “Effective Date”** means the date the Director of Transportation executes this Agreement.

**1.68. “EIR”** means the Environmental Impact Report for the Project, including the Draft EIR, public and agency comments on the Draft EIR (DEIR) received during the review process, a list of people and organizations that submitted comments, responses from the lead agency to the comments received, and any revisions of the Draft EIR.

**1.69. “Energy Management Program”** is defined in Section 6.7 (Energy Management Program).

**1.70. “Engineering Analysis”** means the process of applying scientific analytic principles and processes to reveal the properties and state of a system, device, or mechanism under study.

**1.71. “Entitlements and General Regulatory Approvals Plan”** is described in Section 2.2.3.2 (Entitlements and General Regulatory Approvals Plan) of Appendix B-2.

**1.72. “Equity Member”** means a Person that directly holds a legal and beneficial interest in Lead Developer.

**1.73. “Equity Transfer”** means any assignment, mortgage, encumbrance, hypothecation, conveyance, sale, or other transfer of equity interest in Lead Developer.

**1.74. “Extension Notice”** is defined in Section 3.3(c) (Performance Extension).

**1.75. “Extension Request”** is defined in Section 3.1 (PDA Term; Predevelopment Period Extensions).

**1.76. “Extremely low income”** is described in Section 3.1.2 (Housing) of Division 8 (Public Benefit Principles) of the Technical Requirements.

**1.77. “Facility”** means the Bus Yard Component, Housing and Commercial Component, and Common Infrastructure, collectively.

**1.78. “FF&E”** means furniture, fixtures, and equipment.

**1.79. “Final Acceptance”** means that all design and construction work is complete and all other prerequisites for final acceptance have been met as set forth in (a) any Early Works Agreement (with respect to the applicable Early Works); (b) the Project Agreement (with respect to the Infrastructure Facility); and (c) the HCC Agreement (with respect to the Housing and Commercial Component), as applicable.

**1.80. “Final Price”** is defined in the “Final Price and Cost Savings Form” in Attachment 4 of Appendix B-2.

**1.81. “Finance Plan”** is defined in Section 6.8 (Project Financing).

**1.82. “Financial Model”** is described in Section 2.2.1.2 (Financing Management Plan) of Appendix B-2.

**1.83. “Financial Proposal”** means Volume 3 to the Proposal, which is attached as Appendix G, except the Housing and Commercial Component contingency plan included in

Financial Submittal 11 (*Housing and Commercial Component Organizational, Financial, and Operations Plan*).

**1.84. “Financing Management Plan”** is described in Section 2.2.1.2 (*Financing Management Plan*) of Appendix B-2.

**1.85. “Fixed Budget Limit”** or “FBL” is defined in Section 2.5(a) (*Fixed Budget Limit*).

**1.86. “Floating Milestone Date”** is defined in Section 3.2(b) (*Phase 2 Floating Milestone*).

**1.87. “General Regulatory Approvals”** is defined in Section 6.21(b) (*General Regulatory Approvals*).

**1.88. “Geotechnical Baseline Report”** is described in Section 3.2.1 (*Drawings and Reports*) of Appendix B-2.

**1.89. “gsf”** is defined in Section E1.2.3 (*Lead Developer’s Predevelopment Costs*) of Appendix B-2.

**1.90. “Guarantor”** means each Person providing a Guaranty as described in Section 6.23 (*Guaranty*). As of the Effective Date, the Guarantor is Plenary Americas US Holdings Inc.

**1.91. “Guaranty”** means each guaranty executed by a Guarantor guaranteeing some or all of the obligations of Lead Developer under the Agreement.

**1.92. “Handback Requirements”** means the terms, conditions, requirements, and procedures governing the condition in which Principal Project Company is to deliver the Infrastructure Facility and its assets upon expiration of the Infrastructure Facility Term.

**1.93. “HCAO”** is defined in Section 24.2 (*Requiring Health Benefits for Covered Employees*).

**1.94. “HCC Agreement”** means the agreement between City and the Housing Project Company (or between City and the Principal Project Company and assigned by Principal Project Company to a Housing Project Company) which would be signed at the HCC Commercial Close, pursuant to which City will grant a long-term real property interest in certain premises for the development of the Housing and Commercial Component.

**1.95. “HCC Change”** is defined in Section 9.2(a) (*Basis for HCC Changes*).

**1.96. “HCC Change Request”** is defined in Section 9.2(b) (*HCC Change Request*).

**1.97. “HCC Commercial Close”** means the full execution and delivery of the HCC Agreement.

**1.98. “HCC Financial Close”** means the full execution and delivery of the HCC Financing Documents, either at or after HCC Commercial Close, where all conditions to the effectiveness of the HCC Agreement and Housing Financing Documents have been satisfied so that the Housing Project Company is sufficiently funded to commence construction of the Housing and Commercial Component.

**1.99. “HCC Financing Documents”** means all documents to be executed by the Housing Project Company) to finance the Housing and Commercial Component.

**1.100. “HCC Interface Requirements”** is defined in Section 6.9(a) (*HCC Interface Requirements*).

**1.101. “HCC Schedule”** is defined in Section 6.9(c) (*HCC Schedule*).

**1.102. “HCC Term Sheet”** is defined in Section 6.9(d) (*HCC Term Sheet*).

**1.103. “HCC Transaction Documents”** mean, collectively, the HCC Term Sheet, the HCC Agreement, and any other documents to be executed by City and the Housing Project Company with respect to the Project.

**1.104. “Housing and Commercial Component”** or “HCC” means the Facility’s housing and commercial component, which would include the commercial space, the housing units and their associated support spaces (e.g., lobbies, vertical and horizontal circulation, storage, open space, rooms for building systems, offices for property management and residential services, and resident amenities such as laundry and community rooms) that are not used for the Bus Yard Component or the Common Infrastructure.

**1.105. “Housing Developer”** means each of Presidio Development Partners, LLC and Tabernacle Community Development Corp.

**1.106. “Housing Project Company(ies)”** means the special-purpose entity(ies) that will deliver, operate and maintain the Housing and Commercial Component pursuant to the HCC Agreement.

**1.107. “Housing Term”** means the period during which a Housing Project Company has the right and obligation to maintain and operate the Housing and Commercial Component.

**1.108. “IF Commercial Close”** means the full execution and delivery of the Project Agreement.

**1.109. “IF Financial Close”** means the full execution and delivery of the IF Financing Documents, either at or after IF Commercial Close, where all conditions to the effectiveness of the Project Agreement and IF Financing Documents have been satisfied so that the Principal Project Company is sufficiently funded to commence construction of the Infrastructure Facility.

**1.110. “IF Financing Documents”** means all documents to be executed by the Principal Project Company to finance the Infrastructure Facility.

**1.111. “IF Transaction Documents”** mean, collectively, the Project Agreement, and any other documents to be executed by City and the Principal Project Company with respect to the Project.

**1.112. “IFM Contract”** is defined in Section 6.13 (*IFM Contract*).

**1.113. “IFM RFP”** means the request for proposals for the IFM Contract.

**1.114. “IFM RFQ”** means the request for qualifications for the IFM Contract.

**1.115. “Indemnified Parties”** is defined in Section 21.1 (*Lead Developer’s Duty to Indemnify*).



**1.116. “Infrastructure Facility”** means the Bus Yard Component and the Common Infrastructure, collectively.

**1.117. “Infrastructure Facility Maintenance” or “IFM”** means all management, engineering, repairs and maintenance, renewals and replacement, and other ancillary services required at all times for the Infrastructure Facility to allow for the ongoing operations and maintenance activities needed at the Facility and to meet the service requirements specified in the Asset Management Program and the Handback Requirements.

**1.118. “Infrastructure Facility Term”** means the 30-year period during which the Principal Project Company must provide the Infrastructure Facility Maintenance under the Project Agreement.

**1.119. “Intellectual Property”** means all current and future legal and/or equitable rights and interests, anywhere in the world, in know-how, patents (including applications), copyrights (including moral rights), trademarks (registered and unregistered), service marks, trade secrets (as defined by the Defend Trade Secrets Act § 2(b)(1) (18 USC § 1839(3)), and pursuant to US state and federal laws), designs (registered and unregistered), utility models, circuit layouts, mask works, business and domain names, inventions, solutions embodied in technology, and other intellectual activity, and applications of or for any of the foregoing, subsisting in or relating to the Work Materials or IP Materials. Without limiting the foregoing, Intellectual Property includes Software and City Data. For the avoidance of doubt, Intellectual Property is distinguished from the physical, electronic, and/or mechanical embodiments of such Intellectual Property (see IP Materials).

**1.120. “IP Escrow”** is defined in Section 11.7(b).

**1.121. “IP Escrow Agent”** is defined in Section 11.7(b).

**1.122. “IP Materials”** means all physical, electronic and/or mechanical embodiments of, and documents disclosing, Intellectual Property. Without limiting the generality of the foregoing, IP Materials include embodiments, documents, deliverables and/or Work Materials incorporating concepts, inventions (whether or not protected under patent laws), works of authorship, information, new or useful art, combinations, discoveries, formulae, algorithms, specifications, manufacturing techniques, technical developments, systems, computer architecture, artwork, Software, Source Code, decompilation instructions, programming, applets, scripts, designs, procedures, processes, and methods of doing business, and any other media, materials, plans, reports, project plans, work plans, documentation, training materials, and other tangible objects produced under the Agreement or required by, incorporated into or combined with the Work, Work Materials, or the Project.

**1.123. “LBE Plan”** is defined in Section 6.10 (*Local Business Enterprise Plan*).

**1.124. “LD Change Request”** is defined in Section 9.1(c) (*LD Change Request*).

**1.125. “LD Event of Default”** is defined in Section 19.1 (*LD Event of Default*).

**1.126. “LD Media Contact”** is defined in Section 7.6(d)(iii) (*Media and Communications Team Contacts*).

**1.127. “LD Outreach Plan”** is defined in Section 7.6(c) (*Lead Developer Outreach Plan*).

**1.128. “LD Predevelopment Cost”** is defined in Section 2.3(d) (*LD Predevelopment Cost*).

**1.129. “LD Project Director”** is defined in Section 7.3(a) (*For Lead Developer*).

**1.130. “LD Project Manager”** is defined in Section 7.3(a) (*For Lead Developer*).

**1.131. “LD Proposed Change”** is defined in Section 9.1(a) (*LD Proposed Change*).

**1.132. “Lead Developer” or “LD”** is defined in the Preamble.

**1.133. “Lead Developer Agents”** means, collectively, Lead Developer’s employees, officers, members, managers, directors, agents, contractors, subcontractors, consultants, members, Affiliates, and Development Team Members.

**1.134. “Lead Developer IP”** means Intellectual Property that is (i) owned by any Lead Developer Related Entity prior to the Effective Date, (ii) developed or acquired by any Lead Developer Related Entity independently of the Agreement or not specifically for the purposes of performing the Work (iii) any adaptation, continuation or derivative work which requires the incorporation, exercise or practice of Intellectual Property that is the subject of either subsection (i) or (ii).

**1.135. “Lead Developer Related Entities”** means:

- (a) Lead Developer;
- (b) Lead Developer Agents;
- (c) any Guarantor;
- (d) any other persons or entities performing any of the Work;
- (e) any other persons or entities for whom Lead Developer may be legally or contractually responsible; and
- (f) the employees, agents, officers, directors, representatives, consultants, successors and assigns of any of the foregoing.

**1.136. “Local Business Enterprise” or “LBE”** means a business designated and certified as such by the San Francisco Contract Monitoring Division under San Francisco Administrative Code Section 14B.3.

**1.137. “Losses”** means, collectively, any loss, expense, cost, compensation, damages (including foreseeable consequential damages), attorneys’ fees, claims, demands, liens, obligations, injuries, liability, interest, penalties, fines, lawsuits and other proceedings, judgments, awards, or liabilities of any kind, known or unknown, contingent or otherwise, equitable relief, mandamus relief, specific performance, or any other relief.

**1.138. “Low income”** is described in Section 2.2.2 (*Equity, Affordability Mix and Tenant Preferences*) of Division 6 (*Program for the Housing and Commercial Component*) of the Technical Requirements.

**1.139. “Mediation”** is defined in Section 25.5(a) (*Mediation Request*).



**1.140. “Mediation Request”** is defined in Section 25.5(a) (*Mediation Request*).

**1.141. “MEP”** means mechanical, electrical, and plumbing.

**1.142. “MME Expansion Project”** means the expansion of SFMTA’s Muni Metro East facility located at 601 25th Street in San Francisco, as further described in Appendix K.

**1.143. “MME Construction Agreement”** means the agreement between Lead Developer and City for the performance of the MME Expansion Project to be negotiated and finalized in accordance with Section 6.24 (*MME Expansion Project*).

**1.144. “MMRP”** means any Mitigation Monitoring and Reporting Program for the Project adopted by the Planning Commission in certifying the EIR.

**1.145. “Moderate income”** is described in Section 2.2.2 (*Equity, Affordability Mix and Tenant Preferences*) of Division 6 (*Program for the Housing and Commercial Component*) of the Technical Requirements.

**1.146. “MOHCD”** means the San Francisco Mayor’s Office of Housing and Community Development.

**1.147. “Muni Metro East” or “MME”** means the City property that comprises portions of Blocks 4297, 4298, 4299, 4300, 4310, and 4313, and is bounded by 25<sup>th</sup>, Illinois, Cesar Chavez, and Maryland Streets.

**1.148. “Notice of Acceptance”** means the notice described in Section 4.3(c) (*Notice of Acceptance*).

**1.149. “Notice to Proceed” or “NTP”** is defined in Section 4.1 (*Performance*).

**1.150. “NPV”** means net present value.

**1.151. “OEWD”** means City’s Office of Economic Workforce and Development.

**1.152. “Original Proposal”** means the original proposal submitted by Lead Developer on December 30, 2021, as described in Recital E, in response to the Initial RFP.

**1.153. “Outside Delivery Date”** means November 30, 2027.

**1.154. “Owner’s Information Requirements” or “OIR”** is described in Section 2.2.2.2 (*BIM Execution Plan*) of Appendix B-2.

**1.155. “PCIC”** means the percentage of Common Infrastructure cost allocated to City, which will be 55.10%, as set forth in FS Form B of the Financial Proposal, as may be further adjusted pursuant to the version of FS Form B submitted by Lead Developer at Performance Milestone 15 and Performance Milestone 27A if approved, respectively, by City at Performance Milestone 16 and Performance Milestone 28.

**1.156. “PCIC(Dis)”** means the discount to the PCIC(Max) described in FS Form B of the Financial Proposal.

**1.157. “PCIC(Max)”** means the percentage of Common Infrastructure cost allocated to City as stated in Form FS B of the Financial Proposal, which is based on (i) the gross square feet of floor area of the Bus Yard Component divided by (ii) the gross square feet of floor area of the

Bus Yard Component and the Housing and Commercial Component. Such percentage may be further adjusted pursuant to the version of FS Form B submitted by Lead Developer at Performance Milestone 15 and Performance Milestone 27A if approved, respectively, by City at Performance Milestone 16 and Performance Milestone 28.

**1.158. “PCIH”** means the percentage of Common Infrastructure cost allocated to the Housing and Commercial Component, which will be 44.90%, as set forth in FS Form B of the Financial Proposal. Such percentage may be further adjusted pursuant to the version of FS Form B submitted by Lead Developer at Performance Milestone 15 and Performance Milestone 27A if approved, respectively, by City at Performance Milestone 16 and Performance Milestone 28.

**1.159. “PDA Management Plan”** means a plan that covers Lead Developer’s management of the Work, which will be based on the preliminary plan included in the Technical Proposal and to be finalized as described in Appendix B-2.

**1.160. “PDA Phase”** is defined in Section 4.1 (Performance).

**1.161. “PDA Term”** is defined in Section 3.1 (PDA Term; Predevelopment Period Extensions).

**1.162. “Performance Date”** means the date for the performance of a Performance Milestones, as set forth in Appendix B-1.

**1.163. “Performance Extension”** is defined in Section 3.3(c) (Performance Extension).

**1.164. “Performance Milestones”** is defined in Section 3.2(a) (Compliance).

**1.165. “Person”** means any individual, corporation, joint venture, limited liability company, company, voluntary association, partnership, trust, unincorporated organization, governmental entity, or other entity.

**1.166. “Phase 2 Floating Milestone”** is defined in Section 3.2(b) (Phase 2 Floating Milestone).

**1.167. “Plan for Coordination with Regulatory Agencies”** is described in Section 2.2.2.5 (Plan for Coordination with Regulatory Agencies) of Appendix B-2.

**1.168. “Planning Commission”** means the San Francisco Planning Commission.

**1.169. “Planning Department”** means the San Francisco Planning Department.

**1.170. “Predevelopment Agreement Management Plan”** or “PMP” is described in Section 2.1.1 (Predevelopment Agreement Management Plan) of Appendix B-2.

**1.171. “Predevelopment Period”** means the five hundred sixty-eight (568) consecutive day period that commences on the Commencement Date, as may be extended by in accordance with Section 3.1 (PDA Term; Predevelopment Period Extensions).

**1.172. “Preliminary Financial Model”** means the electronic financial model that generates financial projections for the Infrastructure Facility, which Lead Developer included in its Financial Proposal.

**1.173. “Preliminary Pro Forma”** means the electronic pro forma model that generates financial projections for the Housing and Commercial Component, which Lead Developer included in its Financial Proposal.

**1.174. “Preliminary Term Sheet”** is the term sheet attached as Appendix F.

**1.175. “Premises”** is defined in Section 6.9(d) (*HCC Term Sheet*).

**1.176. “Press Matters”** is defined in Section 7.6(h) (*Press Contacts*).

**1.177. “Press Release”** is defined in Section 7.6(h) (*Press Contacts*).

**1.178. “Prevailing Rate of Wages”** shall have the meaning given in Section 6.22(e) of the San Francisco Administrative Code.

**1.179. “Principal Project Company” or “PPC”** means the Lead Developer or a special-purpose entity in which Lead Developer is the only party with the power to direct the management of that entity, whether through voting, nomination, or other selection rights, by contract, or by other means, that enters into the Project Agreement with City for delivery of the Infrastructure Facility and maintenance of certain elements thereof.

**1.180. “Pro Forma”** is defined in Section 2.2.1.2 (*Financing Management Plan*) of Appendix B-2.

**1.181. “Project”** means development, design, construction, and financing of the Facility at the Project Site, the Infrastructure Facility Maintenance, and the Property Management.

**1.182. “Project Agreement”** means the agreement between City and the Principal Project Company for delivery of the Infrastructure Facility, which would be signed at IF Commercial Close.

**1.183. “Project Documents”** mean, collectively, the Transaction Documents, the IF Financing Documents, the HCC Financing Documents, the Design-Build Contract, the IFM Contract, and any other documents to be executed by the Principal Project Company, the Housing Project Company, any Design-Build Contract contractor, the IFM Contract contractor, or any other third party providing either services, funding, or financing with respect to the Project, the performance of the Principal Project Company’s obligations under the Project Agreement, the performance of the Housing Project Company’s obligations under the HCC Agreement, or the independent function of the Bus Yard Component and the Housing and Commercial Component.

**1.184. “Project IP”** means all Intellectual Property authored, created, invented or reduced to practice under or for the purposes of the Agreement, or otherwise required by, integrated into or combined with the Work or the Project.

**1.185. “Project Management Deliverables”** is defined in Appendix B-2.

**1.186. “Project Objectives”** are set forth in Appendix D.

**1.187. “Project Principal(s)”** is the person(s) each Equity Member has designated as its representative principally responsible for that Equity Member’s role on the Development Team.

**1.188. “Project Schedule”** is defined in Section 6.2 (*PDA Phases*).

**1.189. “Project Site”** is defined in Recital A.

**1.190. “Property Management”** means the management, leasing, rent collection, tenant services and relations, engineering, repairs and maintenance, renewals and replacement, and other ancillary services required for operating the of the Housing and Commercial Component in compliance with Applicable Law and keeping it in a good operating condition during the Housing Term.

**1.191. “Proposal”** means the Original Proposal, and the revised response to the RFP submitted by Lead Developer to City on July 20, 2022 as clarified through the request for clarifications process set forth in the RFP. Portions of the Proposal are included in the Agreement at Appendix C (Proposal Commitments), Appendix G (Financial Proposal), Appendix H (Technical Proposal), Appendix I (Development Team and Key Personnel), and including Attachment 1 (SFMTA Trainee Hiring Program) and Attachment 2 (First Source Hiring Program) of Appendix G.

**1.192. “Proposal Payment”** is defined in Section 16.3(a) (Proposal Payment).

**1.193. “Proposed HCC”** is defined in Section 6.9 (HCC Predevelopment Work).

**1.194. “Public Records Act”** means the Public Records Act in California Government Code Section 6250 *et seq.*

**1.195. “Quality Assurance Manager”** is the person that the Lead Developer has designated to develop, implement, and maintain a system of quality management for the Development Team’s work products and development process.

**1.196. “Quality Management Plan”** or “QMP” is described in Section 2.1.2 (Quality Management Plan) of Appendix B-2.

**1.197. “Qualified Out-of-Pocket Costs”** means the costs incurred by Lead Developer, including demonstrated internal costs, to prepare the Work Materials and procure the Design-Build Contract and IFM Contract, which costs must not be increased by any dollar or percentage amount representing added profit, fee, or administrative or other charge but can include the actual financing costs incurred by Lead Developer during the PDA Term from loans or lines of equity extended by any third party financial institutions, or Affiliates provided the Affiliate provides rates competitive with third party financial institutions, to finance the Work Materials and the procurement of the Design-Build Contract and IFM Contract, and which must have been documented by Lead Developer in compliance with this Agreement. The following costs shall not be included as Qualified Out-of-Pocket Costs: (a) HCC costs (except those specifically incurred in connection with Work Materials identified in Appendix B-1 and Appendix B-2; (b) the internal financing costs incurred by any of the Development Team Members; or (c) the costs of any Additional HCC Materials.

**1.198. “Reference Documents”** means the materials described in Appendix N.

**1.199. “Regulatory Agency”** is defined in Section 6.21(c) (No Lobbying: Proprietary Capacity).

**1.200. “Regulatory Appeal Delay”** is defined in Section 3.3(b) (Regulatory Appeal Delay).

**1.201. “Regulatory Approval”** is defined in Section 6.21 (Regulatory Approvals).

**1.202. “Regulatory Approval Strategy”** is defined in Section 6.21(b) (*General Regulatory Approvals*).

**1.203. “Regulatory Change”** is defined in Section 9.1(a) (*LD Proposed Change*).

**1.204. “Release Conditions”** is defined in Section 11.7(c).

**1.205. “RFP”** means the request for proposals for the selection of the Lead Developer, as described in Recital D.

**1.206. “RFQ”** means the request for qualifications for the selection of the Lead Developer.

**1.207. “Scheduled Substantial Completion Date”** means the Substantial Completion date for the Infrastructure Facility or the HCC, as applicable, that Lead Developer includes in the Financial Model and Pro Forma.

**1.208. “SFMTA”** means the San Francisco Municipal Transportation Agency.

**1.209. “SFMTA Board”** means the San Francisco Municipal Transportation Agency Board of Directors.

**1.210. “SFMTA Media Contact”** is defined in Section 7.6(d)(iii) (*Media and Communications Team Contacts*).

**1.211. “SFMTA Public Outreach and Engagement Program”** is defined in Section 7.6(a) (*SFMTA Public Outreach and Engagement Program*).

**1.212. “SFPW”** means San Francisco Public Works.

**1.213. “Short-Listed Proposers”** means Potrero Neighborhood Collective, Potrero Mission Community Partners, and Potrero Yard Community Partners.

**1.214. “Software”** means individually each, and collectively all, of the computer programs developed or provided by Lead Developer, and any Lead Developer Related Entity, under this Contract (including Project IP, Lead Developer IP and/or Third-Party IP), including as to each such program, the processes, and routines used in the processing of data, the object code, interfaces to be provided hereunder by Lead Developer, updates, upgrades, and any and all programs otherwise provided by Lead Developer under this Agreement.

**1.215. “Source Code”** means the version of a Software computer program in which the programmer's original programming statements are expressed in any programming language. (See 2 CCR 20621.)

**1.216. “Substantial Completion”** means (a) in the case of Early Works, when construction is completed in accordance with the requirements of the applicable Early Works Agreement and the Early Works can be utilized for its intended purpose; (b) in the case of the Housing and Commercial Component, when (i) construction is completed in accordance with the requirements of the HCC Agreement and the Housing and Commercial Component can be utilized for its intended purpose, (ii) a certificate of temporary occupancy is issued for the Housing and Commercial Component, (iii) tenants are able to move into the Housing and Commercial Component; and (iv) demobilization from the Project Site is complete, and (c) in the case of the Infrastructure Facility, when (i) construction is completed in accordance with the requirements of the Project Agreement and the Infrastructure Facility can be utilized for its

intended purpose, (ii) a certificate of temporary occupancy is issued for the Bus Yard Component, and (iii) the Bus Yard Component is in a condition of full operational functionality to allow the SFMTA's transit operations to relocate to the Bus Yard Component.

**1.217. "Sunshine Ordinance"** means the San Francisco Sunshine Ordinance in Chapter 67 of the San Francisco Administrative Code.

**1.218. "TDM"** means transportation demand management.

**1.219. "Technical Proposal"** means Volume 2 to the Proposal, which is attached as Appendix H, except the Housing and Commercial Component contingency plan included in Technical Submittal 28 (PDA Management Plan).

**1.220. "Technical Requirements"** means the requirements set forth in Appendix E, as may be modified in writing by City during the PDA Term.

**1.221. "Terminating Event"** is defined in Section 16.2 (Terminating Event).

**1.222. "Termination"** is defined in Section 16.2 (Terminating Event).

**1.223. "Termination Notice"** is defined in Section 16.4 (Termination Notice; Effect of Termination).

**1.224. "Termination Payment"** is defined in Section 16.3 (Termination Payments).

**1.225. "Third Party IP"** means Intellectual Property owned by any Person unrelated to any Lead Developer Related Entity.

**1.226. "Transaction Documents"** mean, collectively, the IF Transaction Documents and the HCC Transaction Documents.

**1.227. "Unavoidable Delays"** is defined in Section 3.3(a) (Unavoidable Delay).

**1.228. "Very low income"** is described in Section 1.2.1 (Equity, Affordability, and Target Populations) of Division 6 (Program for the Housing and Commercial Component) of the Technical Requirements.

**1.229. "Work"** means all work, services and activities to be performed, furnished, provided, or undertaken by or on behalf of Lead Developer under this Agreement, including but not limited to the activities in Appendix B-1 and Appendix B-2.

**1.230. "Work Materials"** means the Proposal and all studies, analyses, models, applications, reports, permits, plans, drawings, designs, drawings, specifications, blueprints, studies, memoranda, computation sheets, pro-forma assumptions, financial methodologies, computer files and media, or other documents, original works of authorship and similar work product, whether in digital or any other format, generated by or for the Lead Developer in submitting the Proposal or performing the Work.

## **2. PREDEVELOPMENT GUIDELINES**

**2.1. Predevelopment Approach.** During the PDA Term, each Party will diligently and collaboratively work to develop the Project, with City performing its obligations as described in Article 8 (City Predevelopment Obligations) below, and Lead Developer performing all other predevelopment activities required to allow for IF Financial Close no later than



November 30, 2024, Substantial Completion of the Infrastructure Facility within the Fixed Budget Limit no later than the Outside Delivery Date, and Substantial Completion of the Housing and Commercial Component no later than one year after Substantial Completion of the Infrastructure Facility. The commercial and financing structure for the Project shall not expose City to any interface or integration risk relating to the Project's physical and operational components, or resulting from the use, if specifically permitted by this Agreement, of multiple entities and contracts to deliver the Project. Lead Developer's predevelopment activities shall fulfill the Project's objectives set forth in Appendix D ("Project Objectives") and conform to the Technical Requirements and the requirements of this Agreement.

## **2.2. Incorporation of Elements of RFP and Proposal.**

(a) The Technical Requirements and Project Objectives, which comprised a portion of the RFP, and portions of the Proposal are attached to and incorporated in this Agreement, provided that:

(i) if there is any conflict between the Technical Requirements or the Project Objectives and the body of this Agreement, then the terms of the body of this Agreement shall govern;

(ii) if there is any conflict between Appendix B-1, Appendix B-2 or the Technical Requirements and the Project Objectives, then Appendix B-1, Appendix B-2 and the Technical Requirements shall govern; and

(iii) if there is any conflict among the portions of the Proposal attached to and incorporated into this Agreement and the body of this Agreement, Appendix B-1, Appendix B-2, the Technical Requirements or the Project Objectives, then the body of this Agreement, Appendix B-1, Appendix B-2, the Technical Requirements and the Project Objectives shall govern, except as otherwise approved by City in writing, which approval shall be at City's sole discretion, and provided that if City determines, in its sole discretion, that the Proposal contains a provision that is more beneficial to City than is specified elsewhere in this Agreement, then that provision shall take precedence.

(b) Lead Developer acknowledges City's execution of this Agreement with portions of the Proposal attached to and incorporated in this Agreement as appendices shall not in and of itself serve as City's approval to any variance between the Proposal and any aspect of this Agreement.

(c) City will not be responsible for any errors, omissions, inaccuracies or incomplete statements in the Proposal, and the incorporation of the Technical Proposal and the Financial Proposal in this Agreement does not constitute any statement or determination as to their compliance with the Technical Requirements or the Project Objectives.

(d) With the exception of the Fixed Budget Limit, the LD Predevelopment Cost, the PCIC, PCIC(Max), PCIC(Dis), and the PCIH, the Parties acknowledge that the financing assumptions for the Infrastructure Facility and the Housing and Commercial Component included in the Financial Proposal are indicative in nature and subject to development during the PDA Term.

(e) City's interim or final answers to the questions or requests for clarifications (RFCs) posed during the Proposal process for this Agreement shall in no event be deemed part of the Agreement and shall not be relevant in interpreting the Agreement except and solely to the extent as they may clarify provisions otherwise considered ambiguous by City, in its

sole discretion. Except to the extent incorporated into this Agreement in accordance with Section 2.2(a), the RFP shall not be relevant in interpreting this Agreement.

**2.3. Prior Costs and Predevelopment Costs.** Before the Effective Date, City, Lead Developer and the Lead Developer Agents devoted time, effort, and financial resources with respect to the Project. City performed due diligence, submitted and pursued certain Regulatory Approval applications, and issued the RFQ and the RFP, and Lead Developer submitted a statement of qualifications in response to the RFQ and submitted the Proposal in response to the RFP. The Parties also anticipate that during the PDA Term, City, the City Agents, Lead Developer, and the Lead Developer Agents will devote substantial time, effort, and financial resources as required in this Agreement. The Parties are willing to engage in these PDA Term activities subject to the terms and conditions set forth in this Agreement. Each Party shall bear its own costs; provided, however, that if any Commercial Close occurs, the applicable Transaction Documents will require the Principal Project Company and the Housing Project Company, as applicable, to reimburse the Parties as set forth in this Section 2.3 (*Prior Costs and Predevelopment Costs*).

(a) City's Prior Cost. None of the costs incurred by City with respect to the Project prior to the Effective Date will be reimbursed to City.

(b) Lead Developer Prior Cost. None of the costs incurred by Lead Developer or any of the Lead Developer Agents with respect to the Project prior to the Effective Date will be recovered as a direct reimbursement.

(c) City Predevelopment Cost. The "**Reporting Date**" means the twentieth (20<sup>th</sup>) Business Day before the Commercial Close, and the "**City Predevelopment Cost**" means City's direct and indirect costs related to the development of the Project and its obligations under this Agreement and any Early Works Agreements between the Effective Date and the Reporting Date. On the Reporting Date, City will notify Lead Developer of the total amount of the City Predevelopment Cost as of the Reporting Date. At the HCC Financial Close, the Housing Project Company will be required to reimburse City by an amount equal to the City Predevelopment Cost multiplied by the PCIH, which will be allocated to the Housing and Commercial Component. At City's election, at the IF Financial Close, the Principal Project Company will be required to reimburse City by an amount equal to the City Predevelopment Cost multiplied by the PCIC, which will be allocated to the Bus Yard Component.

(d) LD Predevelopment Cost. During the PDA Term, Lead Developer will bear its direct and indirect costs related to the development of the Project and its obligations under this Agreement at its sole cost (as described in FS Form A5-PR of the Financial Proposal and as adjusted through the PDA Term as specified in this Agreement, the "**LD Predevelopment Cost**"); provided, however, that at the IF Financial Close, the Principal Project Company will be required to reimburse Lead Developer by the amounts calculated and allocated as follows: (i) for the Bus Yard Component, the amount equal to the LD Predevelopment Cost multiplied by the PCIC minus the amount of the Continuation Payment; and (ii) for the Housing and Commercial Component, the amount equal to the LD Predevelopment Cost multiplied by the PCIH.

## **2.4. Risk Allocation.**

(a) Preliminary Term Sheet; HCC Term Sheet. The risks assigned to each Party with respect to designing, building, and financing the Infrastructure Facility, the long-term Infrastructure Facility Maintenance, and the physical and operational interface and integration of Infrastructure Facility and the Housing and Commercial Component, are described in the Preliminary Term Sheet. The Preliminary Term Sheet will be the basis for allocating Project



risks in the Project Agreement and any other applicable IF Transaction Documents. The HCC Term Sheet will be the basis for allocating Project risks in the HCC Agreement.

(b) Integration and Interface Risks. While Lead Developer may form a Principal Project Company to develop the Infrastructure Facility, and a separate Housing Project Company to develop the Housing and Commercial Component, and may procure a design-build contractor for the Infrastructure Facility and a different design-build contractor for the Housing and Commercial Component, all risks relating to the physical and operational interface and integration of the various elements of the Facility, and all risks arising from the use, if specifically permitted by this Agreement, of multiple entities and contracts to deliver the Project, shall be allocated to Lead Developer, the Principal Project Company and the Housing Project Company under the Project Agreement and the HCC Agreement (with sufficient performance guaranties from or development agreements with the original Guarantor, its Affiliate, or other parties acceptable to City) and under no circumstances shall City bear any such risks.

## **2.5. Fixed Budget Limit; Adjustments; Allowances; Submittals.**

(a) Fixed Budget Limit. Lead Developer has committed to a maximum amount for the design and construction costs and Infrastructure Facility Maintenance costs of the Infrastructure Facility, together with the LD Predevelopment Cost, as specified in FS Form A7 of the Financial Proposal (the “**Fixed Budget Limit**”). The Fixed Budget Limit is subject to adjustment from the Commencement Date through to Performance Milestone 27A in accordance with Section 2.5(b) (Increases to Fixed Budget Limit), (c) (No Other Increases to Fixed Budget Limit), (d) (Reductions to Fixed Budget Limit) and (e) (Submittals, and Process for Adjustments to Fixed Budget Limit). City will exercise reasonable effort to provide notice of changes prior to Performance Milestone 27A.

(b) Increases to Fixed Budget Limit. The Fixed Budget Limit may be increased to account for increases in the design and construction costs or the Infrastructure Facility Maintenance costs of the Infrastructure Facility, and to account for increases in the LD Predevelopment Cost due only to increased design costs related to the Infrastructure Facility incurred during the PDA Term, due to the following only:

(i) City Proposed Change. A City Proposed Change under Section 9.3 (Changes Proposed by City), including any City Proposed Change to the Technical Requirements to add any additional scope item Allowance described in FS Form D, other than Allowances relating to escalation or insurance;

(ii) LD Proposed Change. City accepts an LD Proposed Change due to:

A. A change in Applicable Law that occurs within the period commencing June 20, 2022 and ending at Performance Milestone 27A;

B. Project Site conditions revealed through Lead Developer’s due diligence investigation of the Project Site differ materially from the conditions disclosed in the Reference Documents; or

C. The Planning Commission, the SFMTA Board, or the Board of Supervisors imposes Regulatory Approval conditions on the Infrastructure Facility or Infrastructure Facility Maintenance.

(iii) LBE Changes. LBE Plan requirements that differ from the assumed LBE percentage goals and objectives stated in Technical Submittal 28 of the Technical

Proposal, provided that Lead Developer must reasonably demonstrate the increased costs caused by the differing LBE Plan requirements, using the same qualitative and quantitative methodologies that were used to calculate the costs of the LBE percentage goals and objectives described in Technical Submittal 28.

(iv) Changes to PCIC. The PCIC changes due to a change in the actual gross square footage of the Bus Yard Component or the Housing and Commercial Component from that anticipated in the Technical Proposal and Financial Proposal.

(c) No Other Increases to Fixed Budget Limit. The Fixed Budget Limit will not be adjusted to reflect any increases in the cost to design and build the Infrastructure Facility or to perform the Infrastructure Facility Maintenance, except as specified in Section 2.5(b) (Increases to Fixed Budget Limit), unless City provides its consent, in City's sole discretion.

(d) Reductions to Fixed Budget Limit. City anticipates that, as the Work progresses, the design and construction costs and the Infrastructure Facility Maintenance costs of the Infrastructure Facility, and consequently the Fixed Budget Limit, will trend downward from the Fixed Budget Limit set forth in the FS Form A7 of the Financial Proposal. In addition, the Fixed Budget Limit will be reduced by the MME Expansion Project procurement costs set forth in FS Form A5-PR if the Parties do not sign the MME Construction Agreement (except to the extent that Lead Developer demonstrates to City's satisfaction that Lead Developer has incurred reasonable MME Expansion Project procurement costs), and to account for reductions in the design and construction costs, or the Infrastructure Facility Maintenance costs, of the Infrastructure Facility, arising from changes to the Project made prior to Performance Milestone 27A, including due to: (i) City Proposed Changes, (ii) LD Proposed Changes accepted by the City, (iii) LBE Plan requirements differing from the LBE assumptions given in Technical Submittal 28 of the Technical Proposal, and (iv) PCIC changes due to a change in the actual gross square footage of the Bus Yard Component or the Housing and Commercial Component from that anticipated in the Technical Proposal and Financial Proposal.

(e) Submittals, and Process for Adjustments to Fixed Budget Limit.

(i) Fixed Budget Limit Forms. At Performance Milestone 15 and Performance Milestone 27A, Lead Developer must submit updated versions of FS Forms A1, A2, A3, A4, A5-PR, A7 and A8 and FS Form B to the Financial Proposal, a full and detailed cost estimate in accordance with Attachment 2 to Appendix B-2, a summary schedule in accordance with Appendix B-2 and in the same format as Appendix H, and a risk register in accordance with Appendix B-2. Such updated versions will reflect the following:

A. The updated costs to design and build the Infrastructure Facility and provide the Infrastructure Facility Maintenance, including any changes in costs to the extent arising from the circumstances described in Section 2.5(b) (Increases to Fixed Budget Limit) and Section 2.5(d) (Reductions to Fixed Budget Limit), and updates to the LD Predevelopment Cost, if any, as expressly permitted by this Agreement; and

B. Any change in the actual gross square footage of the Bus Yard Component or the Housing and Commercial Component.

(ii) If the materials submitted pursuant to Section 2.5(e)(i) (Fixed Budget Limit Forms) at Performance Milestone 15 and Performance Milestone 27A are approved by City and show any change in the cost to design and build the Infrastructure Facility or perform the Infrastructure Facility Maintenance due to any of the matters described in Section 2.5(b) (Increases to Fixed Budget Limit) or Section 2.5(d) (Reductions to Fixed Budget Limit), or any change to the LD Predevelopment Cost expressly permitted by this Agreement, or any

change to the actual gross square footage of the Bus Yard Component or the Housing and Commercial Component from that anticipated in the Technical Proposal and Financial Proposal, the Fixed Budget Limit will be modified accordingly at Performance Milestone 16 and at Performance Milestone 28 to be the amount shown in the updated version of FS Form A7 submitted by Lead Developer at Performance Milestone 27A.

(f) Allowances Cost Estimates.

(i) Updates to Form D. At Performance Milestone 15 and Performance Milestone 27A, Lead Developer must submit updated versions of FS Form D to the Financial Proposal and cost estimates in the same format as Attachment 2 to Appendix B-2. The updated information for the Allowance cost estimates shall also be clearly identified in each submission of the Design Deliverables to City (draft and final), as shown in Appendix B-1. The updated version of FS Form D submitted at Performance Milestone 15 must include an explanation for any differences from the Allowance amounts set forth in FS Form D of the Financial Proposal. The updated version of FS Form D submitted at Performance Milestone 27A must include an explanation for any differences from the Allowance amounts set forth in FS Form D submitted at Performance Milestone 15. If any Allowance prices exceed the applicable Allowance amounts in FS Form D of the Financial Proposal, Lead Developer shall propose design strategies and changes to the relevant scope(s) and/or technical requirement(s) to bring them back within the Allowance amounts stated in FS Form D of the Financial Proposal.

(ii) Insurance. At Performance Milestone 15 and Performance Milestone 27A Lead Developer must submit, at item (g) in Part I and item (c) in Part III of FS Form D, its reasonable estimate of the cost of the insurance that will be required for the design and construction of the Infrastructure Facility and the Infrastructure Facility Maintenance, respectively (the “**Required Insurance**”). If the Principal Project Company will self-perform the Infrastructure Facility Maintenance, then at Performance Milestone 32, Lead Developer must submit to City an updated version of FS Form D submitted at Performance Milestone 27A, with the only change being to item (c) in Part III of FS Form D showing the actual cost of the Required Insurance for the Infrastructure Facility Maintenance.

(iii) Escalation. At Performance Milestone 15 and Performance Milestone 27A, Lead Developer must submit, at item (h) in Part I of FS Form D, the updated construction cost escalation Allowance, which shall be equal to the 5-year average of the Engineering News Record (ENR) Buildings Cost Index (BCI) in San Francisco, averaged year over year from the date of the corresponding Performance Milestone, and applied from the date of the corresponding Performance Milestone to the mid-point of construction.

(g) Sum of Fixed Budget Limit, Insurance, Escalation. At Performance Milestone 15 and Performance Milestone 27A, Lead Developer must submit FS Form A8 setting forth the sum of the updated Fixed Budget Limit, plus insurance costs, plus the escalation amount.

**2.6. Allocation of Common Infrastructure Costs.** “**Common Infrastructure Costs**” means the total costs (including those costs incurred during the PDA Term) to design and build the Common Infrastructure and perform the Infrastructure Facility Maintenance with respect to the Common Infrastructure. The PCIC under the Transaction Documents is stated in the FS Form B of the Financial Proposal (the “**Original FS Form B**”); provided, however, that if the gross square footage of the Bus Yard Component or the Housing and Commercial Component changes from the gross square footage set forth in the Technical Proposal and Financial Proposal, the PCIC(Max) and the PCIC shown in the Original FS Form B will be adjusted accordingly at Performance Milestone 27A. In calculating any PCIC adjustment at Performance Milestone 27A, there shall be no change in the PCIC(Dis) from that described in

Original FS Form B, except that if as a result of an HCC Change pursuant Section 9.2 (HCC Change) the Project is modified to only be comprised of the Bus Yard Component, then the PCIC(Dis) shall be zero.

City will compensate the Principal Project Company for delivering the Infrastructure Facility and performing the Infrastructure Facility Maintenance, adjusted by the PCIC, via an industry-standard, performance-based regime of Availability Payments during the Infrastructure Facility Term. The Housing Project Company will pay for its share of the annual cost of Infrastructure Facility Maintenance, based on the PCIH, starting on Substantial Completion of the Infrastructure Facility or on such other date as mutually agreed by the Parties and every year thereafter for the Housing Term.

**2.7. Diligent and Good Faith Efforts.** Subject to each Party's termination rights under the terms of this Agreement, each Party agrees to diligently and in good faith pursue to completion all of its respective obligations under this Agreement during the PDA Term. Lead Developer agrees to commit the financial and personnel resources reasonably required to fulfill its obligations under this Agreement, and pay all costs it incurs to fulfill its obligations under this Agreement. City agrees to commit the personnel resources reasonably required to fulfill its obligations under this Agreement.

**2.8. Standard of Care.** Each Party agrees to perform, and to cause its Agents to perform, its obligations under this Agreement in accordance with accepted standards of professional practice that are applicable to other projects of similar size and complexity in the San Francisco Bay Area. This standard of care shall apply to and define all professional obligations provided by licensed professionals for any of the Work Materials.

**2.9. Suspension of Obligations.** If a Party cannot timely satisfy any obligation under this Agreement solely because the other Party's failure to timely comply with its obligations under this Agreement, the affected obligation of the first Party will be suspended until the other Party performs the unperformed obligation that is precluding or preventing the first Party's performance, with a corresponding extension to the Performance Date for any Performance Milestone the first Party is precluded or prevented from timely performing solely due to the other Party's failure. The first Party must continue to perform all of its other obligations under this Agreement to the extent they are not precluded or prevented by other Party's failure.

**2.10. Exclusive Negotiations; City's Reserved Rights.** City will not solicit or consider any other proposals or negotiate with any other party with respect to developing or using the Project Site without Lead Developer's consent; provided, however, that City reserves the right, in its sole discretion but subject to Section 9.3 (Changes Proposed by City), to take or not take, any or all of the following actions at any time:

(a) Enter into agreements for the use, occupancy, maintenance or repair of all or any portion of the Project Site as long as they do not prevent Lead Developer from conducting due diligence investigations of the Project Site that are reasonably needed for the Project, permanently alter the condition of the Project Site, and expire or are terminable by City without penalty, cost or expense to Lead Developer before Commercial Close. Lead Developer acknowledges the Project site is being used for transit operations and it will need to schedule its due diligence activities in a manner that does not unreasonably interfere with those operations.

(b) Waive, extend or conditionally extend the time to complete the various Performance Milestones by the applicable dates set forth in Appendix B-1 attached hereto (the "**Performance Dates**"), subject to the requirements of Section 3.2 (Performance Milestones) with regard to extending any of the Performance Milestones beyond the Predevelopment Period.



(c) Expand or contract the scope of the Project by altering the Technical Requirements to respond to new information, community, regulatory or environmental issues, or opportunities to reduce costs to City or to enhance community benefits.

In addition, if negotiations with Lead Developer under this Agreement are unsuccessful or do not lead to approval of the Transaction Documents by the Director of Transportation or, as applicable, the SFMTA Board, the Board of Supervisors, or any other City commission or board within the PDA Term, City has the right to negotiate with another developer for the development of the Project Site, to elect not to pursue any project at the Project Site, or to undertake other efforts with the Project Site including pursuing a new procurement or issuing a new request for proposals. Lead Developer agrees that if this Agreement terminates on its own terms, City shall have the right to elect to negotiate with another Short-Listed Proposer or to reprocur the Project.

## **2.11. Proprietary or Confidential Information.**

(a) Lead Developer Information. The Parties enter into this Agreement with the understanding that in the course of the negotiations City may require that Lead Developer provide certain information that is proprietary. Such information may be necessary for City to verify financial, operational or trade secret information that is relevant to the negotiations of the Transaction Documents and the review of other Project Documents that will serve the public interest and the economic feasibility of the Project. Lead Developer will provide such information, and with respect to such information Lead Developer reasonably designates as confidential trade secret or proprietary information, Lead Developer will clearly identify, in writing and with specificity, the materials it believes to be confidential trade secret or proprietary information and the provision of the Public Records Act and the Sunshine Ordinance that it believes to provide an exemption to disclosure (the “**LD Confidential Information**”). City shall not publicly disclose LD Confidential Information without Lead Developer’s consent except to the extent City is compelled to make such a disclosure under Applicable Law. Lead Developer acknowledges that regardless of its determination that any information or materials are confidential trade secret or proprietary information, City must make its own determination of whether the LD Confidential Information or other information or materials are confidential trade secret or proprietary or are subject to disclosure under existing law.

City agrees to notify Lead Developer of any public records request that involves LD Confidential Information. Lead Developer agrees to bear all the costs of any litigation that is filed to determine the applicability of the public records law to documents submitted by Lead Developer and designated as LD Confidential Information under this **Section 2.11 (Proprietary or Confidential Information)**. Lead Developer acknowledges that the drafts of the Project Documents and other Work Materials during negotiations and other correspondence between Lead Developer and City may be public records.

(b) City Information. Lead Developer understands and agrees that, in the performance of the Work or in contemplation thereof, Lead Developer may have access to private or confidential information that may be owned or controlled by City (“**City Confidential Information**”). The City Confidential Information may contain proprietary or confidential details, the disclosure of which to third parties may be damaging to City. Lead Developer shall exercise the same standard of care to protect the City Confidential Information as a reasonably prudent developer would use to protect its own proprietary data.

Lead Developer agrees to hold any City Confidential Information it receives from or creates under this Agreement in strictest confidence and used only in the performance of the Work. Lead Developer shall not use or disclose any City Confidential Information or other City data it receives under this Agreement (“**City Data**”) except as permitted or required by the Agreement or as otherwise authorized in writing by City. Any work using, or sharing or storage

of, City Confidential Information outside the United States is subject to prior written authorization by City. Access to City Confidential Information must be strictly controlled and limited to Key Personnel on a need-to-know basis only. Lead Developer is provided a limited non-exclusive license to use the City Data or Confidential Information solely for performing the Work and not for Lead Developer's own purposes or later use. Nothing herein shall be construed to confer any license or right to the City Data or City Confidential Information, by implication, estoppel or otherwise, under copyright or other intellectual property rights, to any third party. Unauthorized use of City Data or City Confidential Information by Lead Developer, the Lead Developer Agents or other third parties is prohibited. For purpose of this requirement, the phrase "unauthorized use" means the data mining or processing of data, stored or transmitted by the service, for commercial purposes, advertising or advertising-related purposes, or for any purpose other than security or service delivery analysis that is not explicitly authorized.

On any termination of this Agreement (unless this Agreement is terminated due to the full execution of the Project Agreement) or at City's request, Lead Developer shall, within forty-eight (48) hours, return all City Confidential Information which includes all original media. Once Lead Developer has received written confirmation from City that all the City Confidential Information has been successfully transferred to City, Lead Developer shall within ten (10) Business Days purge all the City Confidential Information from its servers, any hosted environment Lead Developer has used in performance of this Agreement, work stations that were used to process the data or for production of the data, and any other work files stored by Lead Developer in whatever medium. Lead Developer shall provide City with written certification that such purge occurred within five (5) Business Days of the purge.

### **3. TERM; PERFORMANCE DATES**

**3.1. PDA Term; Predevelopment Period Extensions.** The term of this Agreement (the "**PDA Term**") will commence on the Effective Date and will expire on the earlier date (the "**Expiration Date**") to occur of the Commercial Close and the expiration of the Predevelopment Period, subject to earlier termination as provided in this Agreement. The Parties obligations under this Agreement will terminate on the termination of this Agreement, subject to any obligations that expressly survive such termination.

The Predevelopment Period can only be extended with the written consent of both Parties, which consent shall not be unreasonably withheld, conditioned or delayed; provided, however, that a non-requesting Party has the sole discretion to withhold or condition its consent to the other Party's Predevelopment Period extension request if the requesting Party is in default of its obligations under this Agreement at the time of submitting the extension request. A Party requesting a Predevelopment Period extension shall do so by delivering written notice of that extension request (an "**Extension Request**") to the other Party. The non-requesting Party must respond in writing to an Extension Request within ten (10) Business Days of receiving of an Extension Request. If the non-requesting Party withholds its consent to an Extension Request, the requesting Party has the right to request a meeting of the Parties to discuss the matter by delivering a written meeting request to the non-requesting Party within ten (10) Business Days of receiving the non-requesting Party's written notice of withholding its consent to the Extension Request. If the requesting Party timely delivers the meeting request to the non-requesting Party, the Parties must meet to discuss the Extension Request at a mutually agreeable time within ten (10) Business Days of the non-requesting Party's receipt of the meeting request. If the non-requesting Party does not agree to the Extension Request after that meeting, the Predevelopment Period will not be extended pursuant to that Extension Request.

### 3.2. Performance Milestones.

(a) **Compliance.** Each of the performance milestones ("**Performance Milestones**") are described in the attached Appendix B-1, which also establishes the dates for completing the Performance Milestones. The Parties established the Performance Milestones to ensure that the Commercial Close occurs on or before the expiration of the Predevelopment Period, the Substantial Completion of the Infrastructure Facility occurs no later than the Outside Delivery Date, and the Substantial Completion of the Housing and Commercial Component occurs no later than one year after Substantial Completion of the Infrastructure Facility. During the PDA Term, subject to City's delivery of the applicable Notice to Proceed to Lead Developer pursuant to Article 4 (PDA Phases; Notices to Proceed), the Lead Developer agrees to diligently pursue to completion the Performance Milestones in the manner and by the Performance Dates described in attached Appendix B-1. "Performance Milestones" shall include any additional Performance Milestones specified by the Parties in writing and "Performance Dates" shall include the performance dates mutually established by the Parties for those additional Performance Milestones.

Lead Developer's compliance with the Performance Milestones by the applicable Performance Dates shall not alter or reduce its obligations to comply with any other provision of this Agreement. The Performance Milestones shown in the attached Appendix B-1 can be changed by the mutual agreement of Lead Developer and City. It is anticipated that the PDA Management Plan could contain additional Performance Milestones and Performance Dates and propose other changes to Appendix B-1, all without increasing the LD Predevelopment Cost or changing the Predevelopment Period.

(b) **Phase 2 Floating Milestone.** The Performance Milestones include a "**Phase 2 Floating Milestone**", which will be achieved upon the last to occur of the following (the "**Floating Milestone Date**"): (i) the Planning Commission has certified the EIR and approved, or recommended to the Board of Supervisors for approval as applicable, the special use district, conditional use authorization, General Plan Referral, and related General Plan amendments (the "**Phase 2 Entitlements**") needed to construct and operate the Facility as stated in the Draft EIR project description or as otherwise mutually agreed to by the Parties; (ii) if the Planning Commission certification of the EIR is appealed, the Board of Supervisors, in its sole discretion, has adopted findings to affirm the Planning Commission's certification of the EIR; (iii) the Board of Supervisors has, in its sole discretion and as applicable, adopted legislation and findings to approve any Phase 2 Entitlements that require the approval of the Board of Supervisors to be effective, and (iv) the approvals and legislation described in the foregoing (i) through (iii) are effective.

### 3.3. Unavoidable Delays and Regulatory Appeal Delays.

(a) **Unavoidable Delay.** "**Unavoidable Delays**" means delays in the timely completion of a Performance Milestone by reason of enemy action, civil commotion, epidemics, pandemics, and related governmental orders and requirements (and private sector responses to comply with those orders and requirements), strikes, lockouts or other labor disputes, protests, riots, demonstrations, acts of God, or by any other similar reason without the fault and beyond the reasonable control of the Party meeting that Performance Milestone. Unavoidable Delays shall not include any Regulatory Appeal Delay, any delays in meeting the MME Project Expansion Performance Milestones specified in Section 6.24 (MME Expansion Project), any delays under the MME Construction Agreement, or any delays under any Early Works Agreement.

(b) **Regulatory Appeal Delay.** "**Regulatory Appeal Delay**" means any delays arising from a proceeding or administrative appeal before any court, tribunal, or other judicial,

adjudicative, or legislative decision-making body that challenges the validity of any Regulatory Approval if the pendency of the proceeding or appeal is reasonably likely to prevent the Parties from timely entering into the Transaction Documents. A Regulatory Appeal Delay includes litigation related to the approval of any of the Transaction Documents by the SFMTA Board or, as applicable, the Board of Supervisors, or any other City commission or board. Regulatory Appeal Delays exclude any action or proceeding brought by any Lead Developer Affiliate or their Affiliates, any Lead Developer Agents, or any other third party assisted directly or indirectly by Lead Developer.

(c) **Performance Extension.** If Lead Developer is unable to timely satisfy any Performance Milestone because of an Unavoidable Delay or a Regulatory Appeal Delay, except as otherwise described below, Lead Developer can extend the period for completing that Performance Milestone (a “**Performance Extension**”) by giving notice to City (the “**Extension Notice**”) within five (5) Business Days of Lead Developer first learning of that Unavoidable Delay or Regulatory Appeal Delay. The Extension Notice must describe the Unavoidable Delay or Regulatory Appeal Delay, as applicable, describe how it immediately affects the timely performance of Lead Developer’s obligations under the applicable Performance Milestone, and provide Lead Developer’s good faith estimate of the dates by which it will be able to satisfy the affected Performance Milestone(s) immediately affected by that Unavoidable Delay or Regulatory Appeal Delay, as applicable, provided that the estimate shall not extend the Performance Date for completing any of Performance Milestones beyond the Predevelopment Period (as may be extended by the Parties pursuant to Section 3.1 (*PDA Term; Predevelopment Period Extensions*)).

If Lead Developer delivers an Extension Notice to City, the Performance Dates for Lead Developer’s satisfaction of the Performance Milestones affected by the Unavoidable Delay or Regulatory Appeal Delay described in the Extension Notice will be extended to the dates specified in the Extension Notice (but no later than the expiration of the Predevelopment Period as may be extended by the Parties pursuant to Section 3.1 (*PDA Term; Predevelopment Period Extensions*)) unless Lead Developer delivers an Extension Notice to City and any of the following applies:

(i) On or before the tenth (10<sup>th</sup>) day following City’s receipt of the Extension Notice, City notifies Lead Developer in writing that there is no basis for a Performance Extension under the criteria set forth in this Section 3.3(c) (*Performance Extension*) for a Performance Extension; or

(ii) A Terminating Event has occurred.

Except for the changes in the Performance Dates for the Performance Milestones affected by an Unavoidable Delay or Regulatory Appeal Delay (which shall not be extended beyond the Predevelopment Period), all other terms and conditions of the Agreement will remain in full force and effect during a Performance Extension. Any Party that is unable to timely achieve any Performance Milestone it is required to meet due to an Unavoidable Delay or Regulatory Appeal Delay must proceed with due diligence to resolve the matters causing the Unavoidable Delay Event or Regulatory Appeal Delay to the extent reasonably possible and, once resolved, to use commercially reasonable efforts to achieve the affected Performance Milestone as soon as possible.

#### **4. PDA PHASES; NOTICES TO PROCEED**

**4.1. Performance.** Lead Developer shall perform, and cause the Lead Developer Agents, as applicable, to perform, the Work in compliance with all the terms and conditions of this Agreement. The Work is to be performed in the three phases (each, a “**PDA Phase**” and



collectively, the “**PDA Phases**”) described in the attached Appendix B-1, with each PDA Phase only commencing if City, in its sole discretion, issues a written notice to proceed (a “**Notice to Proceed**” or “**NTP**”) to Lead Developer for that PDA Phase. Lead Developer is not authorized to perform Work for any PDA Phase until City delivers a Notice to Proceed to Lead Developer for that PDA Phase. In addition, if the Floating Milestone Date occurs, Lead Developer is not authorized to perform any further PDA Phase 2 Work after the Floating Milestone Date unless City delivers a Notice to Proceed for the remaining PDA Phase 2 Work. Notwithstanding anything to the contrary in the two preceding sentences, Lead Developer may elect to perform Work for a PDA Phase before receiving a Notice to Proceed for that PDA Phase, or before receiving a Notice to Proceed for the remaining PDA Phase 2 Work after the Floating Milestone Date occurs, at the risk of not receiving any Termination Payment for that Work if City terminates this Agreement before delivering the applicable Notice to Proceed to Lead Developer.

#### **4.2. Notices to Proceed; Decision Not to Proceed**

(a) Notice to Proceed #1. City will deliver Notice to Proceed #1 of Appendix B-1 to Lead Developer within five (5) Business Days of the last to occur of (i) the full execution and delivery of this Agreement, (ii) the full execution and delivery of the Guaranty, (iii) Lead Developer’s delivery of the evidence of insurance required in Article 17 (Insurance) and any other materials reasonably required by City, and (iv) Lead Developer becoming a City vendor with a valid business tax registration number from the Business Tax Division of the San Francisco Tax Collector.

(b) Additional Notices to Proceed. City can elect, in its sole discretion, to issue to Lead Developer a Notice to Proceed #2 as described in Appendix B-1 for PDA Phase 2 after City has issued a Notice of Acceptance with respect to PDA Phase 1, subject to any suspension of the PDA Phase 2 Work pursuant to Section 4.2(d) (Suspension of PDA Phase 2; Continuation Payment). City can elect, in its sole discretion, to issue to Lead Developer a Notice to Proceed #3 as described in Appendix B-1 for PDA Phase 3 after City has issued a Notice of Acceptance with respect to PDA Phase 2. The issuance of any Notice to Proceed shall not be deemed to excuse the continued compliance with the requirements for the issuance of any prior Notice to Proceed.

(c) Decision Not to Proceed. City has the sole discretion in determining whether to issue a Notice to Proceed for any of the PDA Phases. If City decides not to proceed with a PDA Phase, it must provide written notice of that decision to Lead Developer (a “**Discontinuation Notice**”), after which this Agreement will terminate in accordance with Article 16 (Termination). Within fifteen (15) Business Days of receiving a Discontinuation Notice, Lead Developer will deliver all Work Materials that is in the possession of Lead Developer or the Lead Developer Agents and was not previously delivered to City.

#### **(d) Suspension of PDA Phase 2; Continuation Payment.**

(i) If the Floating Milestone Date occurs, then Lead Developer’s obligation and authorization to perform the PDA Phase 2 Work shall automatically be suspended as of the Floating Milestone Date unless City elects, in its sole discretion, to issue a Notice to Proceed for the continuation of the PDA Phase 2 Work (a “**Continuation Notice**”). Within 45 Business Days of issuing a Continuation Notice, City shall make a payment of Four Million Three Hundred Fifty Thousand Dollars (\$4,350,000) (the “**Continuation Payment**”) to Lead Developer in exchange for an executed release from Lead Developer satisfactory in form and substance to City. The executed release from Lead Developer shall release, waive, and discharge City and City Agents of and from all liabilities, obligations, claims, and demands whatsoever arising out of or under this Agreement for Work during the period beginning on the Effective

Date and ending on the Floating Milestone Date. City's ability to issue the Continuation Notice is contingent on obtaining the authorizations described in Section 4.2(d)(ii).

(ii) City's payment of the Continuation Payment requires the prior authorization of both the SFMTA Board and the Board of Supervisors, each acting in their respective sole discretion.

(iii) If the Floating Milestone Date occurs and City obtains the authorizations described in Section 4.2(d)(ii), but does not elect to issue the Continuation Notice on or before the 30th day after the Floating Milestone Date (the "**Outside Suspension Date**"), then City must provide a Discontinuation Notice to Lead Developer within five (5) Business Days after the Outside Suspension Date, after which this Agreement will terminate in accordance with Article 16 (Termination).

(iv) If the Floating Milestone Date occurs but City does not obtain the authorizations described in Section 4.2(d)(ii) by the Outside Suspension Date, the Parties can mutually agree in writing to permit City to issue the Continuation Notice without any City obligation to make the Continuation Payment.

#### **4.3. Acceptance of Work.**

(a) Acceptance Request. Within five (5) Business Days of determining all the Work for a PDA Phase has been fully completed, including the delivery of the required Work Materials for that PDA Phase, Lead Developer will submit a written request (each, an "**Acceptance Request**") for Acceptance of the PDA Phase specifying that the Work for that PDA Phase is completed and the date that Work was completed to City.

(b) Notice of Incompleteness. Within fourteen (14) Business Days of receiving an Acceptance Request, if City determines that the Work for the applicable PDA Phase is not complete or if additional information is required to determine if Acceptance should be granted, City must notify Lead Developer in writing of any outstanding Work that must be completed at no cost to City and any other outstanding issues (each, a "**Notice of Incompleteness**"). Lead Developer must promptly cure the deficiencies identified in the Notice of Incompleteness and submit a new Acceptance Request for that PDA Phase. The procedure in this subsection (b) shall be repeated until City is satisfied that all Work required for that PDA Phase has been completed in accordance with this Agreement and no further requirements must be met.

(c) Notice of Acceptance. City will issue a Notice of Acceptance for the Work in a PDA Phase if it has received an Acceptance Request for that PDA Phase and determines, in its sole discretion, that the Work for that PDA Phase is complete and the following conditions are met:

(i) Lead Developer has provided a certification that the Work for the applicable PDA Phase has been completed;

(ii) Lead Developer has delivered and City has, if applicable, approved in writing all Work Materials required for that PDA Phase under this Agreement;

(iii) Lead Developer has provided a signed statement under penalty of perjury and in form acceptable to City that all other debts and claims of all applicable Lead Developer Agents and suppliers relating to the Work for that PDA Phase and prior PDA Phases have been paid or settled and provided evidence that any Agents or suppliers that created the

Work Materials have consented to those Work Materials being assigned to City if this Agreement terminates for any reason other than Commercial Close; and

(iv) All of Lead Developer's other obligations relating to that PDA Phase have been satisfied in full or waived in writing by City.

## **5. PROJECT DOCUMENTS**

### **5.1. Negotiating Principles.**

(a) Coordination in Responses. Lead Developer shall ensure each draft of a Project Document, or each response to a draft Project Document, that Lead Developer delivers to City for review under this Agreement has been internally reviewed by the appropriate Lead Developer Related Entities. City shall ensure each draft of a Project Document, or each response to a draft Project Document, that City delivers to Lead Developer for review has been internally reviewed by the appropriate City parties acting with respect to City's rights and obligations under this Agreement.

(b) Good Faith Efforts. The Preliminary Term Sheet provides some of the terms to be incorporated in the Project Agreement and, as applicable, the other IF Transaction Documents except to the extent the Parties mutually agree to modify any of those terms. Section 6.9(d) (HCC Term Sheet) provides some of the terms to be incorporated in the HCC Agreement and, as applicable, the other HCC Transaction Documents except to the extent the Parties mutually agree to modify any of those terms. City reserves the right, in its sole discretion, to modify the Preliminary Term Sheet (either through a revised Preliminary Term Sheet or through development of the Project Agreement) to reflect the Proposal, the commercial/financial structure that is developed during the PDA Term and for impacts to the terms of the Preliminary Term Sheet arising out of the commercial/financial structure of the Housing and Commercial Component. If and to the extent that City does decide to modify the Preliminary Term Sheet (either through a revised Preliminary Term Sheet or through development of the Project Agreement), City will collaborate with Lead Developer on the modified terms. During the PDA Term, City and Lead Developer will each use commercially reasonable good faith efforts to negotiate the terms of the Transaction Documents. The obligation to negotiate in good faith requires the Parties to communicate with each other with respect to those issues for which agreement has not been reached, and in such communication to follow reasonable negotiation procedures, including meetings, telephone, virtual meetings, and correspondence.

(c) Meeting Schedule. The Parties must establish a schedule for weekly meetings, and for providing and reviewing various drafts of the Project Agreement, the HCC Term Sheet, and the other Transaction Documents. This schedule must reflect the Performance Dates for submitting the Project Agreement, the HCC Term Sheet and other Transaction Documents to the SFMTA Board for consideration, the Outside Delivery Date, and the date for Substantial Completion of the Housing and Commercial Component no later than one year after Substantial Completion of the Infrastructure Facility. Lead Developer shall submit its proposed schedule to City by Performance Milestone 2. If the Parties cannot mutually agree on that schedule on or before by Performance Milestone 5 or any later date approved by City in writing, City can terminate this Agreement.

(d) Conformity. The Transaction Documents must conform to the Preliminary Term Sheet, the HCC Term Sheet requirements set forth in Section 6.9(d) (HCC Term Sheet), the Technical Proposal, and the Financial Proposal, except to the extent the Parties mutually agree to revise them, and meet the requirements of this Agreement. The Transaction Documents must be mutually satisfactory to City and Lead Developer, and approved as to form by the Office of the City Attorney.

(e) Subject to Approvals. The negotiated form of each Transaction Document shall be subject to the completion of CEQA review and the Planning Commission's certification of the EIR, the Parties' successful negotiation of the final terms of all of the Transaction Documents (subject to an approved HCC Change pursuant to Section 9.2 (HCC Change) to remove the Housing and Commercial Component), and approval of the negotiated Transaction Documents by the SFMTA Board and, as applicable, the Board of Supervisors and any other City board or commission, each acting in its sole discretion.

## **5.2. Transaction Documents.**

(a) City will submit drafts of the Project Agreement and the HCC Agreement to Lead Developer by the applicable Performance Date specified in the Performance Milestones. City prepare the first drafts of all other Transaction Documents unless otherwise mutually agreed by the Parties.

(b) If the Performance Milestones do not specify a Performance Date for delivering a specific Transaction Document (an "**Unspecified Document**"), City shall deliver the initial draft of that Unspecified Document by the date mutually, if any, selected by the Parties. If the Parties do not agree on a specific date, City will deliver the draft to Lead Developer by Performance Milestone 19.

(c) Each draft of the Transaction Documents must incorporate the following to the extent applicable to that Transaction Document: (i) the Technical Requirements, (ii) the Project Objectives, (iii) the requirements of Section 6.5(c) (Project Agreement), Section 7.1 (Development Team), Section 7.2 (Key Personnel; Organization), and Section 15.1 (Prohibited Payments), (iv) the LBE Plan, (v) the Asset Management Program and Energy Management Program, (vi) the Fixed Budget Limit and the updated Financial Model for the design and delivery of the Infrastructure Facility and performance of the Infrastructure Facility Maintenance for the Infrastructure Facility submitted at Performance Milestone 32, (vii) require Substantial Completion of the Infrastructure Facility no later than the Outside Delivery Date, and Substantial Completion of the Housing and Commercial Component no later than one year after Substantial Completion of the Infrastructure Facility, (viii) require that the Project be consistent with the Project description in the EIR and require the Principal Project Company to comply with and implement the MMRP, and (ix) the requirements listed in the attached Appendix M.

(d) As long as a Party complies with its obligations to negotiate in good faith under Section 5.1 (Negotiating Principles), timely submits the drafts of each Transaction Document it is required to submit to the other Party by the applicable Performance Date, timely provides its comments to the drafts of each Transaction Document submitted by the other Party by the applicable Performance Date, and for each draft Transaction Document incorporates or otherwise conforms the matters described in the foregoing sentence to the extent applicable, that Party will not be in default of its obligations under this Agreement by reason of the Parties' failure to mutually agree to the final form of any Transaction Document.

**5.3. Approval of Project Agreement and Other Transaction Documents.** The Parties acknowledge that the SFMTA Board and Board of Supervisors will, and other City boards or commissions may, need to approve the Project Agreement negotiated under this Agreement, and their approval may be required for the other Transaction Documents. Lead Developer understands and agrees that although the SFMTA is a department of the City, City staff and executives have no authority or influence over the SFMTA Board, the Board of Supervisors, or other City boards or commissions for approval of any Transaction Documents. Accordingly, there is no guarantee or a presumption that any Transaction Document negotiated by the Parties under this Agreement will be approved by the SFMTA Board, the Board of Supervisors or, if applicable, any other City board or commission. City's sole obligation under



this Agreement with respect to the approval of the Transaction Documents shall be to negotiate in good faith with Lead Developer, review Lead Developer's timely submittals in good faith, provide any comments it is required to deliver to Lead Developer by the applicable Performance Date, and present and recommend any final negotiated Transaction Documents that are in the forms approved by the City Project Director and the LD Project Director to the SFMTA Board and the Board of Supervisors (and if applicable, any other City boards or commissions) for their review and consideration, acting in their respective sole discretion.

## **6. PREDEVELOPMENT WORK**

### **6.1. Statement of Work.**

(a) During the PDA Term, Lead Developer must conduct all predevelopment activities needed to (i) develop the Project in compliance with this Agreement and the PDA Management Plan approved by the City, (ii) reach Commercial Close before the expiration of the Predevelopment Period, (iii) reach IF Financial Close by November 30, 2024, (iv) reach Substantial Completion of the Infrastructure Facility in compliance with the requirements of this Agreement by no later than the Outside Delivery Date, (v) reach Substantial Completion of the Housing and Commercial Component no later than one year after Substantial Completion of the Infrastructure Facility, and (vi) avoid delaying Substantial Completion of the Infrastructure Facility beyond the Outside Delivery Date or adversely impacting the SFMTA's operations at or use of the Bus Yard Component. Such activities include, but are not limited, to the predevelopment obligations described in this Article 6 (Predevelopment Work).

(b) As part of City's rights under Section 9.3 (Changes Proposed by City), City may elect to change the Technical Requirements to include any or all of the additional scope item Allowances described in FS Form D, other than Allowances relating to escalation or insurance. Accordingly, Lead Developer shall also develop the scopes and technical requirements of the Allowances, using its best efforts to deliver each Allowance within the applicable cost estimate for that Allowance in FS Form D of the Financial Proposal.

**6.2. PDA Phases.** Lead Developer will deliver the Project Management Deliverables and Design Deliverables to City in the three PDA Phases described in the attached Appendix B-1. Lead Developer must timely deliver the Project Management Deliverables and Design Deliverables by the dates specified for them in the attached Appendix B-1 (as may be modified by Section 3.2 (Performance Milestones)), and prepare the other Work Materials in compliance with the PDA Management Plan schedule ("**Project Schedule**"). Any change in the initial Project Schedule from the schedule originally included in the Financial Proposal, and any change to the Project Schedule, will require written approval from the City.

**6.3. Due Diligence Investigation.** If City delivers Notice to Proceed #1 to Lead Developer, Lead Developer must duly execute and deliver to City the access agreement attached as Appendix L ("Access Agreement") for its due diligence investigations at the Project Site, either by providing the number of original signed copies requested by City or signing the Access Agreement through DocuSign, under a multifactor authentication process initiated by City. City must duly execute the Access Agreement by the tenth (10<sup>th</sup>) Business Day immediately following its receipt of the Access Agreement executed by Lead Developer. Lead Developer and City will use the form of Access Agreement for any other due diligence activities proposed by Lead Developer at the Project Site that are not included in the first Access Agreement executed by the Parties.

Lead Developer must complete all due diligence that is reasonably needed to determine if the Project Site is appropriate for the Project in consideration of the Preliminary Term Sheet, the Fixed Budget Limit, and the other requirements specified in this Agreement. Such due diligence



shall include the site due diligence investigations set forth in Appendix B-2, and shall include, but not be limited to, determining (i) the quality, nature, adequacy and physical condition of the Project Site, including all aspects of the existing improvements, the physical, geological and environmental condition of the Project Site (including soils and any groundwater), and the presence or absence of any hazardous materials in, on, under or about the Project Site, (ii) all title matters affecting the Project Site, (iii) the Applicable Law and private or public covenants, conditions and restrictions relating to the Project Site and its legal status, including, without limitation, the compliance of the Project Site or its operation, (iv) taxes, assessments, use permit requirements relating to the Project Site and the Project, and (iv) all other matters of material significance affecting the Project Site. Lead Developer shall submit the scope of its proposed due diligence investigation of the Project Site and the final reports, analyses, and materials it prepares and receives regarding the conditions described in (i) and (ii) of this paragraph to City by the applicable Performance Dates specified in the Performance Milestones.

All entries by Lead Developer or the Lead Developer Agents onto the Project Site to perform any testing, inspections, or other investigations will be made only at mutually agreeable times and pursuant to the terms and conditions of the Access Agreement. As specified in the Access Agreement, Lead Developer acknowledges the Project Site has active high voltage overhead lines and special clearance procedures and authorizations will be necessary before Lead Developer or the Lead Developer Agents can commence certain due diligence activities at the Project Site. Lead Developer is responsible for scheduling sufficient time to comply with these procedures and obtain these authorizations in order to timely commence and complete its due diligence investigations at the Project Site.

**6.4. Compliance with Plans.** The PDA Management Plan and the other plans described in Appendix B-2 must guide Lead Developer's predevelopment activities and obligations for the Project during the PDA Term. If the PDA Management Plan and those other plans are approved by City through the process described in Appendix B-2, Lead Developer must promptly follow and comply with each of the processes and requirements described in them.

#### **6.5. Design Development.**

**(a) Compliance of Design Deliverables.** Every Design Deliverable must comply with the Technical Requirements and the requirements of Appendix B-2, regardless of any conflicts between the Technical Requirements and the Technical Concept Design submitted as part of the Proposal, unless City approves of any variance in writing, which approval will be in its sole discretion. Every Design Deliverable must maintain the Fixed Budget Limit. Lead Developer is solely responsible for ensuring the Design Deliverables and all other Project design work performed by or for Lead Developer during the PDA Term complies with Applicable Law and the requirements and procedures of this Agreement. Lead Developer bears the risk of any of the Design Deliverables being incorrect or incomplete due to an incomplete and/or incorrect review, examination or investigation of the Project Site or its existing improvements as long as City gives Lead Developer adequate access to the Project Site for its due diligence investigations, subject to the limitations specified in Section 6.3 (Due Diligence Investigation) and the Access Agreement.

**(b) Design Deliverable Analyses.** In developing each Design Deliverable, Lead Developer must comply with the following:

**(i)** Incorporate and make design changes as needed to comply with the Technical Requirements without exceeding the Fixed Budget Limit.

(ii) Evaluate changes to the design that are directly related to material changes to the Technical Requirements implemented pursuant to Article 9 (Changes to the Project). Lead Developer shall provide City with a cost and schedule impact analysis for each proposed material change to the Technical Requirements and a determination if these would increase or decrease the Fixed Budget Limit. As stated in Section 2.10 (Exclusive Negotiations; City's Reserved Rights) and Article 9 (Changes to the Project), City retains sole discretion to propose, accept, or reject any changes to the Technical Requirements.

(iii) Evaluate the development of the Allowance items and provide City with (i) a full and detailed cost estimate of those items in accordance with Attachment 2 to Appendix B-2, (ii) a summary schedule of those items in accordance with Appendix B-2 and in the same format as Appendix H, (iii) a risk register for those items in accordance with Appendix B-2 relative to their corresponding cost estimates provided by Lead Developer in FS Form D of the Financial Proposal, and (iv) a determination if these Allowances would increase or decrease the Fixed Budget Limit.

(c) Project Agreement. The Project Agreement must include substantially the same design submittal and review procedures and requirements for each subsequent design deliverable to be submitted by the Principal Project Company to City after Commercial Close, and shall follow the content and format requirements that shall be agreed by Lead Developer and City during the PDA Term. The Project Agreement design deliverables must comply with these design submittal and review requirements as stated in Appendix B-2 before they are submitted to City, acting in its regulatory capacity, for any site permit or construction permit.

**6.6. Asset Management Program.** Lead Developer must timely refine and finalize the scope of the Infrastructure Facility Maintenance and develop the Asset Management Program, as required in the PDA Management Plan and the attached Appendix B-2, all of which are subject to City's prior approval and must be performed in consultation with City. The Asset Management Program must be used by Lead Developer for the competitive bidding process for the Design-Build Contract and IFM Contract. As of Commercial Close, the implementation of the Asset Management Program will be part of the Principal Project Company's responsibilities under the Project Agreement during the Project's construction period and the Infrastructure Facility Term.

**6.7. Energy Management Program.** Lead Developer must develop an energy management program for the Facility ("**Energy Management Program**") in accordance with the requirements set forth in Appendix B-2 and in consultation with City. The Energy Management Program shall be consistent with good industry practice, Applicable Law, applicable standards and specifications. The Energy Management Program must be used by Lead Developer for the competitive bidding process for the Design-Build Contract and IFM Contract, all as part of the Asset Management Program Development Plan. As of the IF Commercial Close, the implementation of the Energy Management Program will be part of the Principal Project Company's responsibilities under the Project Agreement through the construction of the Infrastructure Facility and the Infrastructure Facility Terms.

**6.8. Project Financing.** Lead Developer must competitively procure and obtain sufficient debt financing for the development and timely delivery of the Project consistent with the Financial Proposal and in compliance with the Financing Management Plan described in the attached Appendix B-2, if approved by City; provided that if a Lead Developer's finance plan for the Infrastructure Facility and the Housing and Commercial Component is approved by the City at Performance Milestone 34, Lead Developer must then competitively procure and obtain the debt financing described in that City-approved finance plan (the "**Finance Plan**").

**6.9. HCC Predevelopment Work.** Lead Developer must use commercially reasonable, good faith efforts to perform all predevelopment activities needed to timely develop, design, finance, fund, construct, operate and maintain the Housing and Commercial Component as described in the Technical Proposal (the “**Proposed HCC**”), as may be modified pursuant to Section 9.2 (HCC Change) or Section 9.3 (Changes Proposed by City). Such predevelopment activities include, but are not limited to, the activities described in this Section 6.9 (HCC Predevelopment Work).

(a) HCC Interface Requirements. The Housing and Commercial Component must meet the following requirements (the “**HCC Interface Requirements**”):

(i) the Housing and Commercial Component must timely fund its share of the Common Infrastructure design, construction, operation and maintenance costs (based on PCIH);

(ii) the development, financing and construction of the Housing and Commercial Component must not delay Substantial Completion of the Infrastructure Facility, which must occur by the Outside Delivery Date;

(iii) the Housing and Commercial Component must achieve Substantial Completion within one year following Substantial Completion of the Infrastructure Facility; and

(iv) the construction of the Housing and Commercial Component must not interfere with or put at risk the Bus Yard Component or its transit operations, as determined by City, in its sole discretion.

A. The following Housing and Commercial Component construction activities are examples of activities that City currently expects would interfere with or impede the SFMTA’s transit operations after Substantial Completion of the Infrastructure Facility. Lead Developer may propose solutions to prevent such activities from interfering with or impeding SFMTA’s transit operations, but City shall have no obligation to accept or agree to those solutions.

(1) Any disturbance or temporary obstruction of building access for individuals, SFMTA vehicles, or Infrastructure Facility supporting services such as deliveries or waste retrieval as a result of Housing and Commercial Component construction activities, construction materials or equipment delivery, or staging of equipment or materials (a written request may be made to City for an exception at least six months in advance of any such proposed activity taking place, which City will review and respond in writing, in its sole discretion);

(2) Any damage to the Infrastructure Facility resulting from ongoing Housing and Commercial Component construction;

(3) Any changes to the Infrastructure Facility building or systems or disturbance to active Infrastructure Facility building operations or building systems, as a result of Housing and Commercial Component design integration; and

(4) Any mobilization for the start of construction.

B. The following Housing and Commercial Component construction activities are examples of activities that City currently expects would not interfere with or impede the SFMTA’s transit operations after Substantial Completion of the Infrastructure Facility, to the extent they do not result in any of the activities described in Section 6.9(a)(iv)(A)

and provided the following activities are completed no later than one year after Substantial Completion of the Infrastructure Facility:

(1) For completion of Housing and Commercial Component construction activities occurring above the completed Infrastructure Facility roof deck, any HCC construction activities that do not negatively impact the roof deck or the SFMTA operations being performed within the Infrastructure Facility, subject to structural analysis and design performed by the Lead Developer during the PDA phase to address potential impact loads from accidental loading;

(2) For completion of Housing and Commercial Component construction activities occurring below the completed Infrastructure Facility roof deck, interior finishes such as the installation of drywall, casework, tile, painting, final inspections and completion of punchlist items; and

(3) Demobilization of Housing and Commercial Component construction occurring above or below the completed Infrastructure Facility roof deck.

(b) **HCC Development Plan.** At the meeting described in Performance Milestone 1F, Lead Developer shall present its draft plan for (i) verifying feasibility and constructability of the Proposed HCC or any other housing that meets the Technical Requirements, (ii) securing Regulatory Approvals and financing for the Proposed HCC, (iii) constructing and achieving Substantial Completion of the Proposed HCC in a manner that meets the HCC Interface Requirements and the HCC Schedule, and (iv) performing the feasibility and financing analysis described in Section 6.9(g) (Feasibility Analysis). The plan is subject to the review and approval of City and the plan, if approved by City, will be the “**HCC Development Plan**”. The HCC Development Plan must include the HCC Schedule and the HCC Term Sheet and Lead Developer’s proposed collaborative approach to work with City to achieve the Proposed HCC in compliance with the HCC Interface Requirements. Lead Developer shall provide its draft HCC Term Sheet to City no later than thirty (30) days after the meeting described in Performance Milestone 1F.

(c) **HCC Schedule.** The “**HCC Schedule**” will be a schedule that provides the key Proposed HCC milestones and their timing, including but not limited to (i) the Parties’ review, negotiation and completion of the HCC Development Plan, the HCC Term Sheet, the HCC Agreement, and any other Project Documents required for the development, design, financing, construction, operation and maintenance of the Housing and Commercial Component, (ii) the dates for securing the needed Regulatory Approvals and financing, and (iii) the construction stages and milestones related to the Proposed HCC through its Substantial Completion, together with the anticipated Substantial Completion of the Infrastructure Facility. The HCC Schedule will also be used by the City to assist it with ensuring the development, financing, design, and construction of the Housing and Commercial Work will meet the HCC Interface Requirements and to help City plan for and manage its corresponding activities. Lead Developer will present a draft HCC Schedule to City at Performance Milestone 1F, which draft must incorporate the Housing and Commercial Component schedule included in FS Form F-PR of the Financial Proposal. Lead Developer shall update and submit the HCC Schedule at regular intervals and, at a minimum, at Performance Milestones 16 and 28.

(d) **HCC Term Sheet.** The “**HCC Term Sheet**” will outline the key terms of the HCC Agreement, which must conform with the relevant provisions of the Proposal (unless otherwise agreed to or modified under Section 9.2 (HCC Change) or through the final design process and approved by City) and the Technical Requirements. The HCC Term Sheet will be non-binding and conditioned on the completion of CEQA review and the Planning Commission’s certification of the EIR, the Parties’ successful negotiation of the Transaction



Documents and, and approval of the negotiated Transaction Documents by the SFMTA Board and, as applicable, the Board of Supervisors and any other City boards or commissions, each acting in its sole discretion. Except as otherwise mutually agreed by the Parties, the HCC Term Sheet must reflect the Proposal, comply with the Project Objectives and the Technical Requirements for the Housing and Commercial Component, and address the following terms related to the Housing and Commercial Component:

(i) A description of the real property interest in the parcel(s) (“**Premises**”) to be transferred to the Housing Project Company, which City will continue to own in fee;

(ii) The approved activities at the Premises;

(iii) A description of the Proposed HCC, including a summary of its size, layout, proposed buildings, and the private and public open spaces;

(iv) The details of each building, including that building’s number of affordable residential units and any market rate units listed by bedroom type and Area Median Income tier, the proposed rent and tenant income level restrictions and utility allowances for the affordable residential units, the minimum and average size of residential units by bedroom type, the affirmative marketing strategy, tenant preferences, resident services plan, and management plan, the proposed location and square footage of commercial and other space, and the financing strategy for constructing and operating the commercial space and the affordable and any market rate residential units;

(v) The public benefit program, the transportation demand management plan if required under the SFMTA’s Transportation Demand Management Program, or if a transportation demand plan is not required, the approach to facilitating public transit use by residents or other users of the Housing and Commercial Component, and the program of public right of way improvements;

(vi) The proposed efforts to achieve labor harmony;

(vii) A description of the needed Regulatory Approvals and the anticipated timing for applying for and securing those Regulatory Approvals;

(viii) A description of the anticipated financing and tax credits, including the timing that financing would be available, the timing of any application for financing and any applicable tax credits, the additional approvals needed for that financing or tax credits, and the relative availability of that financing or tax credits;

(ix) A description of the Housing Project Company’s contingency plans if the Housing Project Company cannot timely obtain the Regulatory Approvals, financing and (if applicable) tax credits needed for delivery of the Proposed HCC, and include (1) a requirement that, if any change is needed to the project to be constructed under the applicable HCC Agreement, the Housing Project Company first obtain City’s approval and any necessary Regulatory Approvals, and (2) a description of the process for obtaining those approvals.

(x) The proposed form of the HCC Agreement to grant the Housing Project Company a long-term real property interest in the Premises, the commencement and expiration of that interest, any conditions precedent to the commencement of that interest, and proposed payments equal to the value of that interest to City (provided a Housing Project Company may first recover the development costs for its Affordable Units, with the HCC Term Sheet describing the anticipated timing for recovering those development costs);



(xi) The conditions precedent to the execution of the HCC Agreement, HCC Financial Close, and the commencement of the HCC Term;

(xii) City participation in any transfer that results in the Housing Project Company (or any of its subtenants or assignees) receiving proceeds after deducting its costs of financing, developing, design, construction and improvement of the Premises and the transaction costs for that transfer (but excluding the lease or sublease of individual residential or commercial units) and calculation and allocation of cost savings resulting from any refinancing of the Housing and Commercial Component construction costs, if any;

(xiii) The method of paying the Housing and Commercial Component share of the Common Infrastructure costs, which will be based on the PCIH, and security for such payment, including the method for paying such costs between Substantial Completion of the Infrastructure Facility and any later Substantial Completion of any portion of the HCC;

(xiv) The security for financial close of any funding to be used to finance any market-rate building to be constructed at the Premises;

(xv) Commercially reasonable standard mortgagee protection provisions, to the extent any lender will take a security interest in any real property interest of the Premises or ownership interest in the Housing and Commercial Component improvements at the Premises;

(xvi) Insurance requirements and the Parties' respective rights and obligations with respect to damage and destruction;

(xvii) A description of capital reserves, security deposit, financing security, and the forms of payment and performance bonds;

(xviii) The sole responsibility and cost of the Housing Project Company (or its assignee) for designing, financing, building, operating, and maintaining the Premises and Housing and Commercial Component during the Housing Term and paying (or obtaining any available abatements) all property taxes and assessments levied against or related to the Housing and Commercial Component during the Housing Term;

(xix) Housing Project Company's obligations with respect to (A) the environmental condition of the Premises and any hazardous materials released at the Premises and (B) the environmental condition of the Common Infrastructure and any hazardous materials released at the Common Infrastructure, which shall be based on the PCIH;

(xx) Restrictions on assignment, subletting and other transfers of the HCC Agreement or the Housing Project Company's interest, including any restrictions on equity transfers or change of control of the Housing Project Company, and a requirement that the Guarantor (being the Guarantor as of the date of execution of this Agreement) or its Affiliate shall, until such time as the Housing and Commercial Component achieves Substantial Completion, be responsible for the delivery of the HCC (but not the financing of the HCC) and its integration with the Infrastructure Facility, by contract, or by other means, unless otherwise agreed to by City in its sole discretion. For the avoidance of doubt, the Housing Project Companies will have primary responsibility for delivering the Housing and Commercial Component and the Guarantor's (or its Affiliate's) responsibility hereunder does not require the provision of guarantees, security or other financial obligations for the delivery of the HCC on behalf of the Housing Project Companies or otherwise;

(xxi) The obligation to achieve Substantial Completion of the Housing and Commercial Component within one year following Substantial Completion of the Infrastructure Facility;

(xxii) Housing Project Company's obligation to ensure that, as of the date for Substantial Completion of the Housing and Commercial Component, it shall be free of defects, including design defects, errors and omissions, except as may be set out in the Housing and Commercial Component punch list (which shall be fully resolved as of final acceptance of the Housing and Commercial Component);

(xxiii) Remedies for defaults, including mortgagee protection rights of lenders and any termination rights for City;

(xxiv) The surrender condition of the Premises, including all improvements then located on the Premises, and any application of reserve funds and transfer of occupants' security deposits at the end of the Housing Term; and

(xxv) Any other fundamental terms, including any applicable stakeholder input, that will serve as a basis for negotiating the HCC Agreement.

(e) **Execution of HCC Term Sheet.** If the Parties mutually agree to a final version of the HCC Term Sheet by the date specified for that agreement in the HCC Schedule, Lead Developer will execute the HCC Term Sheet. If City elects to submit the HCC Term Sheet to the SFMTA Board or any other City body, Lead Developer must attend any meetings held by the SFMTA Board and, if applicable, any other City body considering the HCC Term Sheet. Lead Developer must also be prepared, at City's request, to provide supporting materials and present the HCC Term Sheet and Proposed HCC at any of those meetings. If either the SFMTA Board or, if applicable, any other City body, does not endorse the submitted HCC Term Sheet, then the Parties may mutually agree to modify the HCC Term Sheet and have it resubmitted for endorsement. City will execute the mutually-approved HCC Term Sheet within seven (7) Business Days of endorsement (if at all) of the HCC Term Sheet by the SFMTA Board or later endorsement (if at all) by any other City body, if applicable. The endorsed HCC Term Sheet is subject to modification pursuant to Section 9.2 (HCC Change) and Section 9.3 (Changes Proposed by City), and City may elect to submit modified versions of the HCC Term Sheet to the SFMTA Board or any other City body. The Parties acknowledge that any executed HCC Term Sheet is intended only to set forth general principles for negotiation of the HCC Agreement and the other HCC Transaction Documents. The HCC Agreement and each of the other HCC Transaction Documents will be subject to review and approval by the Parties, their respective legal counsel, the SFMTA Board, and as applicable, by the Board of Supervisors, with both boards acting in their sole discretion. Regardless of whether the HCC Term Sheet is executed by City, City cannot be bound by the HCC Agreement or any of the other HCC Transaction Documents until they are approved by the SFMTA Board and as applicable, the Board of Supervisors or any other City board or commission, each in their respective sole discretion, and executed by City, which will not occur until CEQA review for the Project is complete.

(f) **Financing.** Lead Developer must timely pursue the sources of Housing and Commercial Component funding listed in its Financial Proposal, and any additional sources of funding that it identifies during the PDA Term, in compliance with the HCC Schedule, the Financing Management Plan described in the attached Appendix B-2, and the Finance Plan, if any. Lead Developer shall also be responsible for ensuring compliance with all the conditions and requirements of that funding, including any that apply to actions taken by Lead Developer during the PDA Term. If the Financial Proposal includes MOHCD loans, Lead Developer shall comply with, and structure any Housing Project Company developing Affordable Units to be funded with the MOHCD loans in compliance with, the underwriting guidelines for MOHCD

predevelopment loans, which can be located at <https://sfmohcd.org/housing-development-forms-documents>. At the kick-off meeting described in Performance Milestone 1, MOHCD will discuss the materials Lead Developer will need to submit to MOHCD to apply for a predevelopment loan with respect to the Affordable Units that qualify for a MOHCD predevelopment loan. Lead Developer will promptly respond to MOHCD requests for information needed to timely submit and process the predevelopment loan application. Lead Developer acknowledges and agrees that City shall have no obligation to provide funding for any aspect of the Housing and Commercial Component.

(g) **Feasibility Analysis.** Lead Developer must timely develop and deliver a Housing and Commercial Component feasibility and financing analysis, plans, and commitments consistent with the Financial Proposal and in compliance with the HCC Schedule, the Financing Management Plan described in the attached Appendix B-2, and the Finance Plan, if any. The Financing Management Plan will account for tax credits that Lead Developer anticipates in regard to the construction of the Affordable Units. Although the Housing and Commercial Component share (based on PCIH) of the Common Infrastructure costs will be the Housing Project Company's responsibility, Lead Developer has the sole discretion in allocating those costs among the Affordable Units and the Housing and Commercial Component market rate residential units and non-residential units. The materials described in this subsection and the timelines included in those materials must reflect the Project Schedule and the HCC Schedule and comply with the HCC Interface Requirements.

(h) **Additional HCC Materials.** The Design Deliverables include certain plans, drawings and specifications for the Housing and Commercial Component. If Lead Developer elects to prepare any other plans, drawings and specifications for the Housing and Commercial Component (the "**Additional HCC Materials**") during the PDA Term, Lead Developer must submit the Additional HCC Materials to City for approval, in its proprietary capacity as owner of the Project Site and to confirm compliance with the Technical Requirements, before the Additional HCC Materials are submitted to any Regulatory Agency (including City acting in its proprietary capacity) for review or approval. City shall review and respond to any Additional HCC Materials submitted within the time periods specified in the HCC Development Plan. Lead Developer acknowledges and agrees that any Additional HCC Materials will, to the extent applicable, reflect the HCC Schedule milestones for the development, financing, construction, and Substantial Completion of the Housing and Commercial Component. Lead Developer shall be responsible, at its sole cost and expense, for the development of all Additional HCC Materials, which Lead Developer must ensure are: (i) assignable to any housing developer for the Affordable Units or the Housing and Commercial Component market rate residential units, as necessary, that holds an interest in the proceeds of any construction loan for those Affordable Units or market rate residential units, and (ii) comply with Applicable Law (including but not limited to Chapter 7 of the San Francisco Environment Code), the Technical Requirements, and, if applicable, MOHCD's design requirements for housing funded with MOHCD funds.

**6.10. Local Business Enterprise Plan.** Lead Developer must timely develop a program for utilizing Local Business Enterprises (as defined in Chapter 14B of the San Francisco Administrative Code) that must be consistent with the policy goals and purpose of Chapter 14B of the San Francisco Administrative Code to ensure participation by Local Business Enterprises and non-discrimination in the design, construction, and ongoing asset management of the Project during the term of the Project Agreement (the "**LBE Plan**"). Within twenty-eight (28) days of the Commencement Date, Lead Developer must meet with City to commence LBE Plan discussions. Lead Developer acknowledges City may require an LBE Plan that differs from the Local Business Enterprise assumptions Lead Developer used for the purposes of the Proposal, as described in Technical Submittal 28 of the Technical Proposal. Lead Developer must obtain the approval of City to the LBE Plan no later than Performance Milestone 17. In addition, during

the PDA Term, Lead Developer will strive to incorporate Local Business Enterprises participation in appropriate Work activities. If Lead Developer wishes to engage and receive credit for its use of Local Business Enterprises during the PDA Term, it will need the prior written consent of City's Contract Monitoring Division, which can be withheld in the sole discretion of City's Contract Monitoring Division.

**6.11. Design-Build Contract.** Lead Developer must timely prepare the contract for the design and construction of the Facility in compliance with the requirements of this Agreement (the "**Design-Build Contract**") and its related materials, including the process for obtaining competitive bids and selecting the design-builder, all of which are subject to City's prior approval and must be performed in consultation with City. Lead Developer may procure more than one Design-Build Contract and contractor, provided that the Infrastructure Facility is designed and built by a single design-build contractor pursuant to a single Design-Build Contract, and provided Lead Developer takes responsibility for all integration and interface risks resulting from the use of more than one Design-Build Contract and contractor. The Design-Build Contract must incorporate the 100% Schematic Design Package described in Appendix B-2 to the extent approved by City at Performance Milestone 28, be subject to the applicable requirements of the Project Agreement and the HCC Agreement, as applicable, incorporate the applicable requirements set forth in Appendix M, and, except as otherwise mutually agreed by the Parties, incorporate the Technical Requirements applicable to the work to be performed under the Design-Build Contract. No Development Team Member or its Affiliates can submit a bid for the Design-Build Contract; provided, however, that IBI Group, A California Partnership and Y.A. studio can each be a subcontractor to any entity that submits a Design-Build Contract bid.

**6.12. Infrastructure Facility Maintenance.** Table 1 in Division 7 (Asset Management Program Requirements) of the Technical Requirements summarizes the Infrastructure Facility Maintenance scope of work, which is to be provided on a 24/7/365 basis. In consultation with City, Lead Developer must timely refine and finalize the scope of the Infrastructure Facility Maintenance and develop the Asset Management Program, as required in the PDA Management Plan and the attached Appendix B-2, all of which are subject to City's prior approval and must be performed in consultation with City. City's goal is to pass the risk of life-cycle renewal and replacement to provide cost certainty, transparency, and optimized performance of the Infrastructure Facility to the Principal Project Company. This is important for the financial feasibility and operations of the Bus Yard Component and Housing and Commercial Component and their coexistence as part of a vertically integrated Facility.

City expects that the Housing Term will be longer than the Infrastructure Facility Term. In recognition of this likely fact and to address the relevant risks, after the Infrastructure Facility Term ends, City will ensure that the Infrastructure Facility continues to be maintained with substantially the same scope and performance standards as the Infrastructure Facility Maintenance specified in the Asset Management Program by electing, in its sole discretion, to (a) self-perform the Infrastructure Facility Maintenance, (b) contract it to a maintenance provider, (c) retain the Principal Project Company to continue providing it, or (d) pursue any other option. After the Infrastructure Facility Term ends, the share of the Infrastructure Facility Maintenance Costs allocated to the Housing and Commercial Component must be paid to City for the remainder of the Housing Term.

**6.13. IFM Contract.** Lead Developer must timely prepare the contract for the performance of the Infrastructure Facility Maintenance during the Infrastructure Facility Term in compliance with the requirements of this Agreement (the "**IFM Contract**") and the related contract materials, including the process for obtaining competitive bids for the IFM Contract and selecting the IFM Contract contractor, as further described in the attached Appendix B-2. The IFM Contract must be subject to the applicable requirements of the Project Agreement,



incorporate the scope of the Infrastructure Facility Maintenance to be provided by the Principal Project Company and the applicable requirements set forth in Appendix M and, except as otherwise mutually agreed by the Parties, incorporate the Technical Requirements applicable to the work to be performed under the IFM Contract. Except for Lead Developer, no Development Team Member or its Affiliates can submit a bid for the IFM Contract.

**6.14. Interface Agreements and Direct Agreements.** During the PDA Term, City expects that Lead Developer will develop the form of interface agreements with respect to the Asset Management Program services to be performed by or for the Principal Project Company and the Housing Project Company, which agreements will be among Principal Project Company and/or the Housing Project Company and other parties identified by Lead Developer with City's prior consent during the PDA Term, unless City otherwise agrees, in writing and in its sole discretion, to those forms being developed pursuant to the Project Agreement. City will develop during the PDA Term the forms of direct agreements among City, Principal Project Company or the Housing Project Company, as applicable, and parties providing financing for the Project, unless City otherwise agrees, in writing and in its sole discretion, to those forms being developed pursuant to the Project Agreement.

The interface agreements and direct agreements shall be substantially the same in type, form, and content as those customary for joint development and design-build-finance-maintain procurements, and will be subject to the prior written approval of City in its sole discretion.

**6.15. Pricing and Fixed Budget Limit; Determining the Final Price**

(a) Update with Contractor Pricing. At Performance Milestone 31, Lead Developer must submit to City the forms included as Attachment 4 to Appendix B-2, ("Best-value Contractor Recommendation Form and Final Price and Cost Savings Form"), which will reflect the Design-Build Contract pricing for the Infrastructure Facility and IFM Contract pricing provided by the contractors recommended for award of the Design-Build Contract for the Infrastructure Facility and IFM Contract, respectively, the 30% cost saving amount, if applicable, and any deduction for the Continuation Payment if made by City.

(b) Pricing Lower than Fixed Budget Limit + Insurance + Escalation. If the Best-Value Contractor Recommendation Form submitted at Performance Milestone 31 shows any reduced cost to design and build the Infrastructure Facility or perform the Infrastructure Facility Maintenance when compared to the total amount set forth in FS Form A8 delivered at Performance Milestone 27A, then the Final Price shall be determined in accordance with the Final Price Form and Cost Savings Form included in Appendix B-2.

(c) Pricing Higher than Fixed Budget Limit + Insurance + Escalation.

(i) If the materials submitted at Performance Milestone 31 show any increased pricing to design and build the Infrastructure Facility or perform the Infrastructure Facility Maintenance when compared to the total amount set forth in FS Form A8 delivered at Performance Milestone 27A, then the Parties will enter into good faith negotiations for the ninety (90) day period immediately following Performance Milestone 31, subject to extension by mutual agreement, to identify and agree to changes to the Infrastructure Facility or the Infrastructure Facility Maintenance requirements to bring the costs within the total amount set forth in FS Form A8 delivered at Performance Milestone 27A. If the Parties do not, within the ninety (90) day period, or such extended period as agreed by the Parties, (A) reach agreement on modifications to the Infrastructure Facility or the Infrastructure Facility Maintenance requirements to bring the costs within the total amount set forth in FS Form A8 delivered at Performance Milestone 27A, or (B) agree to reprocure the Design-Build Contract for the Infrastructure Facility and/or the IFM Contract in accordance with Section 6.15(c)(ii), then City



may elect to terminate this Agreement in accordance with Article 16 (Termination), in which case Lead Developer will be entitled to the Termination Payment, provided Lead Developer demonstrates that it used commercially reasonable efforts to stay within the Fixed Budget Limit and otherwise meets the conditions for payment of the Termination Payment.

(ii) During the ninety (90) day negotiation period described in Section 6.15(c)(i), the Parties may agree that Lead Developer will reprocure the Design-Build Contract for the Infrastructure Facility and/or the IFM Contract, on terms mutually agreed by the Parties. If the pricing for any new bids received by Lead Developer exceeds the total amount set forth in FS Form A8 delivered at Performance Milestone 27A, the Parties will enter into good faith negotiations for the ninety (90) day period commencing on the due date for the new bid(s), subject to extension by mutual agreement. If the Parties reach agreement within the specified time period(s) on modifications to the Infrastructure Facility or the Infrastructure Facility Maintenance requirements to bring the costs within the total amount set forth in FS Form A8 delivered at Performance Milestone 27A, then the Final Price shall be the sum of the LD Predevelopment Cost, plus the Design-Build Contract price for the Infrastructure Facility and the IFM Contract price based on the scope and terms negotiated in good faith by the Parties. If the Parties do not reach agreement, within the ninety (90) day period specified in Section 6.15(c)(ii), or such extended period as agreed by the Parties, on modifications to the Infrastructure Facility or the Infrastructure Facility Maintenance requirements to bring the costs within the total amount set forth in FS Form A8 delivered at Performance Milestone 27A, then City may elect to terminate this Agreement in accordance with Article 16 (Termination).

(d) Final Price. If a Final Price is determined pursuant to Section 6.15(b) (Pricing Lower than Fixed Budget Limit + Insurance + Escalation) or Section 6.15(c) (Pricing Higher than Fixed Budget Limit + Insurance + Escalation), Lead Developer will include the Final Price in the Finance Plan submitted to City at Performance Milestone 32.

(e) Adjustments to Final Price Prior to Commercial Close. The Final Price will be adjusted for the period beginning on the date that is thirty (30) days prior to the due date for the Design-Build Contract and IFM Contract proposals and ending on the “**Setting Date**”, being the date that is fifteen (15) days prior to the date of Commercial Close, to account for the following events:

(i) Reprocurement Due to Unavoidable Delay or a Regulatory Appeal Delay. If the Parties mutually agree to extend the Predevelopment Period beyond November 30, 2024 as result of an Unavoidable Delay or a Regulatory Appeal Delay, the Parties will adjust the Final Price and modify the escalation amount set forth in FS Form A8 delivered at Performance Milestone 27A by adding the Reprocurement Amount (defined as follows), if applicable, and modifying the escalation amount given in the modified FS Form D submitted at Performance Milestone 32 to extend the assumed mid-point of construction by the number of days between November 30, 2024 and the extended date of Commercial Close. E.g., if Commercial Close occurs on January 30, 2025, the assumed mid-point of construction will be July 31, 2026. If an Unavoidable Delay or a Regulatory Appeal Delay occurs after Performance Milestone 32 and is not resolved until after the bid validity period for the Design-Build Contract for the Infrastructure Facility or the IFM Contract, the “**Reprocurement Amount**” shall be Lead Developer’s actual costs to reprocure the Design-Build Contract for the Infrastructure Facility or IFM Contract, as applicable.

(ii) Changes to Applicable Law. City accepts an LD Proposed Change due to a change in Applicable Law.

(iii) LD or Principal Project Company Required Insurance Pricing. City agrees to the reasonable costs presented by Lead Developer for insurance coverages to be

provided by Lead Developer or the Principal Project Company based on the insurance requirements set forth in the draft Project Agreement provided by City to Lead Developer at Performance Milestone 29A provided the proposed coverages do not duplicate coverages already included in the Design-Build Contract for the Infrastructure Facility or the IFM Contract.

(iv) Regulatory Approval Conditions. The Planning Commission, the SFMTA Board, or the Board of Supervisors imposes Regulatory Approval conditions on the Infrastructure Facility or the Infrastructure Facility Maintenance.

(v) LD Predevelopment Cost. City approves an IF Reimbursement Request pursuant to Section 9.2(g) (*IF Reimbursement Notice*).

**6.16. Early Works.** As further described in in the attached Appendix B-2, Lead Developer must also submit its analysis on the necessity of commencing Early Works and the process for procuring the contractor(s) that would perform the Early Works. If approved and accepted by City, which approval may be subject to completion of CEQA review for the Project if the Early Work is determined to not have independent utility from the Project, Lead Developer will procure the Early Works contractor(s) in compliance with the process approved by City and, if approved by the SFMTA Board, execute an Early Works Agreement based on terms mutually agreed by the Parties. If Lead Developer enters into an Early Works Agreement in compliance with this Section 6.16 (*Early Works*), Lead Developer will ensure the Early Works is performed and, once executed by City, timely perform its obligations under that Early Works Agreement.

**6.17. Formation of Principal Project Company and Housing Project Company.** Lead Developer must cause the Principal Project Company and the Housing Project Company to be a legal entity that is funded to the satisfaction of City and has become a City vendor with a valid business tax registration number from the Business Tax Division of the City's Tax Collector at least thirty (30) days before Commercial Close, or any other date mutually selected by the Parties.

**6.18. Utilities.** Except as otherwise specified in this Section 6.18 (*Utilities*), Lead Developer is solely responsible for obtaining and implementing all new utility services needed for the Facility, and must submit the appropriate applications to obtain gas (if permitted under Applicable Law), electricity, water, internet (except as otherwise specified in the Technical Requirements), and all other utilities needed to develop and operate the Project, as further described in the attached Appendix B-2. Lead Developer acknowledges that under San Francisco Administrative Code Section 99, electric service to the Project Site must be provided by the San Francisco Public Utilities Commission ("SFPUC") unless it determines it is not feasible for it to provide electricity to the Project Site. As further described in Division 5 (*Battery-Electric Bus Supplemental Criteria*) of the Technical Requirements, the SFMTA submitted two Applications for Electric Service for the Facility to the SFPUC on April 14, 2021 ("SFPUC Applications"). Within twenty-eight (28) days of the Commencement Date (concurrent with Performance Milestone 6), Lead Developer must assume the primary applicant role to the SFPUC Applications. Lead Developer must notify City if it foresees substantial changes in the Facility electrical service approach, as outlined in the SFPUC Applications, that would require an amendment to the SFPUC Applications. Lead Developer will cooperate with City to take all actions needed to further the SFPUC Applications and obtain electrical service for the Project.

**6.19. Construction Permits.** Lead Developer must not submit any construction or site permit application for the Project Site to City's Department of Building Inspection without the prior consent of City, which may be subject to the completion of CEQA review for the Project.

## 6.20. CEQA.

(a) **Project Sponsor.** The SFMTA, as project sponsor, filed an environmental review application for the Project with the Planning Department on November 20, 2019 (the “**CEQA Application**”). The Planning Department issued a preliminary project assessment for the Project (Case No. 2019-02188ENV) on May 22, 2020 (the “**Preliminary Project Assessment**”), and a draft Environmental Impact Report for the Project (Case No. 2019-02188ENV) on June 30, 2021 (the “**Draft EIR**”), and the SFMTA anticipates the EIR will be submitted to the Planning Commission for certification in mid-2023. The SFMTA will continue to be the project sponsor for purposes of CEQA, with the close collaboration of and support from Lead Developer and pay the Planning Department charges for its environmental review of the Project.

(b) **Lead Developer Support.** If the SFMTA intends to submit any materials to the Planning Department with respect to its CEQA review of the Project, Lead Developer must provide the SFMTA (or if directed by the SFMTA, the Planning Department) with its comments to those materials. Lead Developer must also collaborate with the SFMTA with respect to all comments and requests from the Planning Department with respect to its CEQA review of the Project, and provide the Planning Department and the SFMTA with all supporting materials needed for the Draft EIR and EIR (including but not limited to drawings, analyses, data points, and project features, and revisions of the requested materials) within fifteen (15) days of the SFMTA’s or the Planning Department’s request for those comments or materials; provided, however, that if those comments or materials cannot be reasonably provided within that fifteen (15) day period, Lead Developer must provide them to the SFMTA and the Planning Department as soon as reasonably possible.

To facilitate efficient transfer of information after the Commencement Date, City will add LD Project Director and LD Project Manager to the list of approved Project agents to be identified in the submitted CEQA Application. Lead Developer must include City on all Planning Department communications pertinent to CEQA review of the Project, delivering all written communications to the SFMTA at the same time they are delivered to the Planning Department, and inviting the SFMTA to join all meetings and calls with the Planning Department. At the request of the Planning Department, the SFMTA engaged SWCA Environmental Consultants (“**SWCA**”) to provide project scoping and environmental analysis to support the CEQA review process under an agreement (Contract No. SFMTA-2018-03) dated January 17, 2018, as amended (as amended, the “**SWCA Contract**”). The SFMTA will continue to retain SWCA, or any alternative environmental consultant acceptable to the Planning Department, to perform the environmental analysis required by the Planning Department for the Project’s CEQA review process. If Lead Developer elects to have the Draft EIR or the EIR modified to accommodate an HCC Change to reduce the size of the Proposed HCC, then Lead Developer shall pay the costs of SWCA’s and any other consultant’s work to effect that modification.

(c) **Hearings and Meetings.** SFMTA staff will take the lead in coordinating hearings and meetings for the CEQA review of the Project and the certification, if at all, of the EIR. Notwithstanding the SFMTA’s lead role for coordinating hearings and meetings, Lead Developer must provide any supporting materials reasonably requested by the SFMTA for those hearings and meetings on or before the tenth Business Day immediately following its receipt of the SFMTA’s request. In addition, Lead Developer must be available to attend and respond to questions at those hearings and meetings.

(d) **Conformity with CEQA Project Description and Draft EIR; MMRP.** Lead Developer agrees to endeavor to design and plan the Facility in a manner that is consistent with the Project description in the Draft EIR, as well as the draft mitigation measures set forth in the

draft EIR, subject to the review and findings of the Planning Department; provided if the EIR is certified by the Planning Commission during the PDA Term, Lead Developer must design and plan the Facility in a manner that is consistent with the Project description in the EIR and comply with any MMRP, to the extent any MMRP requirements apply during the PDA Term. Nothing in this Agreement shall be construed to preclude Lead Developer from proposing, or City and other public agencies from considering or approving Project designs, modifications, or alternatives that avoid or mitigate significant adverse environmental impacts. If the Planning Commission certifies the EIR, the Parties anticipate the Planning Commission would adopt the MMRP at that time. Lead Developer acknowledges and agrees that the MMRP, if adopted, may differ from the draft mitigation measures in the Draft EIR and it will modify its designs and plans accordingly to reflect the requirements of the MMRP.

**6.21. Regulatory Approvals.** The Parties acknowledge that approvals, permits, determinations, and authorization from governmental agencies acting in their regulatory capacity, including but not limited to those required from City acting in its regulatory capacity, and utility companies, are required for the development of the Project (each, a “**Regulatory Approval**”). Regulatory Approvals shall include any certification or adoption of environmental review for the Project prepared pursuant to CEQA and adoption of any CEQA findings that must be made by City or a responsible agency, as required by CEQA. The Parties’ respective obligations for the CEQA review of the Project are set forth in Section 6.20 (CEQA). The Parties’ respective obligations for the other Regulatory Approvals are described below.

(a) Transaction Document Approvals. SFMTA staff will take the lead in coordinating hearings and meetings for any approval of the Transaction Documents from all applicable City Regulatory Agencies (and their individual members and committees). Notwithstanding the SFMTA’s lead role for coordinating hearings and meetings, the Lead Developer must provide any supporting materials reasonably requested by the SFMTA for those hearings and meetings on or before the tenth (10<sup>th</sup>) Business Day immediately following its receipt of the SFMTA’s request. In addition, Lead Developer must be available to attend and respond to questions at those hearings and meetings.

(b) General Regulatory Approvals. “**General Regulatory Approvals**” means all Regulatory Approvals other than those needed for CEQA review of the Project and to authorize City’s execution of the Transaction Documents.

(i) Lead Developer is solely responsible for determining and obtaining, during the PDA Term, only those General Regulatory Approvals required to perform the Work, to achieve the Phase 2 Floating Milestone, and to achieve the following objectives set forth in Section 6.1(a): (A) develop the Project in compliance with this Agreement and the PDA Management Plan approved by City, (B) reach Commercial Close before the expiration of the Predevelopment Period, and (C) reach IF Financial Close by November 30, 2024. In obtaining such General Regulatory Approvals, Lead Developer shall incorporate any Project modifications or requirements required for those General Regulatory Approvals, and timely pursue such General Regulatory Approvals; provided that SFMTA staff will take the lead in coordinating General Regulatory Approval hearings and meetings for the Project with the applicable City Regulatory Agencies (and their individual members and committees) and the SFMTA will pay the Planning Department’s charges for any entitlement application review that Lead Developer requests from the Planning Department for the Project during the PDA Term, including the special use district, conditional use authorization, San Francisco General Plan amendment, and General Referral and design review. The SFMTA, as the City department with jurisdiction over the Project Site, will also collaborate with Lead Developer on its strategy for seeking the General Regulatory Approvals from all applicable City departments and City Regulatory Agencies and at Lead Developer’s request, SFMTA staff will join in Lead Developer’s meetings with the various City departments to discuss the General Regulatory Approvals at mutually agreeable times.



(ii) Lead Developer must not seek any General Regulatory Approvals for anything that does not comply with the requirements and processes described in the Technical Requirements or fall within the scope of the Project described in the Draft EIR, unless otherwise approved of in writing by City, which approval will be in its sole discretion. Lead Developer understands and agrees the SFMTA's status as a department of City shall in no way limit the obligation of Lead Developer, at Lead Developer's own cost and initiative, to obtain all the General Regulatory Approvals from the applicable Regulatory Agencies. If any Regulatory Agency does not initially approve any General Regulatory Approval pursued by Lead Developer, Lead Developer shall use commercially reasonable efforts to make the changes required by the Regulatory Agency for that General Regulatory Approval, to the extent it is possible to do so while complying with the other requirements of this Agreement.

(iii) Before submitting any application or request for any General Regulatory Approval, Lead Developer first must present the basis upon which Lead Developer proposes to obtain all the required Regulatory Approvals (the "**Regulatory Approval Strategy**") to the City for the Director of Transportation's review and approval. City may suggest revisions or changes to the proposed Regulatory Approval Strategy, which Lead Developer must consider in good faith. Lead Developer acknowledges and agrees that maintaining professional working relations with Regulatory Agencies is critical to the SFMTA's management of San Francisco ground transportation, including other current or future SFMTA projects. Accordingly, Lead Developer must use its best efforts throughout the PDA Term to take no actions relating to the Project that does not comport to the approved Regulatory Approval Strategy, would significantly and adversely affect the SFMTA's relationship with any other Regulatory Agency, or would adversely affect the SFMTA's management of San Francisco ground transportation or any current or future SFMTA projects unless otherwise approved of in writing by City, which approval will be in its sole discretion.

(iv) Before filing an application for any General Regulatory Approval that is not described in the Regulatory Approval Strategy approved by City, Lead Developer must obtain the Director of Transportation's authorization, which will not be unreasonably withheld or delayed. Lead Developer agrees that City's withholding or delay in approving any application for a General Regulatory Approval will be reasonable if the application would adversely affect the SFMTA's management of San Francisco ground transportation or any current or future SFMTA projects, does not substantially conform to the Preliminary Term Sheet, the HCC Term Sheet, or any subsequent Project Document or design document to which City and Lead Developer agreed, or requires City to be a co-permittee to the application as owner of the Project Site.

(c) No Lobbying; Proprietary Capacity. The approval of various City departments (including, but not limited to, the Planning Department, MOHCD, and SFPW) and other City Regulatory Agencies (including, but not limited to the Planning Commission, the SFMTA Board, and the Board of Supervisors) will be required for the Project. The City Project Manager and the SFMTA staff working on the Project on behalf of City in its proprietary capacity will collaborate with Lead Developer regarding its Project discussions with other City staff with respect to the Project, and Lead Developer will promptly and substantively respond to any communications or requests for information that it receives from City staff; provided, however, that Lead Developer understands and agrees that although the SFMTA is a department of City, City staff and executives have no authority or influence over any officials, departments, boards, commissions, agencies, or other entities responsible for the issuance of any Regulatory Approvals (individually defined as "**Regulatory Agency**" and collectively as "**Regulatory Agencies**") including but not limited to City officials, departments, boards, commissions or agencies acting in City's regulatory capacity. Accordingly, there is no guarantee or a presumption that any of the Regulatory Approvals will be issued by the appropriate Regulatory Agency. Other than as described in Section 5.3 (Approval of Project Agreement and Other



*Transaction Documents*) as to the approval of the Transaction Documents by the SFMTA Board of Directors and the Board of Supervisors, to the extent applicable, City's sole obligation under this Agreement with respect to the Regulatory Approvals shall be to review the submitted Regulatory Approval Strategy and CEQA and General Regulatory Approvals Plan described in Appendix B-2, and act as the project sponsor for the CEQA review with the support of Lead Developer pursuant to Section 6.20(a) (Project Sponsor).

Lead Developer acknowledges City is acting in its proprietary capacity under this Agreement and understands and agrees no City staff has an obligation to advocate, promote or lobby any Regulatory Agency and/or any governmental official (including any City official) for any Regulatory Approval or for approval of the Project, the Project Agreement, the HCC Term Sheet, or any other Transaction Documents, and any such advocacy, promotion or lobbying shall be done by Lead Developer at Lead Developer's sole cost and expense. Lead Developer hereby waives any claims against City, and fully releases and discharges City to the fullest extent permitted by law, from any liability relating to the failure of City or any Regulatory Agency from issuing any required Regulatory Approval or from issuing any approval of the Project.

(d) Costs. Subject to Lead Developer's costs to perform its obligations under Section 6.20(b) (Lead Developer Support) and Section 6.21(b) (General Regulatory Approvals), during the PDA Term, City will be responsible for City's costs associated with the Regulatory Approvals required under CEQA and for the approval of the Transaction Documents. Lead Developer will be solely responsible for applying for, obtaining, and paying all costs associated with all Regulatory Approvals, and Lead Developer, at its sole cost and expense, will comply with the terms of all Regulatory Approvals and shall pay and discharge any fines or penalties imposed as a result of Lead Developer's failure to comply with any Regulatory Approval, for which City will have no monetary or other liability.

(e) Cooperation. The Parties agree to cooperate with one another to expeditiously aid in (i) Lead Developer's efforts to obtain the General Regulatory Approvals in accordance with this Agreement and (ii) City's efforts, acting in its proprietary capacity, to seek the necessary CEQA approvals for the Project and the approvals of the SFMTA Board and, as applicable, the Board of Supervisors and any other City boards or commissions, to the Transaction Documents.

(f) Third-Party Challenge.

(i) "Third-Party Challenge" means any administrative, legal or equitable action or proceeding instituted by any party other than City or Lead Developer challenging the validity or performance of any provision of this Agreement, the Project, any Regulatory Approvals made by City acting as a Regulatory Agency (including the adoption or certification of the EIR), other actions taken pursuant to CEQA, or any action taken by City or Lead Developer in furtherance of this Agreement, or any combination thereof relating to all or any portion of the Project. The Parties agree to proceed with due diligence and cooperate with one another to defend and resolve any Third-Party Challenge to the extent reasonably possible. Lead Developer shall assist and cooperate with City at Lead Developer's own expense in connection with any Third-Party Challenge. The City Attorney's Office may use its own legal staff or outside counsel in connection with defense of the Third-Party Challenge, at the City Attorney's sole discretion.

(ii) Subject to Section 6.21(f)(iii): (A) if a Third-Party Challenge solely arises from any aspect of the Housing and Commercial Component, Lead Developer shall reimburse City for its actual costs in defense of the action or proceeding, including but not limited to the time and expenses of the City Attorney's Office (at the non-discounted rates then charged by the City Attorney's Office) and any consultants (collectively, the **"City Challenge**

**Costs**”), within thirty (30) days of receiving an invoice for those costs from City; provided, however, Lead Developer shall have the right to monthly invoices for all the City Challenge Costs with respect to that Third-Party Challenge; and (B) if a Third-Party Challenge arises with respect to the Bus Yard Component and the Housing and Commercial Component, or cannot be clearly ascribed to solely the Bus Yard Component, Lead Developer shall reimburse City by an amount equal to the City Challenge Costs multiplied by the PCIC within thirty (30) days of receiving an invoice for those costs from City; provided, however, Lead Developer shall have the right to monthly invoices for all the City Challenge Costs with respect to that Third-Party Challenge.

(iii) Notwithstanding Section 6.21(f)(ii), Lead Developer will not be responsible for reimbursing City for City Challenge Costs relating to any Third Party Challenge to Regulatory Approvals made by City acting as a Regulatory Agency (including the adoption or certification of the EIR), or other actions taken pursuant to CEQA, except to the extent the Third Party Challenge is directly related to Lead Developer’s failure to comply with this Agreement.

(iv) If this Agreement terminates before a Third-Party Challenge is resolved, the Parties shall jointly seek to have the Third-Party Challenge dismissed and Lead Developer shall have no obligation to reimburse City for any defense costs that City incurs after the dismissal.

(v) The filing of any Third-Party Challenge shall not delay or stop the Lead Developer’s performance of its obligations under this Agreement unless the third party obtains a court order preventing the activity or City elects to require that action.

**6.22. Correction of Defective Work Materials.** In addition to the other remedies that are available to City under this Agreement or Applicable Law and at no cost to City, at City’s request, Lead Developer must correct or revise, or cause the Lead Developer Agents, as applicable, to correct or revise, as applicable, any Work Materials that are defective due to the negligent acts, errors or omissions of Lead Developer or any of Lead Developer Agents. City’s inspection of (or failure to inspect), review (or failure to review), acceptance of any of the Work Materials or any Termination Payment made under this Agreement cannot be construed to relieve any Lead Developer Related Entity of Lead Developer’s obligations and responsibilities under this Agreement for any negligent acts, errors or omissions nor operate as a waiver of any of City’s rights under this Agreement or any cause of action arising out of the performance of this Agreement. Subject to the terms of Section 21.3 (*Limitation of Liability*), Lead Developer will be and remain liable to City for all Losses caused by Lead Developer’s failure to comply with the terms and conditions of this Agreement or by the negligent acts, errors or omissions of any Lead Developer Related Entities in the performance of this Agreement in accordance with Applicable Law. Lead Developer must use its professional judgment, care and prudence in approving and accepting any Work Materials prepared by any Lead Developer Agents and take all action necessary to ensure the Work Materials prepared by any Lead Developer Agents are correct and accurate.

### **6.23. Guaranty.**

(a) The Guarantor shall provide and maintain the Guaranty, in the form of Appendix J, in full force and effect throughout the PDA Term.

(b) Lead Developer shall periodically report to City regarding the financial capacity of the Guarantor. If, at any point during the PDA Term, the Guarantor’s financial capacity is materially negatively affected, as determined by City in its sole discretion, City may require, and Lead Developer shall provide, one or more additional guarantors so that the combined financial capacity of the Guarantor and the additional guarantors provides equivalent

security to City as the Guaranty provided as of the Effective Date. Each such Guaranty shall be substantially in the form provided in Appendix J, together with appropriate evidence of authorization, execution, delivery and validity of such Guaranty.

#### **6.24. MME Expansion Project.**

(a) During the period preceding Performance Milestone 6B, City and Lead Developer will each use commercially reasonable good faith efforts to negotiate the terms of the MME Construction Agreement based on the MME Construction Agreement Terms included in Appendix K. The obligation to negotiate in good faith requires the Parties to communicate with each other with respect to those issues for which agreement has not been reached, and in such communication to follow reasonable negotiation procedures, including meetings, telephone, virtual meetings, and correspondence.

(b) If the Parties mutually agree to terms for the MME Construction Agreement on or before Performance Milestone 6B, the Parties will execute and deliver the MME Construction Agreement within five (5) Business Days of the SFMTA Board's approval of the MME Construction Agreement.

(c) If the Parties do not mutually agree to terms for the MME Construction Agreement on or before Performance Milestone 6B, if the SFMTA Board does not approve the MME Construction Agreement, or if the Parties do not execute and deliver the MME Construction Agreement within five (5) Business Days of the SFMTA Board's approval of the MME Construction Agreement, then City may, in its sole discretion, separately procure a contractor to deliver the MME Expansion Project.

### **7. PREDEVELOPMENT MANAGEMENT**

**7.1. Development Team.** Lead Developer, and the Persons described in the attached Appendix I as its controlling and other Equity Members, the Affordable Housing Developer, the Housing Developer, the Design Consultant, the Construction Management Consultant, and Infrastructure Facility Maintenance Consultant (each, a "**Development Team Member**" and collectively, the "**Development Team**") will serve those respective roles for Lead Developer's performance of its obligations under this Agreement. Lead Developer must not make any changes to the Development Team or the roles assigned to each Development Team Member in the attached Appendix I without the prior written consent of City, which may be withheld in its sole discretion. If a Development Team Member notifies Lead Developer that it is withdrawing from the Project or the Guarantor intends to withdraw from the Project, Lead Developer shall immediately notify City. If Lead Developer and City do not mutually agree to the replacement for the withdrawing Development Team Member or Guarantor within fifteen (15) days of the withdrawal of that Development Team Member or Guarantor (the "**Selection Period**"), City shall have the right to terminate this Agreement by delivering written notice of such termination to Lead Developer within ten (10) days of the expiration of the Selection Period. If City timely delivers a termination notice to Lead Developer under this Section 7.1 (Development Team), this Agreement shall terminate on the date of such delivery.

**7.2. Key Personnel; Organization.** In addition to the Development Team, Appendix I describes the additional persons that will be instrumental to Lead Developer's predevelopment activities for the Project (collectively, the "**Key Personnel**"). During the PDA Term, Lead Developer must retain the Key Personnel to implement the Lead Developer's obligations under this Agreement and to manage other Lead Developer personnel working on that implementation. Except for any termination of employment, retirement, death, injury or other similar circumstances, Lead Developer must not change any Key Personnel without City's prior written approval, which shall not be unreasonably withheld or conditioned. Lead Developer's proposed

replacement of any Key Personnel for any reason is subject to City's prior written approval, which shall not be unreasonably withheld or conditioned. If Lead Developer intends to replace any Key Personnel, it shall first notify City in writing of the proposed replacement, the reason for the proposed replacement, the person it proposes as a replacement, and certify that the proposed replacement person complies with the requirements for the position that person would fill described in Appendix I (a "**Proposed Replacement Notice**"). Within five (5) Business Days of receiving a Proposed Replacement Notice, City shall notify Lead Developer if it approves of the proposed replacement. If Lead Developer and City do not mutually agree to the replacement for the withdrawing Key Personnel individual within fifteen (15) Business Days of the withdrawal of that individual (the "**Selection Period**"), City shall have the right to terminate this Agreement by delivering written notice of such termination to Lead Developer within ten (10) Business Days of the expiration of the Selection Period. If City timely delivers a termination notice to Lead Developer under this Section 7.2 (Key Personnel; Organization), this Agreement shall terminate on the date of such delivery.

### **7.3. Project Directors and Project Managers.**

(a) For Lead Developer. Brian Middleton ("**LD Project Manager**") is the person responsible for managing Lead Developer's day-to-day activities of the Project on a full-time basis, including ongoing communications and coordination with City and acting as the main point of contact between City and Lead Developer. Stuart Marks ("**LD Project Director**") is authorized to make decisions and bind Lead Developer, and is the person responsible for overseeing Lead Developer's rights and obligations under the PDA and Lead Developer's contractual rights and obligations with the Development Team Members. Lead Developer must obtain the prior written approval of City to any change in the LD Project Director or the LD Project Manager, which approval will not be unreasonably withheld.

(b) For City. Tim Kempf ("**City Project Manager**") will be the person responsible for managing City's day-to-day activities of the Project on a full-time basis, including ongoing communications and coordination with Lead Developer and acting as the main point of contact between City and Lead Developer. Kerstin Magary ("**City Project Director**") is authorized to make decisions and bind City, and is the person responsible for overseeing City's rights and obligations under the PDA. City must give written notice to Lead Developer of any change in the City Project Director or the City Project Manager.

**7.4. Communication.** The LD Project Director must keep the City Project Director fully informed on all matters concerning the Work and shall keep records of all material aspects, with weekly meetings on the status of the Performance Milestones.

### **7.5. Cost Reports and Audits.**

(a) Quarterly Cost Reports. On the first day of each January, April, July, and October in the PDA Term, Lead Developer must submit a written report of all LD Predevelopment Cost (segregated into those incurred in connection with the Housing and Commercial Component, those incurred in connection with the Bus Yard Component, those incurred in connection with the Common Infrastructure) incurred by it in the three-month period immediately preceding the date of the applicable report, together with reasonable supporting materials documenting those costs.

(b) Audits. Lead Developer agrees to maintain and make available to City, during regular business hours, accurate books and accounting records relating to the LD Predevelopment Cost (segregated into those incurred in connection with the Housing and Commercial Component, those incurred in connection with the Bus Yard Component, those incurred in connection with the Common Infrastructure). Lead Developer will permit City to



audit, examine and make excerpts and transcripts from such books and records, and to make audits of all invoices, materials, payrolls, records or personnel and other data related to all other matters covered by this Agreement, whether funded in whole or in part under this Agreement. Lead Developer shall maintain such data and records in an accessible location and condition for a period of not fewer than five years after final payment under this Agreement or until after final audit has been resolved, whichever is later. The State of California or any Federal agency having an interest in the subject matter of this Agreement shall have the same rights as conferred upon City by this Section 7.5(b) (Audits). Lead Developer shall include the same audit and inspection rights and record retention requirements in all subcontracts.

#### **7.6. Community Outreach and Public Relations.**

(a) SFMTA Public Outreach and Engagement Program. City will lead the stakeholder outreach to the following parties (the “**SFMTA Outreach Parties**”): SFMTA staff, the SFMTA Citizens’ Advisory Council, other SFMTA working and advisory groups, the SFMTA Board, the Board of Supervisors (and its committees and members), City departments, and other City Regulatory Agencies. This outreach (the “**SFMTA Public Outreach and Engagement Program**”) will be to educate the SFMTA Outreach Parties and address any of their questions regarding the Bus Facility Component. Lead Developer must not initiate any outreach for matters within the SFMTA Public Outreach and Engagement Program. Lead Developer must forward any questions or information requests it receives from the SFMTA Outreach Parties for matters within the scope of the SFMTA Public Outreach Program (other than those raised by a Regulatory Agency in connection with a General Regulatory Approval) to a SFMTA Project Communications Team Contact (defined in Section 7.6(d) (SFMTA Project Communications Team Meetings and Contacts)) and notify the questioner or requester that it is doing so.

(b) Lead Developer Support. Lead Developer must use commercially reasonable efforts to support the SFMTA Public Outreach and Engagement Program by taking the following actions:

(i) Attending meetings scheduled by the SFMTA with members of the public and any of the SFMTA Outreach Parties to describe the Bus Facility Component, the Common Infrastructure, the Infrastructure Facility Maintenance, or the Housing and Commercial Component, provided the SFMTA shall provide at least five (5) Business Days’ prior notice of such meetings to Lead Developer;

(ii) Providing supporting materials for those meetings, as requested by the SFMTA;

(iii) Collaborating with the SFMTA on any written materials provided by the SFMTA to Lead Developer for the SFMTA Public Outreach and Engagement Program; and

(iv) If the SFMTA requests Lead Developer to provide supporting materials for the meetings described in the foregoing subsection (i) or input on any materials described in the foregoing subsection (iii), Lead Developer must make commercially reasonable efforts to provide those materials or that input within three (3) Business Days following its receipt of the SFMTA’s request; if such supporting materials cannot be reasonably provided within such three (3) Business Day period, then Lead Developer must provide them as soon as reasonably possible.

(c) Lead Developer Outreach Plan. As described in Appendix B-2, Lead Developer must develop a Public Outreach and Engagement Plan (the “**LD Outreach Plan**”) for



City's review. Once approved by City, Lead Developer must comply with the processes and requirements of the LD Outreach Plan. Lead Developer will work collaboratively with City to ensure that the goals of the LD Outreach Plan are met, and address any needed changes to LD Outreach Plan during the PDA Term.

(d) SFMTA Project Communications Team Meetings and Contacts.

(i) Within five (5) days of the Commencement Date, Lead Developer will organize and hold a one-day (minimum 3-hour) collaboration session with SFMTA staff members and consultants that have worked on Project stakeholder outreach and engagement (the "**SFMTA Project Communications Team**") to discuss the following: (A) stakeholder identification process (e.g. type of stakeholders and their level of involvement), (B) mapping the public participation spectrum for each phase of the Project, including the design phase, the phase for public meetings and hearings for the Regulatory Approvals, the construction phase, and the operations phase, (C) planning the details of the engagement process, (D) best practices stemming from prior outreach and engagement efforts, (E) expected outreach and engagement budget, (F) resources needed to implement community outreach events, (G) dealing with and managing stakeholder conflict, and (H) reviewing and assessing the process to demonstrate achievements and to identify lessons learned for informing future engagement exercises.

(ii) Within thirty-five (35) days of the Commencement Date, Lead Developer will organize and hold another collaboration session (minimum 2-hours) with the SFMTA Project Communications Team to discuss proposed public outreach and engagement events and the timeline around key decision points for public input, and to confirm the scope of work outlined by Lead Developer. City will review, vet, and approve all outreach content proposed by Lead Developer, and Lead Developer must incorporate stakeholder input into the Project in a manner satisfactory to City. The SFMTA will have the right to, at its election, attend every stakeholder engagement event held by Lead Developer, and Lead Developer will provide agenda allotment to the SFMTA at these events to provide SFMTA news and service updates and other announcements not otherwise pertinent to the Project.

(iii) Media and Communications Team Contacts. At or before the meeting described in the foregoing subsection (i), (A) City must designate at least two (2) SFMTA staff members authorized to receive notices and communicate with Lead Developer about all public outreach program matters (each, the "**SFMTA Project Communications Team Contact**") and designate at least two (2) SFMTA staff members authorized to receive notices and communicate with Lead Developer about all media matters (each, the "**SFMTA Media Contact**"), and (B) Lead Developer must designate at least one person (the "**LD Project Communications Team Contact**") who will be authorized to receive notices and communicate with City about the public outreach program matters and designate at least one person (the "**LD Media Contact**") who will be authorized to receive notices and communicate with City about all media matters. Either Party shall have the right to change the persons designated as their respective Communications Team Contact and Media Contact by delivering written notice of that change to the other Party.

(e) Lead Developer Public Outreach. In addition to complying with the Public Outreach and Engagement Requirements included in Division 9 (SFMTA's Communications Division's Public Outreach and Engagement Requirements) of the Technical Requirements, any City-approved LD Outreach Plan, and any outreach requirements required for the General Regulatory Approvals, Lead Developer must adhere to the following practices:

(i) Establish an appropriate budget to fund the SFMTA Public Outreach and Engagement Program and Lead Developer's obligations under this Section 7.6 (Community Outreach and Public Relations) to safely and effectively engage with Project

stakeholders through each Project phase described in Section 7.6(d)(i)(B) (i.e. Project led events, community tabling events, sponsoring community events, collateral mailers, newspaper, radio and online ads, brochures, flyers, posters/signage, website/digital content, stakeholder giveaways, hand sanitizers, t-shirts, tote bags, water bottles, and other forums for educating the public).

(ii) Ensure that stakeholder contact information and correspondence is sent weekly to the SFMTA Project Communications Team Contact in order to update their stakeholder database.

(iii) Propose, plan, and schedule regular stakeholder updates by email, physical mailers, or in-person or virtual meetings when appropriate. These various communications channels are intended to keep Project stakeholders informed as the Project progresses. The proposed schedule of in-person and/or virtual meetings may be based on time, such as quarterly, and or may track to key Project milestones or community decision points for the Project.

(f) Potrero Yard Neighborhood Working Group. Commencing on the Commencement Date, Lead Developer will take the lead in facilitating, attending and sufficiently funding regular Potrero Yard Neighborhood Working Group meetings and activities during the PDA Term. Prior to the Effective Date, the Potrero Yard Neighborhood Working Group generally met on a monthly basis.

(g) Media Presence and Project Publicity. Unless City agrees otherwise in writing, Lead Developer must obtain the SFMTA Media Contact's consent prior to all Project press releases and press conferences. Lead Developer shall notify City as early as possible regarding Lead Developer's plan to issue press releases or hold press conferences and provide City with sufficient time to review and comment on those plans.

(h) Press Contacts. Lead Developer must not speak with the press or social media about the Project, its negotiations with City or submittals to City, or Lead Developer's proposed development concepts, plans, phasing or uses (collectively, "**Press Matters**") that have not been approved by City in writing for public release.

A "**Press Release**" means any written press release, advertisement, or other formal communication to any media outlet (including newspapers, local blog, radio and television stations, and web sites). Lead Developer agrees it will provide the SFMTA Media Contact with a draft copy of any Press Release with no less than five (5) Business Days' prior notice before its proposed release and will not issue any Press Release that has not been approved by the SFMTA Media Contact. City will have the right to issue its own separate Press Releases.

The LD Outreach Plan will govern Lead Developer's Press Releases and Lead Developer's media contacts unless City gives Lead Developer written notice (a "**Noncompliance Notice**") that Lead Developer has not kept City informed of Lead Developer media's activities with respect to the Project as required in the LD Outreach Plan. As of the date of a Noncompliance Notice, Lead Developer may not issue, nor permit or authorize any other party to issue, any Press Release relating to the Project, its negotiations with City or submittals to City, or Lead Developer's proposed development concepts, plans, phasing or uses that have not been approved by the SFMTA Media Contact in writing for public release.

(i) Press Conference or Media Activity.

(i) Lead Developer agrees not to hold any press conference or media activities regarding any Press Matters without first inviting the SFMTA Media Contact to be present, or have another SFMTA representative to be present, at the press conference or media activity and obtaining the SFMTA Media Contact's consent to the press conference or media activity. Lead Developer must provide the SFMTA Media Contact with no less than five (5) Business Days' prior notice of the date and time of any proposed press conference or media activity and state in detail the purpose of the press conference or media activity and the topics to be discussed ("**Conference/Media Summary**"). The SFMTA Media Contact must review the Conference/Media Summary promptly and advise Lead Developer of any comments by 5:00 p.m. on the day before the press conference/media activity. If the SFMTA Media Contact does not respond within two (2) Business Days of receiving the Conference/Media Summary, the Conference/Media Summary will be deemed approved.

Lead Developer must make reasonable efforts to schedule the press conference or media activity to accommodate the schedules of the SFMTA representatives designated to attend by the SFMTA Media Contact. If City reasonably believes the proposed press conference/media activity would adversely affect its interests, then City shall have the right to withhold its consent to Lead Developer holding the press conference or media activity, even if the press conference or media activity may further Lead Developer's interests.

(ii) City is entitled to withhold its consent to a Press Release, proposed press conference or media activity by Lead Developer, or a Conference/Media Summary if the SFMTA believes it would adversely affect the SFMTA's relationship with the public or a Regulatory Agency or adversely affect a Regulatory Agency's decision regarding any Regulatory Approvals. If the SFMTA Media Contact reviews a Press Release or Conference/Media Summary and believes that revisions or changes are advisable and appropriate, Lead Developer must make the those suggested revisions or changes irrespective of whether it may further Lead Developer's interests.

(iii) Lead Developer must timely notify the SFMTA Media Contact of media inquiries regarding the Project received by Lead Developer and Lead Developer's proposed response. The SFMTA Media Contact can waive any of the notice periods required under this Section 7.6 (Community Outreach and Public Relations) in writing or by telephone.

**7.7. Monthly and Quarterly Report.** No later than the first day of each month and each calendar quarter during the PDA Term, Lead Developer must prepare and submit to City a meaningful summary (as described for progress reporting in Section 2.1.1.2 (Progress Reporting) of Appendix B-2) of its major activities during the previous month or quarter, as applicable, to achieve each of the Performance Milestones for it required under Appendix B-1, and to prepare and deliver the Project Management Deliverables and Design Deliverables required under Appendix B-2.

**7.8. Weekly Meetings.** The LD Project Manager and City Project Manager will meet weekly to discuss Project coordination and the status of CEQA review for the Project, the Transaction Documents, Project financing, Regulatory Approvals, Design Documents, the status of any Early Works, Project feasibility, the Performance Milestones, and other Project-related matters, unless a weekly meeting is waived or rescheduled by mutual agreement. The LD Project Manager will coordinate for the LD Project Director, appropriate Key Personnel and other Lead Developer Agents, and the City Project Manager will coordinate for the City Project Director and other appropriate City staff working on the Project with respect to City's proprietary capacity under this Agreement, to attend those weekly meetings as applicable. The

LD Project Manager and City Project Manager may, by mutual agreement, hold two weekly meetings to divide the topics for discussion between those meetings.

**7.9. Data Room.** Lead Developer must set up and manage an industry-standard virtual data room to store Project documents (including Project Documents) and materials to be shared between the Parties and with other parties approved by City to receive those documents and materials.

**7.10. Assignment of Work Materials.** Lead Developer must ensure its contracts with any Lead Developer Agent for the creation or submission of any Work Materials must include provisions automatically assigning the Work Materials created under those contracts to City if there is a Termination. Lead Developer must provide a copy of each contract for Work Materials between Lead Developer and that Lead Developer Agent. Work Materials will be assigned to City in accordance with Section 16.6 (Assignment of Work Materials). Lead Developer's obligations under this Section 7.10 (Assignment of Work Materials) shall survive any termination of this Agreement.

## **8. CITY PREDEVELOPMENT OBLIGATIONS**

In addition to City's other obligations under this Agreement, City must comply with the predevelopment obligations described in this Article 8 (City Predevelopment Obligations) acting solely in its proprietary capacity and not in its regulatory capacity.

**8.1. Design and Plan Development.** City will timely provide written comments to the draft Design Deliverables it receives from Lead Developer in the manner described in the Design Management Plan in the attached Appendix B-2 (if approved by City) and by the Performance Dates described for those comments in Appendix B-1; provided, however, that once any draft Design Deliverables are submitted to City by Lead Developer for City review, City shall have no less than twenty-eight (28) days to review and provide written comments on such drafts to Lead Developer.

**8.2. Cooperation in Developing the Transaction Documents.** City will deliver the draft Project Agreement and any other Transaction Documents for which it elects to prepare the initial draft, and provide comments to the drafts of the Project Agreement and the other Transaction Documents within the time periods specified for those comments in the attached Appendix B-2.

**8.3. Cooperation in Financing Efforts.** City must use good faith efforts to reasonably cooperate in Lead Developer's efforts to secure the Project financing described in the City-approved Finance Plan ("**Approved Financing**") by timely responding to requests for information and attending meetings with potential lenders as reasonably requested by Lead Developer. City will use reasonable efforts to timely provide its comments on the draft Approved Financing agreements, the terms of which agreements shall be consistent with the requirements of the HCC Term Sheet and the final form of Project Agreement. City's full faith and credit and taxing power will not be pledged to secure any Approved Financing, nor can any Approved Financing constitute general indebtedness of City. Any Approved Financing agreements that require City's signature will be subject to the approval of the SFMTA Board and, if applicable, the Board of Supervisors, each acting in their sole discretion.

**8.4. Housing and Commercial Component Feasibility Analysis and Financing.** City will provide comments to the Housing and Commercial Component feasibility and financing analyses, plans, and commitments it receives from Lead Developer in the manner described in the attached Appendix B-2.



**8.5. Design-Build Contract.** City will provide comments to the draft Design-Build Contract materials it receives from Lead Developer, including the procurement materials and Lead Developer's proposed process for obtaining competitive bids for the Design-Build Contract and selecting the Design-Build Contract contractor in the manner described in the attached Appendix B-2.

**8.6. Asset Management Program.** City will collaborate with Lead Developer to ensure the Infrastructure Facility Maintenance will be sufficient to support the SFMTA's operations and maintenance of the Bus Yard Component. In addition to that collaboration, City will provide comments to the drafts of the scope of the Principal Project Company's Infrastructure Facility Maintenance it receives from Lead Developer in the manner described in the attached Appendix B-2.

**8.7. Energy Management Program.** City will collaborate with Lead Developer in its efforts to develop the Energy Management Program.

**8.8. IFM Contract.** City will provide comments to the draft IFM Contract materials it receives from Lead Developer, including the procurement materials and Lead Developer's proposed process for obtaining competitive bids for the IFM Contract and selecting the IFM Contract contractor in the manner described in the attached Appendix B-2.

**8.9. Early Works.** City will provide comments to the Early Works analysis it receives from Lead Developer and, if it approves and accepts the Early Works analysis, which approval may be subject to completion of CEQA review for the Project, execute an Early Works Agreement that addresses the City's requirements for the Early Works.

**8.10. General Regulatory Approval Cooperation.** City agrees, subject to its rights under Section 6.21 (Regulatory Approvals), to: (a) reasonably cooperate with Lead Developer in filing for, processing, and obtaining all General Regulatory Approvals in accordance with the Regulatory Approval Strategy; and (b) respond within a commercially reasonable time to requests for coordination, consultation, and scheduling additional meetings regarding the Project, including matters relating to any General Regulatory Approval if City would be the co-applicant. This Section 8.10 (General Regulatory Approval Cooperation) does not limit or otherwise constrain City's discretion, powers, and duties as a Regulatory Agency.

## **9. CHANGES TO THE PROJECT**

### **9.1. Infrastructure Facility or Infrastructure Facility Maintenance Changes Proposed by Lead Developer.**

(a) **LD Proposed Change.** Lead Developer may, at any time during the PDA Term, propose a modification to the Infrastructure Facility or the Infrastructure Facility Maintenance requirements as described in the Technical Proposal or the Technical Requirements (an "**LD Proposed Change**") due to: (i) any change in Applicable Law that occurs after June 20, 2022; (ii) the imposition of Regulatory Approval conditions on the Infrastructure Facility or Infrastructure Facility Maintenance by the Planning Commission, the SFMTA Board, or the Board of Supervisors (a "**Regulatory Change**"); (iii) any Project Site condition revealed through Lead Developer's due diligence investigation of the Project Site that differs materially from the conditions disclosed in the Reference Documents; or (iv) any modification that Lead Developer reasonably believes is in the best interests of City or the Project.

(b) **LD Proposed Change Processes.** Any LD Proposed Change that, if accepted by City, would (i) increase the design and construction costs or the Infrastructure Facility Maintenance costs of the Infrastructure Facility, or (ii) alter the Technical Requirements,



must be presented to City, for City's review and approval or disapproval, through the LD Change Request procedures set forth in Section 9.1(c) (LD Change Request). Lead Developer may present all other LD Proposed Changes, being those not included in item (i) or (ii) of this Section 9.1(b) (LD Proposed Change Processes), to City through the weekly Project meetings required pursuant to Section 7.8 (Weekly Meetings). City may, in its sole discretion, take the following actions with respect to any LD Proposed Change presented at a weekly Project meeting: (A) approve, (B) disapprove, or (C) request that Lead Developer submit an LD Change Request for such LD Proposed Change. City's approval, disapproval or request for an LD Change Request with respect any LD Proposed Change presented at a weekly meeting will be documented in the meeting minutes. City's approval of LD Proposed Changes at weekly meetings shall be summarized and included in the monthly and quarterly reports required under Section 7.7 (Monthly and Quarterly Report).

(c) LD Change Request.

(i) To propose an LD Proposed Change that, if accepted by City, would (A) increase the design and construction costs or the Infrastructure Facility Maintenance costs of the Infrastructure Facility, or (B) alter the Technical Requirements, Lead Developer must submit a written, detailed description of the LD Proposed Change and a narrative justification supporting the LD Proposed Change (an "LD Change Request").

(ii) The LD Change Request must include the following: (A) narrative overview of the LD Proposed Change and how it differs from the Project, (B) rationale for the LD Proposed Change, (C) impact analysis, including environmental, social, economic, community, traffic, safety, operations and maintenance or third-party impacts (positive and negative) of the LD Proposed Change, (D) cost analysis, including any additional costs or savings to the Project resulting from the LD Proposed Change, (E) specifications and plan drawings, as applicable, and (F) any additional information relevant to adjudicating a decision on the LD Proposed Change.

(iii) Within ten (10) Business Days of receiving an LD Change Request, City will notify Lead Developer, in writing, if it agrees to the LD Change Request, disapproves or tentatively disapproves the LD Change Request, or needs additional information regarding the LD Change Request, and the reasons for any tentative disapproval, disapproval, or additional information request. Any such request for additional information from City must detail the specific information City needs from Lead Developer to consider the LD Change Request. If City requests additional information for an LD Change Request, City will, within ten (10) Business Days of receiving that additional information, notify Lead Developer if it approves the LD Change Request, tentatively disapproves the LD Change Request, or needs additional information regarding the LD Change Request. The Parties shall agree in good faith to any necessary extensions to the review periods in this Section 9.1(c)(iii) to accommodate particularly complex LD Proposed Change or combination of LD Proposed Changes.

(iv) If City disapproves an LD Change Request because City reasonably determines it is not an LD Proposed Change as defined, Lead Developer can request a meeting of the Parties to further discuss that LD Change Request within ten (10) Business Days of receiving City's written notice of its disapproval. Within ten (10) Business Days of that meeting, City will notify Lead Developer if City approves, tentatively disapproves, or disapproves the LD Change Request and the reasons for any tentative disapproval or disapproval.

(v) Any LD Proposed Change presented to City through the LD Change Request procedures will not take effect until approved in writing by City, which approval shall not be unreasonably withheld with respect to LD Proposed Changes categorized within items (i) through (iii) of Section 9.1(a) (LD Proposed Change); the approval of LD

Proposed Changes described in item (iv) of Section 9.1(a) (*LD Proposed Change*) are within the City's sole discretion.

(vi) Lead Developer agrees that it would be reasonable for City to withhold its approval of any LD Proposed Change that City determines would (i) materially alter the Infrastructure Facility or the Infrastructure Facility Maintenance as described in the Technical Proposal or the Technical Requirements, (ii) materially increase City's costs or other liability with respect to the Project, (iii) materially and adversely affect the SFMTA's operations at or use of the Bus Yard Component, (iv) delay Substantial Completion of the Infrastructure Facility beyond the Outside Delivery Date, (v) materially reduce the number of residential units or reduce the number of any Affordable Units from that shown in the Technical Proposal, or (vi) materially increase City's risk from that shown in the Preliminary Term Sheet (or if an HCC Term Sheet is signed, from that shown in the HCC Term Sheet), materially differ from the Project Objectives, or any other aspect of the Project important to City.

(d) LD Proposed Changes will not result in an increase to the Fixed Budget Limit, except to the extent specifically permitted in Section 2.5(b)(ii) (*LD Proposed Change*).

## **9.2. HCC Change.**

(a) Basis for HCC Changes. The Proposed HCC must comply with the applicable Project Objectives and the Technical Requirements and must be developed in a manner that meets the HCC Interface Requirements. However, the Parties recognize that the Proposed HCC can only be achieved in compliance with the HCC Interface Requirements with sufficient and timely financing, funding, and Regulatory Approvals. If Lead Developer reasonably determines that (i) it cannot feasibly obtain the financing, funding, or Regulatory Approvals needed to construct the Proposed HCC, or (ii) it can obtain the necessary financing, funding, and Regulatory Approvals but cannot reasonably comply with the conditions of any of the Regulatory Approvals despite using cost effective means or cannot comply with the HCC Interface Requirements, then Lead Developer may propose a change to the Proposed HCC (an "HCC Change"). An HCC Change may, but is not required to, consist of the Housing and Commercial Component contingency plan included in Technical Submittal 28 (PDA Management Plan) and Financial Submittal 11 (Housing and Commercial Component Organizational, Financial, and Operations Plan) of the Proposal.

(b) HCC Change Request. To request an HCC Change, Lead Developer must submit a written request (an "HCC Change Request") that includes (i) an overview of the HCC Change and how it differs from the Proposed HCC, (ii) the rationale for the HCC Change, including a detailed description of why the Proposed HCC is no longer determined to be feasible, (iii) an impact analysis, including environmental, social, economic, community, traffic, safety, operations and maintenance or third-party impacts (positive and negative) of the HCC Change, if applicable, (iv) a cost analysis, including any additional costs or savings to the Infrastructure Facility or Proposed HCC resulting from the HCC Change, if applicable, (v) if the HCC Change would reduce the level of affordability or number of Affordable Units of the Proposed HCC, an analysis (with supporting backup documentation) showing that the Proposed HCC, if modified by the HCC Change, will have the highest level of affordability and number of Affordable Units that is feasible, including a detailed description of the methods Lead Developer considered to preserve the level of affordability and number of Affordable Units in the Proposed HCC and why those methods were not feasible, (vi) specifications and plan drawings, if applicable, and (vii) any additional information relevant to adjudicating a decision on the HCC Change.

(c) City Review. City shall not unreasonably withhold its consent to an HCC Change Request. The Parties agree it shall be reasonable for City to withhold its consent to an HCC Change Request if City determines (i) the matters described in the HCC Change Request

do not qualify for an HCC Change, or (ii) the matters described in the HCC Change Request qualify for an HCC Change, but the Proposed HCC, as modified by the proposed HCC Change, would (A) fail to comply with the Technical Requirements, (B) fail to meet the HCC Interface Requirements or the Project Objectives, (C) fail to meet the affordable rental unit requirements of California Government Code Section 54221(f)(1)(F)(i) or California Government Code Section 54221(f)(1)(F)(ii), or if higher, the requirements of San Francisco Planning Code Section 415.6(a), (D) materially increase City's costs or other liability; or (E) fail to reach Substantial Completion no later than one year after Substantial Completion of the Infrastructure Facility.

(d) Response to HCC Change Request. Within fifteen (15) Business Days of receiving an HCC Change Request, City will notify Lead Developer, in writing, if it approves or disapproves of the HCC Change Request or needs additional information, and the reasons for any disapproval or additional information request. If City requests additional information for an HCC Change Request, City will, within fifteen (15) Business Days of receiving that additional information, notify Lead Developer if it approves or disapproves of the HCC Change Request or needs additional information regarding the HCC Change Request.

(e) Approved HCC Change. If City approves an HCC Change, the Proposed HCC will be modified by that HCC Change as of Lead Developer's receipt of City's written approval of the HCC Change. Any costs or time resulting from an approved HCC Change will not be a LD Predevelopment Cost or otherwise be allocated to the Bus Yard Component. If the HCC Change results in removal or reduction of the Housing and Commercial Component from the Project, the LD Predevelopment Cost shall be reduced accordingly, and the amount of that reduction shall be negotiated in good faith by the Parties.

(f) Disapproved HCC Change. If City reasonably disapproves an HCC Change Request under Section 9.2(c)(i), there will be no change to the Proposed HCC for that HCC Change Request. If City reasonably disapproves an HCC Change Request under Section 9.2(c)(ii) but it is feasible to construct a modified Proposed HCC that would (i) comply with the applicable Project Objectives, the Technical Requirements, and the HCC Interface Requirements, (ii) meet the affordable rental unit requirements of California Government Code Section 54221(f)(1)(F)(i) or California Government Code Section 54221(f)(1)(F)(ii), or if higher, the requirements of San Francisco Planning Code Section 415.6(a), and (iii) reach Substantial Completion no later than one year after Substantial Completion of the Infrastructure Facility without materially increasing City's costs or other liability, then Lead Developer will submit a revised HCC Change Request for that modified version. If City reasonably disapproves an HCC Change Request under Section 9.2(c)(ii) and it is not feasible to construct a modified Proposed HCC that would (x) comply with the applicable Project Objectives, the Technical Requirements, and the HCC Interface Requirements, (y) meet the affordable rental unit requirements of California Government Code Section 54221(f)(1)(F)(i) or California Government Code Section 54221(f)(1)(F)(ii), or if higher, the requirements of San Francisco Planning Code Section 415.6(a), and (z) reach Substantial Completion no later than one year after Substantial Completion of the Infrastructure Facility without materially increasing City's costs or other liability, then the Project will be modified to only be comprised of the Bus Yard Component.

(g) IF Reimbursement Notice. If Lead Developer submits an HCC Change Request after Performance Milestone 27A due to a Regulatory Approval condition of the Planning Commission, the SFMTA Board, or the Board of Supervisors, and the Project is modified to only be comprised of the Bus Yard Component pursuant to Section 9.2(f) (*Disapproved HCC Change*), then the LD Predevelopment Cost will be increased by any additional, documented costs incurred by Lead Developer (subject to City approval, which will not be unreasonably withheld) to modify the Design Deliverables for a Facility that will only be comprised of the Bus Yard Component. To request City's approval of any such costs, Lead Developer must submit a written request (an "**IF Reimbursement Notice**") that has a detailed

description of the Design Deliverables modifications together with invoices evidencing the costs for those modifications. Within fifteen (15) Business Days of receiving an IF Reimbursement Notice, City will notify Lead Developer, in writing, if it approves or disapproves of the IF Reimbursement Request or needs additional information, and the reasons for any disapproval or additional information request. If City requests additional information for an IF Reimbursement Notice, City will, within fifteen (15) Business Days of receiving that additional information, notify Lead Developer if it approves or disapproves of the Request or needs additional information regarding the IF Reimbursement Notice.

### **9.3. Changes Proposed by City.**

(a) City may propose modifying the Preliminary Term Sheet and the HCC Term Sheet, if any, in the applicable draft Transaction Documents, and may also propose modifying the Technical Requirements, the Proposal, or any other aspect of the Project (“**City Proposed Change**”) at any time, in each case without notice to any Guarantor. To propose a City Proposed Change, City must submit a written, detailed description of that City Proposed Change and a narrative justification for the City Proposed Change. Within five (5) Business Days of receiving notice of a City Proposed Change, Lead Developer must notify City in writing if it accepts the City Proposed Change or requests a meeting of the Parties to discuss the City Proposed Change. Any failure to timely respond to a City Proposed Change will be deemed Lead Developer’s acceptance of that City Proposed Change. If Lead Developer timely requests a meeting of the Parties with respect to a City Proposed Change, the Parties will meet within ten (10) Business Days of City’s receipt of that meeting request from Lead Developer. If City elects to pursue the City Proposed Change after that meeting, it must deliver written notice of that election to Lead Developer and the Project will be accordingly modified by the City Proposed Change. Pursuant to Section 2.5 (Fixed Budget Limit; Adjustments; Allowances; Submittals), any additional costs or time incurred by a City Proposed Change shall be equitably adjusted by the Parties, using the PCIC to the extent a City Proposed Change also benefits the Common Infrastructure or the Housing and Commercial Component.

(b) As of the execution of this Agreement, the Lead Developer anticipates the requirements of the Regulatory Approvals that will be needed for the Proposed HCC, and the construction timing of the Proposed HCC, will not have a material, negative impact on City’s cost of the Infrastructure Facility, the timing for Substantial Completion of the Infrastructure Facility, or the operation of the Bus Yard Component after Substantial Completion of the Infrastructure Facility. However, the Parties acknowledge new information discovered during the PDA Term with respect to the timing, feasibility, and Regulatory Approval conditions and financing to deliver the Proposed HCC may affect that initial analysis. The primary objective of the Project is the timely delivery and operation of the Infrastructure Facility, but City recognizes that Lead Developer will expend time and funds to pursue its predevelopment obligations under this Agreement with respect to the Proposed HCC.

Accordingly, notwithstanding anything to the contrary in Section 9.3(a), City will not propose a City Proposed Change to modify or remove the Housing and Commercial Component and Common Infrastructure from the Project unless City reasonably determines (i) Lead Developer will not be able to obtain the Regulatory Approvals or financing needed for the timely construction of the Proposed HCC and timely payment of the Infrastructure Facility construction costs allocated to the Housing and Commercial Component, (ii) the Proposed HCC will delay Substantial Completion of the Infrastructure Facility beyond the Outside Delivery Date, (iii) the anticipated timing for Housing and Commercial Component construction activities will interfere with the SFMTA’s transit operations at the Bus Yard Component after the Substantial Completion of the Infrastructure Facility, or (iv) the Proposed HCC will materially increase City’s costs or liabilities with respect to the Project. A City Proposed Change to modify the Housing and Commercial Component may, but is not required to, consist of the Housing and



Commercial Component contingency plan included in Technical Submittal 28 (PDA Management Plan) and Financial Submittal 11 (Housing and Commercial Component Organizational, Financial, and Operations Plan) of the Proposal.

If any of the conditions of the foregoing paragraph are met, City can make a City Proposed Change to modify or remove the Housing and Commercial Component and Common Infrastructure from the Project through the procedure to effect a City Proposed Change under Section 9.3(a).

## **10. RECORDS**

**10.1. Definition of Material Adverse Change.** The term “material adverse change” shall include any (i) bankruptcy, (ii) decrease in tangible net worth of 10% or greater of net assets, (iii) sale, merger, or acquisition exceeding 10% of the value of net assets prior to the sale, merger, or acquisition, (iv) downward change in credit rating, (v) inability to meet material conditions of loan or debt covenants, (vi) incurrence of a net operating loss, (vii) sustained charges exceeding 5% of the then net assets due to claims, changes in accounting, write-offs, or business restructuring; restructuring/reduction in salaried personnel exceeding 10% of its workforce or involving the disposition of assets exceeding 10% of the then net assets, (viii) or event known to the entity which represents a material change in financial position from previously submitted financial statements.

**10.2. Material Adverse Change in Financial Position.** Lead Developer shall, for itself and for each Equity Member, Housing Developer, Affordable Housing Developer, and Guarantor, notify City of, and shall provide an explanation for, any material adverse change in financial position that was not reflected in or differed from the financial position reflected in the latest financial statements submitted in its response to the RFQ and updated in the Proposal. If there is any such material adverse change, Lead Developer shall promptly provide City with an assessment regarding the effect of such change on Lead Developer’s ability to complete its obligations under this Agreement.

**10.3. Future Performance.** Following its review of financial statements or certifications provided under this Article 10 (Records), City may, in its sole discretion, require Lead Developer to develop and implement a plan assuring City of Lead Developer’s capacity to continue to perform its obligations under this Agreement. City shall have the right to review and approve, in its sole discretion, such plan, and may identify additional measures assuring future performance, including requiring additional guarantees in accordance with Section 6.23 (Guaranty). Lead Developer shall promptly and diligently carry out any approved plan in accordance with its terms.

## **11. INTELLECTUAL PROPERTY**

### **11.1. Developed IP.**

(a) Lead Developer acknowledges and agrees that the City shall own all Developed IP and the Lead Developer agrees to assign, and shall cause all Lead Developer Related Entities to assign, to City all rights, title and interest in and to the Developed IP including any deliverable and/or Work Materials upon Commercial Close, provided that to the extent this Agreement is terminated in accordance with Section 16, the Lead Developer will assign, and cause Lead Developer Related Entities to assign, to City all rights, title and interest in and to the Developed IP in connection with the assignment of Work Materials contemplated by Section 16.6 and subject to payment receipt by the Lead Developer of the applicable Termination Payment. In connection with the foregoing, Lead Developer agrees to execute, and shall cause all Lead Developer Related Entities to execute, such further documents and to do such further



acts as may be necessary to perfect, register, or enforce City's ownership of such rights, in whole or in part. If any Lead Developer Related Entity fails or refuses to execute any such documents, Lead Developer for itself and on behalf of any Lead Developer Related Entity hereby appoints City as the necessary Lead Developer Related Entity's attorney-in-fact (this appointment is irrevocable and is coupled with an interest) to act on Lead Developer Related Entity's behalf and to execute such documents. Lead Developer hereby forever waives and agrees never to assert, and shall cause any Lead Developer Related Entity to waive and never to assert, against City, its successors or licensees any and all "moral rights" (including claims based on 17 U.S.C. §§ 101-810 (the Copyright Act of 1976, as modified), specifically including 17 U.S.C. § 106A(a) (the Visual Artists Rights Act of 1990, "VARA")) that such Lead Developer Related Entity may have in Intellectual Property or deliverable and/or Work Materials following assignment thereof in accordance with this Agreement.

(b) Reserved.

(c) Lead Developer shall deliver to City all deliverables and/or Work Materials authored, created or developed under or for the purpose of the Agreement at time(s)/date(s) pursuant to the Agreement.

### **11.2. Lead Developer IP.**

(a) Lead Developer hereby grants, and shall cause each Lead Developer Related Entity to grant, to City an irrevocable, perpetual, non-exclusive, transferable, fully paid-up right and license to use, execute, perform, sublicense, exploit, , manufacture, distribute, reproduce, adapt, display, and prepare derivative works ("**Base License Rights**") of Lead Developer IP in connection with the Work or the Project. Lead Developer acknowledges and agrees that all rights, title or license(s) granted under this Article 11 (*Intellectual Property*) will survive any expiration or earlier termination of this Agreement without regard to convenience, default or other causation.

(b) Lead Developer shall identify and disclose to City all Lead Developer IP required by, incorporated in, or combined with the Work or the Project.

### **11.3. Third Party IP.**

(a) Lead Developer shall secure license(s) in the name of City for the Base License Rights of Third Party IP, in connection with the Work or the Project, including a representation and warranty that Third Party IP does not infringe the rights, including Intellectual Property rights, of any Person. To the extent that the foregoing license rights or representation and warranty are refused by any owner of Third Party IP, Lead Developer shall secure City's prior written approval, in its reasonable discretion, for any license, the terms of which are acceptable to such owner of Third Party IP. For the avoidance of doubt, in no event shall Lead Developer incorporate Third Party IP into the Work, any Work Materials, or the Project without first securing such licenses.

(b) Lead Developer shall obtain from each owner of Third Party IP consent to have all necessary IP Materials related to Third Party IP, including but not limited to Source Code, documentation and/or related instructions and materials to execute Software deposited into an IP Escrow deposit requirements of Section 11.7 (IP Escrow). No Third Party IP shall be incorporated into the Work or the Project without City's prior written approval, in its sole discretion, to the extent the owner of the relevant Third Party IP has not provided such consent.

(c) COTS. Lead Developer shall secure license(s) in the name of City based on commercially available terms for the COTS, including any standard end user license

agreement. If the COTS license terms fail to provide the complete Base License Rights, Lead Developer shall provide (i) an outline of such license deficiencies and (ii) the identification of at least one (1) other COTS available for the same purpose, function or design. Lead Developer shall identify and disclose to City all COTS required by, incorporated in, or combined with the Work or the Project.

#### **11.4. City IP and City Data.**

(a) City hereby grants to Lead Developer a limited, non-exclusive license to use, execute, perform, exploit, manufacture, distribute, reproduce, adapt, display, sublicense (solely to the Development Team Design Consultant and to its design subconsultants listed in Appendix O (List of Design Subconsultants), and prepare derivative works from the Project IP, City IP, and City Data, and any deliverable and/or Work Materials incorporating such Intellectual Property, solely in connection with and limited to the Allowed Uses. “**Allowed Uses**” are: (a) incorporation into the Work Materials and/or the Project; and (b) performance, provision, furnishing and discharge of the Work under the Agreement. All rights not specifically granted in this Section 11.4(a) are reserved to City. For the avoidance of doubt, no rights to trademarks of City, whether registered or not, (the “**City Marks**”) are granted to Lead Developer and Lead Developer may not incorporate, refer to, or otherwise use the City Marks for any marketing, promotional or advertising purposes without a separate trademark license agreement. Any sublicense permitted under this Section 11.4(a) shall include the same limitations, terms and conditions that apply with respect to the Lead Developer’s license granted hereunder, and Lead Developer shall provide City with a copy of each such sublicense. Changes to the list of design subconsultants included in Appendix O may be made with the prior written consent of the City Project Director, and such changes shall be effective from the date of City’s delivery of that written consent to Lead Developer (which consent shall include a copy of the revised Appendix O), or such later date stated in the notice delivering that consent.

(b) In addition to Lead Developer’s obligations and restrictions related to City Data in this Agreement, Lead Developer acknowledges and agrees that all City Data, including the results or creation of any anonymization, de-identification, aggregation or other analysis of such City Data, whether physical or digital, is owned by City. Except as specifically provided in this Agreement, no Lead Developer Related Entity shall make use of City Data even if such use is for such Lead Developer Related Entity’s internal use or analysis, whether or not commercial value is available or received, and/or such information or data is available in other, separate or cumulative sources.

(c) Notwithstanding any other term or condition of this Agreement, the rights and permissions granted under this Section 11.4 (City IP and City Data), including the rights and permissions of any sublicensees, shall terminate (i) upon the effective date of termination of this Agreement or (ii) upon 24-hour written notice by City to Lead Developer, whichever is earlier.

**11.5. Delivery.** Excluding COTS pursuant to Section 11.3(c), but in addition to any deliverable and/or Work Materials or other items to be delivered to City under this Agreement, Lead Developer shall deliver, or cause to be delivered, to City all IP Materials. Only to the extent that such delivery would eliminate or substantially limit the legal protections for, or commercial value of, such IP Materials, in such cases Lead Developer shall comply, and cause Lead Developer Related Entities to comply, with the IP Escrow deposit requirements of Section 11.7 (IP Escrow), below, provided that such delivery to City or deposit into IP Escrow(s) shall occur at the earlier of (x) when such deliverable and/or Work Materials is due under the Agreement terms, (y) within 60 days after the Effective Date of the Agreement or (z) 60 days prior to the effective date of termination.

**11.6. Payment Inclusive.** Lead Developer acknowledges and agrees that the sum of all payments made pursuant to the Agreement shall include all royalties, fees, costs and expenses arising from or related to the Software or any licenses granted under this Article 11 (Intellectual Property). For the avoidance of doubt, all fees, costs and expenses for IP Escrow(s) are included in such payments paid to Lead Developer by City under this Agreement.

**11.7. IP Escrow.**

(a) City and Lead Developer acknowledge that Lead Developer, Lead Developer Related Entities and/or owners of Third Party IP may not wish to deliver the required IP Materials directly to City pursuant to this Agreement as public disclosure could deprive the such owners of Intellectual Property commercial value. Lead Developer further acknowledges that City nevertheless must be guaranteed access to such IP Materials and the complete enjoyment of all rights, including Intellectual Property rights, granted pursuant to this Agreement, and must be assured that the IP Materials are delivered to City.

(b) In lieu of delivering the IP Materials directly to City pursuant to the Agreement, subject to the requirements of Section 11.5 (Delivery), Lead Developer, Lead Developer Related Entity or the owner of Third Party IP may from time to time elect to deposit relevant IP Materials with a neutral depository. In such event, City and Lead Developer (or the applicable Lead Developer Related Entity or other owner of Third Party IP) shall: (i) mutually select one or more escrow companies or other neutral depositories (each an “**IP Escrow Agent**”) engaged in the business of receiving and maintaining escrows of Software Source Code or other Intellectual Property; (ii) establish one or more escrows (each an “**IP Escrow**”) with the IP Escrow Agent on terms and conditions reasonably acceptable to City and Lead Developer for the deposit, retention, audit, upkeep and release of IP Materials to City pursuant to this Agreement; (iii) determine a date for each deposit of the IP Materials into the IP Escrow; and (iv) determine a process for releasing from escrow the IP Materials to be delivered to City pursuant to the Agreement. Lead Developer shall be responsible for the fees and costs of the IP Escrow Agent and IP Escrow(s).

(c) Any IP Materials deposited in IP Escrow(s) shall be released and delivered to City in any of the following circumstances (“**Release Conditions**”):

(i) this Agreement is terminated for any reason;

(ii) voluntary or involuntary bankruptcy of Lead Developer, Lead Developer Related Entity or the owner of Third Party IP; or

(iii) Lead Developer, Lead Developer Related Entity or the owner of Third Party IP is dissolved or liquidated or otherwise ceases to engage in the ordinary course of the business of manufacturing, supplying, maintaining, and servicing the software, product, part, or other item containing the relevant Intellectual Property.

(iv) City shall maintain the confidentiality of any IP Materials released pursuant to this Section 11.7(c) pursuant to Section 2.11 (Proprietary or Confidential Information) and shall enter into a non-disclosure agreement with any third party to whom City, in its sole discretion, grants access to such IP Materials to the extent that such IP Materials contain Confidential Information.

(d) **Audit & Verification.** Regardless of whether one of the Release Conditions occurs, City shall have the right to require the IP Escrow Agent to verify the relevance, completeness, currency, accuracy, and functionality of the IP Materials held by the IP Escrow in a manner and form as directed by City at the expense of Lead Developer not more

than once in any calendar year. In the event such testing demonstrates the IP Materials held by the IP Escrow does not correspond to the Work Materials and/or Project or pursuant to the Agreement, Lead Developer shall deposit the correct materials with the IP Escrow Agent within seventy-two (72) hours following notice by City.

**11.8. Lead Developer Related Entities** Lead Developer acknowledges and agrees that it shall direct, and be responsible for, the compliance of all Lead Developer Related Entities with the obligations and restrictions of this Article 11 (Intellectual Property) and shall incorporate the provisions of this Article 11 (Intellectual Property) into each agreement involving development, provision or acquisition of Intellectual Property or the creation or generation of any deliverable and/or Work Materials.

## **12. NO REPRESENTATION OR WARRANTY OF PROJECT VIABILITY**

Lead Developer acknowledges and agrees that City has not made any representation or warranty regarding any matters relating to the Project Site, including but not limited to (i) the suitability of the Project Site for construction of the Project, (ii) the Project, (iii) if the SFMTA Board, Board of Supervisors, any other applicable City board or commission, and City's Mayor will approve the Transaction Documents, (iv) the ability to obtain CEQA approval for the Project, or (v) Lead Developer's ability to obtain the General Regulatory Approvals. Lead Developer further acknowledges and agrees that although City is a Regulatory Agency, it is entering into this Agreement in its proprietary capacity and not as a Regulatory Agency with certain police powers and in that proprietary capacity, it has no authority or influence over other City officials, departments, boards, commissions, or agencies or any other Regulatory Agency responsible for issuing required Regulatory Approvals (including City, in its regulatory capacity). Accordingly, no guarantee or presumption exists that any of the Regulatory Approvals will be issued by the appropriate Regulatory Agency, and City's status as a Regulatory Agency will not limit Lead Developer's obligation to obtain General Regulatory Approvals from appropriate Regulatory Agencies that have jurisdiction over the Project.

## **13. FINAL ACTION SUBJECT TO ENVIRONMENTAL REVIEW**

City will not enter into any Transaction Document or request approval of them until City has completed environmental review with respect to the Project in compliance with the California Environmental Quality Act ("CEQA") and City's CEQA Procedures, as set forth in San Francisco Administrative Code Chapter 31. The Project will also require discretionary approvals by a number of government bodies after public hearings and environmental review. Nothing in this Agreement commits, or shall be deemed to commit City or any other public agency to approve or implement the Project or the Transaction Documents, and they may not do so until environmental review of the Project as required under Applicable Law has been completed and they are able to review and consider the information contained in the CEQA document and all other relevant information about the Project. Accordingly, all references to the "Project" in this Agreement shall mean the proposed Project subject to future environmental review and consideration by City and other public bodies.

City and any other public agencies with jurisdiction over any part of the Project each shall have the absolute discretion to (a) require modifications to the Project and/or implementation of specific measures to mitigate significant adverse environmental impacts; (b) select feasible alternatives that avoid significant adverse impacts of the Project, including the "no project" alternative; (c) reject all or part of the Project if the economic and social benefits of the Project do not outweigh otherwise unavoidable significant adverse impacts of the Project; (d) approve the Project upon a finding that the economic and social benefits of the Project outweigh otherwise unavoidable significant adverse environmental impact of the Project; and (e) deny the Project.



## 14. COMMERCIAL CLOSE

**14.1. Achieving Commercial Close.** If Lead Developer has obtained all necessary General Regulatory Approvals, CEQA review for the Project has been completed, the Transaction Documents have been mutually approved by the Parties, and the Transaction Documents have been approved by the SFMTA Board, the Board of Supervisors, and any other applicable City board or commission, each acting in its sole discretion, and all the other Performance Milestones have been timely achieved, Lead Developer shall cause the Principal Project Company and the Housing Project Company to execute and deliver the Transaction Documents. Such execution and delivery will occur on or before the tenth (10th) Business Day (the “**Scheduled Commercial Closing Date**”) immediately following the date legislation adopted by the Board of Supervisors to approve the Transaction Documents is effective (the “**Project Approval Date**”) or any earlier date mutually selected by the Parties, the Principal Project Company, and the Housing Project Company between the Project Approval Date and the Scheduled Commercial Closing Date.

**14.2. Flexibility for Separate Commercial Closings.** Notwithstanding Section 14.1 (Achieving Commercial Close), the IF Commercial Close and the HCC Commercial Close may occur at different times, provided that City has provided its prior written approval in its sole discretion.

## 15. PROHIBITED ACTIONS

**15.1. Prohibited Payments.** Lead Developer may not pay, or agree to pay, any fee or commission, or any other thing of value contingent on entering into this Agreement, any other Project Document, or any other agreement with City related to the Project, to any City or City employee or official or to any contracting consultant hired by City for the Project. By entering into this Agreement, Lead Developer certifies to City that Lead Developer has not paid or agreed to pay any fee or commission, or any other thing of value contingent on entering into this Agreement, any other Project Document, or any other agreement with City related to the Project, to any City employee or official or to any contracting consultant hired by City for the Project.

**15.2. No Entry.** Lead Developer expressly acknowledges and agrees that this Agreement does not give Lead Developer or any Lead Developer Agents the right to enter or access the Project Site. Any entry on the Project Site by Lead Developer or any of the Lead Developer Agents must be pursuant to terms and conditions of the Access Agreement.

**15.3. Submitting False Claims.** The full text of San Francisco Administrative Code Section 21.35, including the enforcement and penalty provisions, is incorporated into this Agreement by this reference. Pursuant to San Francisco Administrative Code Section 21.35, any contractor or subcontractor who submits a false claim shall be liable to City for the statutory penalties set forth in that section. A contractor or subcontractor will be deemed to have submitted a false claim to City if the contractor or subcontractor: (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. Lead Developer agrees that all references to a contractor in San Francisco Administrative Code Section 21.35 apply to Lead Developer and all references to a subcontractor in San Francisco Administrative Code Section 21.35 apply to Lead Developer Agents and agents of Development Team Members.



## 16. TERMINATION

**16.1. Termination for Convenience.** In addition to its other termination rights in this Agreement, City shall have the right to terminate this Agreement at any time at its sole discretion by providing at least ten (10) days prior written notice of that termination to Lead Developer. Termination (or partial termination) of this Agreement shall not relieve any Guarantor of its obligation for any claims arising out of the Work performed.

**16.2. Terminating Event.** The occurrence of any of the following events (each, a “Terminating Event”) will cause early termination of and extinguish this Agreement (“Termination”), without an opportunity for the Lead Developer to cure:

- (a) City exercises its right to terminate this Agreement following an LD Event of Default;
- (b) City exercises its right to terminate this Agreement for convenience;
- (c) City issues a Discontinuation Notice;
- (d) The PDA Term expires before Commercial Close occurs;
- (e) Lead Developer exercises its right to terminate this Agreement following a City Event of Default;
- (f) Lead Developer fails to comply with Article 15 (Prohibited Actions), Article 18 (Assignment and Changes in Ownership of Lead Developer), or Section 24.1 (Nondiscrimination in City Contracts and Benefits Ordinance).

**16.3. Termination Payments.** If this Agreement terminates before Commercial Close for any reason, City will have no obligation to reimburse or otherwise pay Lead Developer for any of Lead Developer’s Project costs or expenses. Notwithstanding anything to the contrary in the foregoing sentence, City shall, in exchange for an executed release from Lead Developer satisfactory in form and substance to City, make the following payments (each, a “Termination Payment”), as applicable, to Lead Developer if this Agreement terminates before Commercial Close for any reason other than an LD Event of Default and Lead Developer has performed its obligations under Section 16.6(a). The executed release from Lead Developer shall release, waive, and discharge City and City Agents of and from all liabilities, obligations, claims, and demands whatsoever arising out of or under this Agreement. City’s liability to Lead Developer with respect to any claims or Disputes arising from this Agreement shall not exceed Nine Million Nine Hundred Ninety Thousand Dollars (\$9,990,000) plus the amount of the Continuation Payment, if paid. City’s payment of any Termination Payment shall not affect any of City’s rights under the Agreement with respect to completed Work, or relieve Lead Developer or any Guarantor from its respective obligations with respect thereto.

(a) Proposal Payment. If this Agreement terminates for any reason other than an LD Event of Default, then City will pay Lead Developer an amount equal to One Million Three Hundred and Fifty Thousand Dollars (\$1,350,000) for Work Materials comprising the Proposal (the “Proposal Payment”).

(b) PDA Phase 1. If this Agreement terminates for any reason other than an LD Event of Default after Lead Developer has timely submitted all the documents described as Performance Milestone 15, and those documents comply with the applicable requirements for them in the attached Appendix B-2, then, in addition to the Proposal Payment, City will pay Lead Developer an amount equal to the lesser of Lead Developer’s Qualified Out-of-Pocket

Costs to provide the PDA Phase 1 materials (“**PDA Phase 1 Costs**”) and Four Million Nine Hundred Ninety Thousand Dollars (\$4,990,000). Lead Developer must submit commercially reasonable evidence of its PDA Phase 1 Costs to City before City is obligated to make any payment under this subsection (b).

(c) PDA Phase 2. If this Agreement terminates for any reason other than an LD Event of Default after Performance Milestone 16 and Lead Developer has timely delivered the materials described as Performance Milestone 27, and those materials comply with all the applicable requirements for them in the attached Appendix B-2, then, in addition to the Proposal Payment, City will pay Lead Developer an amount equal to the lesser of (A) the PDA Phase 1 Costs and Lead Developer’s Qualified Out-of-Pocket Costs to provide those PDA Phase 2 materials (“**PDA Phase 2 Costs**”) and (B) Seven Million Six Hundred Forty Thousand Dollars (\$7,640,000). Lead Developer must submit commercially reasonable evidence of its PDA Phase 1 Costs and its PDA Phase 2 Costs to City before City is obligated to make any payment under this subsection (c).

(d) PDA Phase 3. If this Agreement terminates for any reason other than an LD Event of Default after Performance Milestone 28 and after Lead Developer has timely delivered the materials and evidence described as Performance Milestones 32 and 33, and those materials comply with all the applicable requirements for them in the attached Appendix B-2, then, in addition to the Proposal Payment, City will pay Lead Developer an amount equal to the lesser of (A) the PDA Phase 1 Costs, the PDA Phase 2 Costs and Lead Developer’s Qualified Out-of-Pocket Costs to provide those PDA Phase 3 materials and perform those PDA Phase 3 activities (“**PDA Phase 3 Costs**”) and (B) Eight Million Six Hundred Forty Thousand Dollars (\$8,640,000). Lead Developer must submit commercially reasonable evidence of its PDA Phase 1 Costs, its PDA Phase 2 Costs, and its PDA Phase 3 Costs to City before City is obligated to make any payment under this subsection (d).

(e) Termination between Milestones. City’s delivery of Notice to Proceed #1 to Lead Developer and each of the Performance Milestones described in the foregoing subsections (b)-(d) are “**Qualifying Payment Milestones**”. If this Agreement terminates for any reason other than an LD Event of Default between any of the Qualifying Payment Milestones for any reason other than an LD Event of Default, City will make a partial termination payment (a “**Partial Payment**”) for Lead Developer’s Qualified Out-of-Pocket Costs for any Work Materials completed by Lead Developer for the Qualifying Payment Milestone that would have immediately followed the date this Agreement is terminated if (1) Lead Developer has delivered those Work Materials to City within ten (10) Business Days following the termination of this Agreement, (2) those Work Materials comply with all the requirements for them in the attached Appendix B-2, as modified to reflect the early delivery of those Work Materials, and (3) all third parties that prepared any of those Work Materials have consented in writing to the assignment of them to City.

Lead Developer must submit commercially reasonable evidence of its Qualified Out-of-Pocket Costs for these partially-completed Work Materials to City before City is obligated to make any payment under this subsection (e). The amount of the Partial Payment will be the higher of (i) the amount calculated by prorating the termination payment associated with the next Qualifying Payment Milestone at the time this Agreement terminates by the number of days between that next Qualifying Payment Milestone and the immediately preceding Qualifying Payment Milestone, and determining the prorated portion of that next Qualifying Payment Milestone termination payment as of the date of termination, and (ii) the value of the completed or partially completed Work Materials prepared for the PDA Phase during which this Agreement terminates, as reasonably determined by mutual agreement of the Parties based on the percentage of completion of those Work Materials relative to the total amount of Work Materials required during the applicable PDA Phase.

(f) **Electronic Payments.** Lead Developer agrees that City's obligation to make any Termination Payment to Lead Developer is conditioned on Lead Developer signing up to receive electronic payments through the City's Automated Clearing House (ACH) payments service/provider. The process to sign up for those electronic payments is described at [www.sfcontroller.org/electronic-payments-ach-vendors](http://www.sfcontroller.org/electronic-payments-ach-vendors).

(g) **Survival.** The Parties' respective rights and obligations under this Section 16.3 (Termination Payments) shall survive any termination of this Agreement.

**16.4. Termination Notice; Effect of Termination.** A Party shall exercise any termination right it has under this Agreement by delivering written notice to the other Party ("**Termination Notice**"). Following the delivery of a Termination Notice, this Agreement will terminate and each Party will be released from all liability under this Agreement except for any obligations that expressly survive the termination or expiration of this Agreement.

**16.5. City's Rights Following Termination.** If a Termination occurs, City, in its sole discretion, may take any action with respect to the Project Site, including the right to negotiate with another developer for the development of the Project Site, to elect not to pursue any project at the Project Site, or to undertake other efforts with the Project Site including pursuing a new procurement or issuing a new request for proposals. Lead Developer agrees that if this Agreement terminates on its own terms, City shall have the right to elect to negotiate with another Short-Listed Proposer to reprocur the Project, and use the Proposal and the Work Materials submitted by Lead Developer prior to Termination.

#### **16.6. Assignment of Work Materials**

(a) If there is a Termination, Lead Developer must take the following actions within the time periods specified in City's notice:

(i) assign, at no cost to City, all of its rights under its consulting contracts with Lead Developer Agents, including any rights to use all resulting Work Materials;

(ii) satisfy all outstanding fees relating to the Work Materials that are then due and payable or will become due and payable for services relating to the Project rendered by any of Lead Developer Agents providing any Work Materials up to the date of Termination and provide written evidence of satisfaction to City; and

(iii) deliver copies of all Work Materials in the possession of Lead Developer or a Development Team Member or, for materials not in the possession of Lead Developer or a Development Team Member, confirm, on request from the applicable Lead Developer Agents or City, those Lead Developer Agents are authorized to deliver or have delivered from the appropriate parties all Work Materials to City.

(b) If there is a Termination, and except as provided in Article 11 (Intellectual Property), including without limitation Lead Developer's payment of fees, and subject to Section 21.1(g), City's use, license or other exercise of rights of Intellectual Property subject to Article 11 (Intellectual Property) or Work Materials following a Termination shall be at City's risk and Lead Developer neither warrants nor represents that such Intellectual Property or Work Materials are suitable for use without modification for a subsequent purpose, project or procurement.

(c) Lead Developer's obligations under this Section 16.6 (Assignment of Work Materials) shall survive a Termination.

## 17. INSURANCE

**17.1. Required Coverage During PDA Term.** Without in any way limiting Lead Developer's liability pursuant to Article 21 (*Indemnity; Disclaimers; Limitation of Liability*), Lead Developer must maintain or cause to be maintained in force insurance in the following amounts and coverages during the PDA Term:

(a) Commercial General Liability Insurance with limits not less than \$1,000,000 each occurrence for Bodily Injury and Property Damage, including Contractual Liability, Personal Injury, Products and Completed Operations.

(b) Commercial Automobile Liability Insurance with limits not less than \$1,000,000 each occurrence, "Combined Single Limit" for Bodily Injury and Property Damage, including Owned, Non-Owned and Hired auto coverage, as applicable.

(c) Workers' Compensation, in statutory amounts, with Employers' Liability limits not less than \$1,000,000 for each accident, injury, or illness; provided that Lead Developer shall not be required to carry workers' compensation coverage as long as Lead Developer has no employees.

(d) Professional Liability Insurance, applicable to Lead Developer's profession, with limits not less than \$1,000,000 for each claim with respect to negligent acts, errors or omissions in connection with the Work.

**17.2. Endorsements.** The insurance described in Section 17.1 (*Required Coverage During PDA Term*) shall include the following endorsements:

(a) The Commercial General Liability policy and the Commercial Automobile Liability Insurance policy must be endorsed to name as Additional Insured the City and County of San Francisco, its Officers, Agents, and Employees.

(b) The Workers' Compensation policy(ies) shall be endorsed with a waiver of subrogation in favor of City for all work performed by Lead Developer, its employees, agents and subcontractors under this Agreement.

(c) The Commercial General Liability policy shall 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 the insurance applies separately to each insured against whom a claim is made or suit is brought.

(d) The Commercial Automobile Liability Insurance policy shall 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 the insurance applies separately to each insured against whom claim is made or suit is brought.

**17.3. Other Insurance Requirements.** The insurance described in Section 17.1 (*Required Coverage During PDA Term*) are subject to the following requirements:

(a) Thirty (30) days' advance written notice shall be provided to City of cancellation, intended non-renewal, or reduction in coverages, except for non-payment for which no less than ten (10) days' notice shall be provided to City. Notices shall be sent to City address set forth in Article 23 (*Notices*) below.

(b) Should any of the required insurance be provided under a claims-made form, Lead Developer shall maintain such coverage continuously throughout the PDA Term and, without lapse, for a period of three years beyond the end of the PDA Term, to the effect that, should occurrences during the PDA Term give rise to claims made after the end of the PDA Term, such claims shall be covered by such claims-made policies.

(c) Should any of the required insurance 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.

(d) Should any required insurance lapse during the PDA Term, City shall have no obligation to make any termination payments to Lead Developer until City receives satisfactory evidence of reinstated coverage as required by this Agreement, effective as of the lapse date. If insurance is not reinstated, City may, at its sole option, terminate this Agreement effective on the date of such lapse of insurance.

(e) Before commencing any Work, Lead Developer shall 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. Approval of the insurance by City shall not relieve or decrease Lead Developer's liability hereunder.

(f) If Lead Developer will use any Lead Developer Related Entity to provide Work, Lead Developer shall require the Lead Developer Related Entity to provide all necessary insurance and to name the City and County of San Francisco, its officers, agents and employees and Lead Developer as additional insureds.

## **18. ASSIGNMENT AND CHANGES IN OWNERSHIP OF LEAD DEVELOPER**

**18.1. Restrictions on Assignment.** Lead Developer acknowledges that City is entering into this Agreement on the basis of the special skills, capabilities, and experience of Lead Developer, the Development Team and the Key Personnel. This Agreement is personal to Lead Developer and, except as provided in this Agreement, may not be assigned, transferred, conveyed, or otherwise disposed of without City's prior consent, which may be withheld in City's sole and absolute discretion; provided, however, that Lead Developer can assign this Agreement to an entity that (i) has Lead Developer as its sole or controlling member or shareholder, (ii) has the minimum assets required for the respondents to the RFP, and (iii) has assumed Lead Developer's agreements with the Development Team Members) and (iv) has the same Guarantor with respect to the Project (an "**Approved Subsidiary**"). Any assignment, transfer, conveyance, or other disposition of this Agreement in violation of this Section 18.1 (Restrictions on Assignment) will be an incurable LD Event of Default under this Agreement.

**18.2. Restrictions on Changes in Ownership of Lead Developer.** A Change of Control of Lead Developer or an Equity Transfer that results in any Equity Member ceasing to own (directly or indirectly) the same percentage of the issued share capital, partnership or membership interests, as applicable, in Lead Developer that it owned (directly or indirectly) as of Effective Date, shall be subject to City's prior written approval in City's sole discretion.

## **19. DEFAULT**

**19.1. LD Event of Default.** The occurrence of any of the following events will constitute a default by Lead Developer under this Agreement after the expiration of the applicable cure period, if any (each, an "**LD Event of Default**"):



(a) Any fraudulent act, misrepresentation or willful misconduct by any Lead Developer Related Entity with respect to the Proposal, the Project or this Agreement;

(b) Lead Developer fails to achieve any of the Performance Milestones to be achieved by Lead Developer in the manner and by the Performance Dates described in the attached Appendix B-1, as the Performance Dates may be extended or stayed in accordance with Section 2.9 (Suspension of Obligations), Section 2.10 (Exclusive Negotiations; City's Reserved Rights), or Section 3.1 (PDA Term; Predevelopment Period Extensions), or Section 3.3 (Unavoidable Delays and Regulatory Appeal Delays), as applicable, or extended by City in its sole discretion, if such failure is not cured within ten (10) Business Days after City's notice to Lead Developer, but if the default cannot reasonably be cured within the ten (10) Business Day cure period, Lead Developer will not be in default of this Agreement if Lead Developer commences to cure the default within the ten (10) Business Day cure period and diligently and in good faith prosecutes the cure to completion;

(c) Lead Developer fails to comply with any other provision of this Agreement or any Early Works Agreement if not cured within ten (10) Business Days after City's notice to Lead Developer, but if the default cannot reasonably be cured within the ten (10) Business Day cure period, Lead Developer will not be in default of this Agreement if Lead Developer commences to cure the default within the ten (10) Business Day cure period and diligently and in good faith prosecutes the cure to completion;

(d) Any of the representations, warranties or covenants made by Lead Developer or any Guarantor in Section 22.1 (Lead Developer Representations and Warranties) are not true in any material respect throughout the PDA Term;

(e) A voluntary or involuntary action is filed (i) to have Lead Developer adjudicated insolvent and unable to pay its debts as they mature or a petition for reorganization, arrangement or liquidation under any bankruptcy or insolvency law, or a general assignment by Lead Developer, for the benefit of creditors, or (ii) seeking Lead Developer's reorganization, arrangement, liquidation, or other relief under any law relating to bankruptcy, insolvency, or reorganization or seeking appointment of a trustee, receiver, or liquidator of Lead Developer or any substantial part of Lead Developer's assets or any of the foregoing events occurs with respect to any of the members of Lead Developer, any of the Development Team Members, or any Guarantor, and, in respect of any involuntary action, such action has not been dismissed within 60 days of being filed;

(f) There is an uncured event of default under any Early Works Agreement or the Access Agreement by Lead Developer or any of the Lead Developer Agents;

(g) There is a change in the Development Team or Key Personnel without City's consent;

(h) Lead Developer, its parent company, or their respective members or shareholders, or any of the Development Team Members are debarred or prohibited from doing business with any federal, state or local government agency; or

(i) Lead Developer fails to comply with Article 15 (Prohibited Actions) or Section 24.1 (Nondiscrimination in City Contracts and Benefits Ordinance); or

(j) Any Guarantor revokes or attempts to revoke its obligations under its Guaranty or otherwise takes the position that such instrument is no longer in full force and effect, and Lead Developer fails to cure such LD Event of Default cured within five (5) Business Days after City's notice to Lead Developer by providing City with alternative security and/or a new

guarantor, which security and/or new guarantor must be in a form satisfactory to City, in its sole discretion.

**19.2. City Event of Default.** The occurrence of any of the following events will constitute a default by City under this Agreement after the expiration of the applicable cure period, if any (each, a “City Event of Default”):

(a) City’s failure to comply with any provision of this Agreement if the failure is not cured within ten (10) Business Days after Lead Developer’s notice to City; but if the default cannot reasonably be cured within the ten (10) Business Day cure period, City will not be in default of this Agreement if City commences to cure the default within the ten (10) Business Day cure period and diligently and in good faith prosecutes the cure to completion.

(b) A voluntary or involuntary action is filed (i) to have City adjudicated insolvent and unable to pay its debts as they mature or a petition for reorganization, arrangement or liquidation under any bankruptcy or insolvency law, or a general assignment by City for the benefit of creditors, or (ii) seeking City’s reorganization, arrangement, liquidation, or other relief under any law relating to bankruptcy, insolvency, or reorganization or seeking appointment of a trustee, receiver, or liquidator of City or any substantial part of City’s assets.

(c) Any representation or warranty made by City under this Agreement is false, misleading or inaccurate when made, in each case in any material respect, or omits material information when made.

## **20. REMEDIES**

**20.1. City’s Remedies.** Following an LD Event of Default, City may (a) terminate this Agreement by delivery of notice to Lead Developer and, as the termination date specified in that notice (which may be on the delivery of the notice), Lead Developer and City will both be released from all liability under this Agreement (except for those obligations that survive Termination), (b) seek to enforce Lead Developer’s indemnity obligations, (c) seek to enforce any Guarantor obligations under the Guarantees, (d) obtain copies and/or assignments of the Work Materials to which City is entitled. These remedies are not exclusive, but are cumulative with any remedies now or later allowed by law or in equity. If an LD Event of Default occurs, Lead Developer and any Guarantor shall be jointly and severally liable to City for all Losses incurred by the City and the City Agents.

**20.2. Lead Developer’s Remedies.** Following a City Event of Default, Lead Developer will have the option, as its sole and exclusive remedy at law or in equity, to terminate this Agreement by delivery of notice to City and, as the termination date specified in that notice (which may be on the delivery of the notice), Lead Developer and City will both be released from all liability under this Agreement (except for those provisions that survive Termination, including City’s obligations to make any payments to Lead Developer pursuant to Section 16.3 (Termination Payments)). Lead Developer waives any and all rights it may now or later have to pursue any other remedy or recover any other damages on account of any City breach or default, including loss of bargain, special, punitive, compensatory or consequential damages. No member, official, agent or employee of City will be personally liable to Lead Developer, or any successor in interest (if and to the extent permitted under this Agreement), due to a City Event of Default or for any amount that may become due to Lead Developer or successor or on any obligations under the terms of this Agreement.

## **21. INDEMNITY; DISCLAIMERS; LIMITATION OF LIABILITY**

**21.1. Lead Developer's Duty to Indemnify.** To the fullest extent permitted by law, and related to facts and circumstances arising from and after the Effective Date, Lead Developer agrees to indemnify and hold City and the City Agents (collectively, the "**Indemnified Parties**") harmless, and at City's request, defend them from and against any Losses that the Indemnified Parties may incur as a result, directly or indirectly, of any of the following:

(a) Any injury to or death of a person, including employees of any Indemnified Parties or any Lead Developer Related Entity, and any loss of or damage to property, in each case arising out of Lead Developer's performance of this Agreement, including, but not limited to, Lead Developer's use of facilities or equipment provided by City or others;

(b) Breach by any Lead Developer Related Entity of Applicable Law, including but not limited to privacy or personally identifiable information, health information, disability and labor laws or regulations;

(c) Strict liability imposed by any law or regulation arising out of Lead Developer's performance of this Agreement;

(d) Breach by any Lead Developer Related Entity of any of its obligations or any representation, warranty or covenant under the Agreement or any Early Works Agreement, including Lead Developer's execution of subcontracts or Development Team agreements not in accordance with the applicable requirements of this Agreement;

(e) Any Lead Developer Related Entity's failure to obtain or comply with the terms and conditions of any Regulatory Approval;

(f) Any fraud, criminal conduct, intentional misconduct, recklessness, bad faith, gross negligence, negligence or other culpable act or omission of any Lead Developer Related Entity; and

(g) Any infringement, or alleged infringement, of the proprietary rights, including Intellectual Property rights, of any third party based on or related to the Work, Project, or any Work Materials (i) as delivered to the City, (ii) as intended for use by the City, and (iii) as combined or integrated with City hardware, systems and software for which any Lead Developer Related Entity had a reasonable opportunity to investigate or discover."

The foregoing indemnification includes, without limitation, reasonable fees of attorneys, consultants and experts and related costs and City's costs of investigating any claims against City. In addition to Lead Developer's obligation to indemnify City, Lead Developer 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 Lead Developer by City and continues at all times thereafter.

This indemnification shall apply regardless of whether or not a claim, suit, action, loss or liability was caused in part or contributed to by an Indemnified Party. However, without affecting the rights of City under any provision of this Agreement, Lead Developer shall not be required to indemnify and hold harmless City for liability to the extent caused by (i) the negligence, reckless or willful misconduct, bad faith or fraud of an Indemnified Party; or (ii) City's breach of any of its material obligations under this Agreement. In instances where City is shown to have been actively negligent, reckless, engaged in willful misconduct or acting in bad faith or with fraud and where such City actions account for only a percentage of the liability

involved, the obligation of Lead Developer will be for that entire portion or percentage of liability not attributable to such actions of City.

With respect to Work performed by a design professional as defined in Civil Code Section 2782.8, this indemnification shall apply only to the extent permitted by said Section 2782.8.

Lead Developer's obligations under this Section 21.1 (Lead Developer's Duty to Indemnify) will survive the expiration or earlier Termination of this Agreement.

## **21.2. Disclaimer and Acknowledgement.**

(a) Disclaimer. Except as otherwise provided in this Agreement, City does not represent or warrant, and hereby disclaims: (i) that the information contained in the Reference Documents and in any other reference information is either complete or accurate or suitable for use or that such information is in conformity with the requirements of any Regulatory Approvals or other governmental approvals or rules; (ii) that any itemized list set forth in the Technical Requirements is accurate or complete; (iii) responsibility for the condition of the Project Site; and (iv) responsibility for any Regulatory Agency's failure to issue any required Regulatory Approval.

(b) Acknowledgement. Lead Developer, on behalf of itself and the Lead Developer Related Entities, and each of their respective successors and assigns, hereby acknowledges (i) City's disclaimers set forth in Section 21.2(a) (Disclaimer); (ii) that Lead Developer previously received the Reference Documents through the RFP, and they were provided for general or reference information only and without any warranty as to their accuracy, completeness or fitness for any particular purpose; and (iii) agrees that the Lead Developer Related Entities shall have no recourse to City for any claim arising out of or relating to the matters set forth in Section 21.2(a) (Disclaimer).

## **21.3. Limitation of Liability**

(a) Except as provided in Section 21.3(b), Lead Developer's liability to City for damages, including direct, indirect and consequential damages, arising out of Lead Developer's performance of the Agreement (or failure to perform hereunder) shall be limited to Nine Million Nine Hundred Ninety Thousand Dollars (\$9,990,000) plus the amount of the Continuation Payment if paid.

(b) The limitation of damages set forth in Section 21.3(a) does not apply to or limit any right of recovery City may have respecting the following:

(i) Losses arising out of fraud, criminal conduct, intentional misconduct, recklessness, bad faith, or gross negligence on the part of any Lead Developer Related Entity;

(ii) Lead Developer's indemnities set forth in Section 21.1 (Lead Developer's Duty to Indemnify), or elsewhere in the Agreement, for third party claims;

(iii) Losses arising out of any release of hazardous materials by any Lead Developer Related Entity; and

(iv) Any liability for any type of damage or loss, to the extent such loss or damage is covered by insurance required under this Agreement or for which Lead Developer was required to provide insurance if coverage is not in force, or is covered by the actual amount of

insurance applicable to the Project and the Work (regardless of whether required to be carried hereunder), whichever is greater.

## **22. REPRESENTATIONS AND WARRANTIES**

**22.1. Lead Developer Representations and Warranties.** Lead Developer represents, warrants and covenants to City (and will cause its members, on behalf of themselves, to represent, warrant and covenant to City) as follows, as of the date hereof and throughout the PDA Term:

(a) Valid Existence; Good Standing. Lead Developer is a limited liability company organized under the laws of the State of Delaware. Lead Developer's sole manager and sole member is Plenary Americas US Holdings Inc., which is a corporation duly incorporated and validly existing under the laws of the State of Delaware. Lead Developer has the requisite power and authority to own its property and conduct its business as presently conducted. Lead Developer and its sole manager and sole member have each made the necessary filings with, and are all good standing in, the State of California.

(b) Business Licenses. Lead Developer and its manager have obtained all licenses required to conduct its business in San Francisco and Lead Developer, its manager, and its member are not in default of any fees or taxes due to the City and County of San Francisco.

(c) Authority. Lead Developer and its manager each have the requisite power and authority to execute and deliver this Agreement and the agreements contemplated hereby and to carry out and perform all of the terms and covenants of this Agreement and the agreements contemplated hereby to be performed by Lead Developer.

(d) No Limitation on Ability to Perform. Neither Lead Developer's operating agreement nor any Applicable Law prohibit Lead Developer's entry into this Agreement or its performance hereunder. No consent, authorization or approval of, and no notice to or filing with, any governmental authority, Regulatory Agency or other Person is required for the due execution and delivery of this Agreement by Lead Developer and Lead Developer's performance hereunder, except for consents, authorizations and approvals which have already been obtained, notices which have already been given and filings which have already been made. There are no undischarged judgments pending against Lead Developer, and Lead Developer has not received notice of the filing of any pending suit or proceedings against Lead Developer before any court, Regulatory Agency, or arbitrator, which might materially adversely affect the enforceability of this Agreement or the business, operations, assets or condition of Lead Developer.

(e) Valid Execution. The execution and delivery of this Agreement and the performance by Lead Developer hereunder have been duly and validly authorized. When executed and delivered by City and Lead Developer, this Agreement will be a legal, valid and binding obligation of Lead Developer.

(f) Defaults. The execution, delivery and performance of this Agreement (i) do not and will not violate or result in a violation of, contravene or conflict with, or constitute a default by Lead Developer under (1) any agreement, document or instrument to which Lead Developer is a party or by which Lead Developer is bound, (2) any Law applicable to Lead Developer or its business, or (3) the operating agreement of Lead Developer, and (ii) do not result in the creation or imposition of any lien or other encumbrance upon the assets of Lead Developer, except as contemplated hereby.

(g) Financial Matters. Lead Developer is not in default under, and has not received notice asserting that it is in default under, any agreement for borrowed money, Lead



Developer has not filed a petition for relief under any Chapter of the U.S. Bankruptcy Code, there has been no event that has materially adversely affected Lead Developer's ability to meet its obligations hereunder, and to the best of Lead Developer's knowledge, no involuntary petition naming Lead Developer as debtor has been filed under any Chapter of the U.S. Bankruptcy Code.

(h) Warranty of LD Development Program. Lead Developer warrants to City that all the Work will be performed with the degree of skill and care that is required by current, good and sound professional procedures and practices, and in conformance with generally accepted professional standards prevailing at the time they are performed so as to ensure that all performed Work is correct and appropriate for the purposes contemplated in this Agreement.

(i) Guarantor Valid Existence; Good Standing. Guarantor is duly organized and validly existing under the laws of the State of Delaware, with full power, right, and authority to own its properties and assets and carry on its business as now conducted or proposed to be conducted.

(j) Enforceability of Guaranty. The Guaranty constitutes the legal, valid and binding obligation of the Guarantor, enforceable in accordance with its terms, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.

(k) Valid Execution of Guaranty. The execution, delivery and performance of the Guaranty have been duly authorized by all necessary action of Guarantor and will not result in a breach of or a default under Guarantor's organizational documents or any indenture or loan or credit agreement or other material agreement or instrument to which Guarantor is a party or by which its properties and assets may be bound or affected.

## **22.2. City Representations and Warranties.**

(a) Valid Existence; Good Standing. City is a municipal corporation created and validly existing under the laws of the State of California.

(b) Authority. City has the requisite power and authority to execute and deliver this Agreement and the Access Agreement and to perform all of the terms and covenants of this Agreement and the agreements contemplated hereby to be performed by City, subject to the terms and conditions of this Agreement.

(c) Valid Execution. The execution and delivery of this Agreement and the performance by City hereunder have been duly and validly authorized. When executed and delivered by City and Lead Developer, this Agreement will be a legal, valid and binding obligation of City.

(d) Defaults. The execution, delivery and performance of this Agreement do not and will not violate or result in a violation of, contravene or conflict with, or constitute a default by City under (i) any agreement, document or instrument to which City is a party or by which City is bound, (ii) any law applicable to City, or (iii) the City's Charter.

(e) Source of Funds. City has adequate sources of funds to perform the payment obligations of City under this Agreement, subject to the requirements of Section 24.15 (Certification of Funds).

**22.3. Survival.** The representations and warranties herein will survive any termination of this Agreement.

## 23. NOTICES.

Any notice given under this Agreement must be in writing delivered in person, by commercial courier, next business day delivery requested, or by registered, certified mail or express mail, return receipt requested, with postage prepaid, to the mailing addresses below. All notices under this Agreement will be deemed given, received, made or communicated on the date personal receipt actually occurs or, if mailed, on the delivery date or attempted delivery date shown on the return receipt. For the convenience of the Parties, copies of notices may also be given by email to the email address given below but email notice will not be binding on either Party.

The effective time of a notice will not be affected by the receipt of the email copy of the notice. Any mailing address, or email address, may be changed at any time by giving written notice of the change in the manner provided above at least ten (10) days before the effective date of the change.

City: San Francisco Municipal Transportation Agency  
1 South Van Ness, 8th Floor  
San Francisco, CA 94103  
Attn: Kerstin Magary

Email: [Kerstin.magary@sfmta.com](mailto:Kerstin.magary@sfmta.com)

With a copy to: Office of the City Attorney  
City Hall, Room 234  
1 Dr. Carlton B. Goodlett Place  
San Francisco, California 94102-4682  
Attn: Real Estate & Finance Group  
Re: Potrero Yard Modernization Project

Email: [Carol.R.Wong@sfcityatty.org](mailto:Carol.R.Wong@sfcityatty.org)

Lead Developer: Potrero Neighborhood Collective LLC  
555 W Fifth Street, Suite 3150  
Los Angeles, CA 90013  
Attn: Stuart Marks  
Re: Potrero Modernization Project

Email: [Stuart.Marks@plenarygroup.com](mailto:Stuart.Marks@plenarygroup.com)

With a copy to: Brian Middleton  
Potrero Neighborhood Collective LLC  
555 W Fifth Street, Suite 3150  
Los Angeles, CA 90013

Email: [Brian.Middleton@plenarygroup.com](mailto:Brian.Middleton@plenarygroup.com)

With a copy to: Chris Jauregui  
Potrero Neighborhood Collective LLC  
555 W Fifth Street, Suite 3150  
Los Angeles, CA 90013

Email: [Chris.Jauregui@plenarygroup.com](mailto:Chris.Jauregui@plenarygroup.com)

## 24. CITY REQUIREMENTS

Lead Developer has reviewed, understands, and is ready, willing, and able to comply with the terms and conditions of this Article 24 (City Requirements), which summarizes special City requirements as of the Effective Date, each of which is fully incorporated by reference. Lead Developer acknowledges that City requirements in effect when any Transaction Documents are executed will be incorporated into the Transaction Documents, as applicable, and will apply to all contractors, subcontractors, and any other Lead Developer Related Entities, as applicable. City requirements of general applicability will apply to the Project even if not summarized below.

The following summary is for Lead Developer's convenience only; Lead Developer is obligated to become familiar with all applicable requirements and to comply with them fully as they are amended from time to time. City ordinances are currently available on the web at [www.sfgov.org](http://www.sfgov.org). References to specific laws in this Article 24 (City Requirements) refer to the San Francisco Municipal Code unless specified otherwise. Capitalized terms used in this Article 24 (City Requirements) and not defined in this Agreement will have the meanings assigned to them in the applicable Section of the San Francisco Municipal Code.

### 24.1. Nondiscrimination in City Contracts and Benefits Ordinance.

(a) Non-Discrimination in Contracts. Lead Developer shall comply with the provisions of Chapters 12B and 12C of the Administrative Code, which are incorporated into this Agreement by this reference. Lead Developer shall incorporate by reference in all Subcontracts the provisions of Sections 12B.2(a), 12B.2(c)-(k), and 12C.3 of the Administrative Code and shall require all subcontractors to comply with such provisions. Lead Developer is subject to the enforcement and penalty provisions in Chapters 12B and 12C.

(b) Non-Discrimination in the Provision of Employee Benefits. Lead Developer does not as of the date of this Agreement, and will not during the PDA Term, in any of its operations in San Francisco, on real property owned by San Francisco, or where work is being performed for City elsewhere in the United States, discriminate in the provision of employee benefits between employees with domestic partners and employees with spouses and/or between the domestic partners and spouses of such employees, subject to the conditions set forth in San Francisco Administrative Code Section 12B.2.

**24.2. Requiring Health Benefits for Covered Employees.** All undefined, initially-capitalized terms used in this Section 24.2 (Requiring Health Benefits for Covered Employees) shall have the meanings given to them in Administrative Code Chapter 12Q (the "HCAO"). If the HCAO applies to this Agreement, Lead Developer shall comply with the requirements of the HCAO. For each Covered Employee, Lead Developer shall provide the appropriate health benefit set forth in Section 12Q.3 of the HCAO. If Lead Developer chooses to offer the health plan option, such health plan shall meet the minimum standards set forth by the San Francisco Health Commission. Information about and the text of the HCAO, as well as the Health Commission's minimum standards, is available on the web at <http://sfgov.org/olse/hcao>. Lead Developer is subject to the enforcement and penalty provisions in the HCAO. Any Subcontract entered into by Lead Developer shall require any Subcontractor with 20 or more employees to comply with the requirements of the HCAO and shall contain contractual obligations substantially the same as those set forth in this Section 24.2 (Requiring Health Benefits for Covered Employees).

**24.3. Minimum Compensation Ordinance.** If San Francisco Administrative Code Chapter 12P applies to this Agreement, Lead Developer shall pay covered employees no less than the minimum compensation required by San Francisco Administrative Code Chapter 12P

("Chapter 12P"), including a minimum hourly gross compensation, compensated time off, and uncompensated time off. Lead Developer is subject to the enforcement and penalty provisions in Chapter 12P. Information about and the text of the Chapter 12P is available on the web at <http://sfgov.org/olse/mco>. Lead Developer is required to comply with all of the applicable provisions of Chapter 12P, irrespective of the listing of obligations in this Section 24.3 (*Minimum Compensation Ordinance*). By signing and executing this Agreement, Lead Developer certifies that it complies with Chapter 12P.

#### **24.4. Prevailing Rate of Wages and Working Conditions.**

(a) Covered Services. Lead Developer agrees it will pay, and require the Lead Developer Agents to pay, the Prevailing Rate of Wages for any Project construction, asset management work or other covered work or improvements performed by Lead Developer or the Lead Developer Agents ("Covered Services"), including any trade work for the Project performed by or for Lead Developer during the PDA Term. The provisions of Section 6.22(e) of the San Francisco Administrative Code are incorporated as provisions of this Agreement as if fully set forth herein and will apply to any Covered Services performed by Lead Developer and the Lead Developer Agents.

(b) Determining the Prevailing Rate of Wages. The latest Prevailing Rate of Wages for private employment on public contracts as determined by the San Francisco Board of Supervisors and the Director of the California Department of Industrial Relations, as such prevailing wage rates may be changed during the PDA Term, are hereby incorporated as provisions of this Agreement. Copies of the Prevailing Rate of Wages as fixed and determined by the Board of Supervisors are available from the Office of Labor Standards and Enforcement ("OLSE") and on the Internet at <http://www.dir.ca.gov/DLSR/PWD> and <http://sfgov.org/olse/prevailing-wage>. Lead Developer agrees that it and the Lead Developer Agents will pay no less than the Prevailing Rate of Wages, as fixed and determined by the Board of Supervisors, to all workers who perform Covered Services and are employed by Lead Developer or the Lead Developer Agents.

(c) Subcontract Requirements. As required by Section 6.22(e)(5) of the San Francisco Administrative Code, Lead Developer shall insert in every subcontract or other arrangement, which it may make for the performance of Covered Services under this Agreement, a provision that said subcontractor shall pay to all persons performing labor in connection with Covered Services under said subcontract or other arrangement not less than the highest general the Prevailing Rate of Wages as fixed and determined by the Board of Supervisors for such labor or services.

(d) Posted Notices. As required by Section 1771.4 of the California Labor Code, Lead Developer shall post job site notices prescribed by the California Department of Industrial Relations ("DIR") at all job sites where Covered Services are to be performed.

(e) Payroll Records. As required by Section 6.22(e)(6) of the San Francisco Administrative Code and Section 1776 of the California Labor Code, Lead Developer shall keep or cause to be kept complete and accurate payroll records for all trade workers performing Covered Services. Such records shall include the name, address and social security number of each worker who provided Covered Services on the project, including apprentices, his or her classification, a general description of the services each worker performed each day, the rate of pay (including rates of contributions for, or costs assumed to provide fringe benefits), daily and weekly number of hours worked, deductions made and actual wages paid. Every subcontractor who shall undertake the performance of any part of Covered Services shall keep a like record of each person engaged in the execution of Covered Services under the subcontract. All such

records shall at all times be available for inspection of and examination by City and its authorized representatives and the DIR.

(f) Certified Payrolls. Certified payrolls shall be prepared pursuant to San Francisco Administrative Code Section 6.22(e)(6) and California Labor Code Section 1776 for the period involved for all employees, including those of subcontractors, who performed labor in connection with Covered Services. Lead Developer and each subcontractor performing Covered Services shall submit certified payrolls to City and to the DIR electronically. Lead Developer shall submit payrolls to City via the reporting system selected by City. The DIR will specify how to submit certified payrolls to it. City will provide basic training in the use of the reporting system at a scheduled training session. Lead Developer and all subcontractors that will perform Covered Services must attend the training session. Lead Developer and applicable subcontractors shall comply with electronic certified payroll requirements (including training) at no additional cost to City.

(g) Compliance Monitoring. Covered Services to be performed under this Agreement are subject to compliance monitoring and enforcement of prevailing wage requirements by the DIR and/or the OLSE. Lead Developer and any subcontractors performing Covered Services will cooperate fully with the DIR and/or the OLSE and other City employees and agents authorized to assist in the administration and enforcement of the prevailing wage requirements, and agrees to take the specific steps and actions as required by Section 6.22(e)(7) of the San Francisco Administrative Code. Steps and actions include but are not limited to requirements that: (i) Lead Developer will cooperate fully with the Labor Standards Enforcement Officer and other City employees and agents authorized to assist in the administration and enforcement of the Prevailing Wage requirements and other labor standards imposed on Lead Developer by the Charter and Chapter 6 of the San Francisco Administrative Code; (ii) Lead Developer agrees that the Labor Standards Enforcement Officer and his or her designees, in the performance of their duties, shall have the right to engage in random inspections of job sites and to have access to the employees of Lead Developer, employee time sheets, inspection logs, payroll records and employee paychecks; (iii) the contractor shall maintain a sign-in and sign-out sheet showing which employees are present on the job site; (iv) Lead Developer shall prominently post at each job-site a sign informing employees that the project is subject to the City's Prevailing Wage requirements and that these requirements are enforced by the Labor Standards Enforcement Officer; and (v) that the Labor Standards Enforcement Officer may audit such records of Lead Developer as he or she reasonably deems necessary to determine compliance with the Prevailing Wage and other labor standards imposed by the Charter and this Chapter and applicable to this Agreement. Failure to comply with these requirements may result in penalties and forfeitures consistent with analogous provisions of the California Labor Code, including Section 1776(g), as amended from time to time.

(h) Remedies. Should Lead Developer, or any subcontractor who shall undertake the performance of any Covered Services, fail or neglect to pay to the persons who perform Covered Services under this Agreement, subcontract or other arrangement for the Covered Services, the general prevailing rate of wages as herein specified, Lead Developer shall forfeit, and in the case of any subcontractor so failing or neglecting to pay said wage, Lead Developer and the subcontractor shall jointly and severally forfeit, back wages due plus the penalties set forth in San Francisco Administrative Code Section 6.22 (e) and/or California Labor Code Section 1775. City, when certifying any payment, which may become due under the terms of this Agreement, shall deduct from the amount that would otherwise be due on such payment the amount of said forfeiture.

**24.5. Local Hire.** Lead Developer agrees to comply with the Local Hiring Policy for Construction set forth in San Francisco Administrative Code Chapter 82 (the "**Local Hiring Policy**") in the performance of any Work that is construction, asset management, and other



covered work or improvement (“**Covered Work**”). Before starting any Covered Work, Lead Developer shall contact OEWD to verify the Local Hiring Policy requirements that apply to the Covered Work and Lead Developer shall comply with all such requirements. Failure to comply shall be deemed a breach of this Agreement, and Lead Developer may also be liable for penalties as set forth in the Local Hiring Policy. Without limiting the foregoing:

(a) For Covered Projects that exceed \$750,000, Lead Developer shall comply with the applicable mandatory participation levels for Project Work Hours performed by Local Residents, Disadvantaged Workers, and Apprentices as set forth in Section 6.22(G)(4).

(b) For Covered Projects that exceed \$1,000,000, Lead Developer shall prepare and submit to OEWD for approval a local hiring plan as set forth in Section 6.22(G)(6).

(c) Lead Developer shall comply with the applicable record keeping and reporting requirements and shall cooperate in City inspections and audits for compliance with the Local Hiring Policy.

Any capitalized term used in this Section 24.5 (Local Hire) that is not defined will have the meaning given to such term in the Local Hiring Policy.

#### **24.6. First Source Hiring; SFMTA Trainee Hiring Program.**

(a) First Source Hiring Program. Lead Developer must comply with the First Source Hiring Program requirements for the Work it performs under this Agreement set forth in the attached Attachment 2 and comply with the requirements of all of the provisions of Chapter 83 of the San Francisco Administrative Code for any Covered Work. Lead Developer is subject to the enforcement and penalty provisions in Chapter 83 for that work. Lead Developer and the Development Team Members must hire a minimum number of professional service trainees in the area of that party’s expertise in any Covered Work. These hires count toward the First Source Hiring Program requirements. Trainees may be obtained through the City’s One Stop Employment Center, which works with various employment and job training agencies/organizations or other employment referral source.

(b) SFMTA Trainee Hiring Program. As part of the SFMTA Employment Training Program, City requires that Lead Developer cause a minimum number of professional service trainees in the area of the expertise of Lead Developer or the Development Team members to be hired during the PDA Term. The Project Agreement and the HCC Agreements also must require the Principal Project Company and the Housing Project Company, respectively, to cause a minimum number of professional service trainees in the area of the expertise of the Principal Project Company and the Housing Project Company to be hired during the term of any agreement between City and Principal Project Company, and City and any Housing Project Company, for the Project. If a person hired by Lead Developer, a Development Team member, the Principal Project Company, or a Housing Project Company for the Project through the First Source Hiring Program also meets the trainee requirements described below, that person will be counted toward these trainee hiring requirements. Trainees may be obtained through the City’s One Stop Employment Center, which works with various employment and job training agencies/organizations or other employment referral source.

Lead Developer must cause at least four (4) trainees to be hired during the PDA Term by the times and for the areas specified in the attached Attachment 1. Lead Developer must cause trainees for any professional services performed under any Early Works Agreement to be hired during the term of those agreements, using no less than the number of trainees required under the SFMTA Trainee Hiring Program (based on the projected cost of professional services under the applicable agreement). Any agreement between the Principal Project

Company and City, or between a Housing Project Company and City, for the Project, including the Project Agreement, and the HCC Agreement, must require that during the term of that agreement, the Principal Project Company and the Housing Project Company, respectively, cause trainees to be hired for any professional services performed for the Project under that agreement, using no less than the number of trainees required by the SFMTA Trainee Hiring Program (based on the projected cost of professional services under the applicable agreement).

The following requirements apply to the trainees:

1. The trainee must be hired by the party providing professional services for the Project.
2. No trainee may be counted towards meeting more than one contract requirement. For example, if City and Lead Developer enter into the PDA and an Early Works Agreement, any trainee hired for the PDA services would not count toward the trainee hiring requirement for the Early Works Agreement.
3. A trainee must meet enrollment qualifications established under the City's First Source Hiring Program as follows:
  - a. "Qualified" with reference to an economically disadvantaged individual shall mean an individual who meets the minimum bona fide occupational qualifications provided by the prospective employer to the San Francisco Workforce Development System in the job availability notices required by the First Source Hiring Program.
  - b. "Economically disadvantaged individual" shall mean an individual who is either (i) eligible for services under the Workforce Investment Act of 1988 (29 U.S.C. 2801 et seq.), as determined by the San Francisco Private Industry Council; or (ii) designated "economically disadvantaged" by the FS First Source Hiring Program HP administration, which means an individual who is at risk of relying upon, or returning to, public assistance.
  - c. "On-the-job training" means the hiring party hire the trainee on a full-time basis for at least 12 months or on a part-time basis for 24 months (using the full-time or part-time definition of the employer hiring that trainee), with prior approval offering him/her on-the-job training that allows the trainee to progress on a career path.
4. Before a trainee is hired, Lead Developer, the Principal Project Company, or the Housing Project Company, as applicable, shall submit for City's approval a description and summary of training proposed for that trainee, along with the rate of pay for the position.
5. The trainee's commitment does not require that he/she is used only on this Project; the trainee may also be used on other Lead Developer, Principal Project Company, or Housing Project Company projects that may be appropriate for the trainee's skill development.

Lead Developer must work with the SFMTA Employment Training Program during the PDA Term to develop a trainee plan (the "**PA Trainee Plan**") that will apply to the term of any agreement between the Principal Project Company and City for the Infrastructure Facility, and to the term of any agreement between Housing Project Company and City for the Housing and Commercial Component, and those agreements will include the obligation to hire trainees as described in the PA Trainee Plan.

**24.7. Prohibition on Use of Public Funds for Political Activity.** In performing the Work, Lead Developer shall comply with San Francisco Administrative Code Chapter 12G, which prohibits funds appropriated by City for this Agreement from being expended to

participate in, support, or attempt to influence any political campaign for a candidate or for a ballot measure. Lead Developer is subject to the enforcement and penalty provisions in Chapter 12G.

**24.8. Consideration of Salary History.** Lead Developer shall comply with San Francisco Administrative Code Chapter 12K, the Consideration of Salary History Ordinance or “Pay Parity Act.” Lead Developer is prohibited from considering current or past salary of an applicant in determining whether to hire the applicant or what salary to offer the applicant to the extent that such applicant is applying for employment to be performed on this Agreement or in furtherance of this Agreement, and whose application, in whole or part, will be solicited, received, processed or considered, whether or not through an interview, in City or on City property. The ordinance also prohibits employers from (1) asking such applicants about their current or past salary or (2) disclosing a current or former employee’s salary history without that employee’s authorization unless the salary history is publicly available. Lead Developer is subject to the enforcement and penalty provisions in Chapter 12K. Information about and the text of Chapter 12K is available on the web at <https://sfgov.org/olse/consideration-salary-history>. Lead Developer is required to comply with all of the applicable provisions of 12K, irrespective of the listing of obligations in this Section 24.8 (Consideration of Salary History).

**24.9. Consideration of Criminal History in Hiring and Employment Decisions.**

(a) Lead Developer agrees to comply fully with and be bound by all of the provisions of Chapter 12T, “City Contractor/Subcontractor Consideration of Criminal History in Hiring and Employment Decisions,” of the San Francisco Administrative Code (“**Chapter 12T**”), including the remedies provided, and implementing regulations, as may be amended from time to time. The provisions of Chapter 12T are incorporated by reference and made a part of this Agreement as though fully set forth herein. The text of the Chapter 12T is available on the web at <http://sfgov.org/olse/fco>. Lead Developer is required to comply with all of the applicable provisions of 12T, irrespective of the listing of obligations in this Section 24.9 (Consideration of Criminal History in Hiring and Employment Decisions). Capitalized terms used in this Section 24.9 (Consideration of Criminal History in Hiring and Employment Decisions) and not defined in this Agreement shall have the meanings assigned to such terms in Chapter 12T.

(b) The requirements of Chapter 12T shall only apply to a Lead Developer’s or its Agent’s operations to the extent those operations are in furtherance of the performance of this Agreement, shall apply only to applicants and employees who would be or are performing work in furtherance of this Agreement, and shall apply when the physical location of the employment or prospective employment of an individual is wholly or substantially within the City of San Francisco. Chapter 12T shall not apply when the application in a particular context would conflict with federal or state law or with a requirement of a government agency implementing federal or state law.

**24.10. Resource Efficiency Requirements.** The Project will be subject to Chapter 7 of the San Francisco Environment Code. Accordingly, the Project must meet certain resource efficient requirements. Lead Developer agrees that it will design the Project to comply with Chapter 7 of the San Francisco Environment Code, as may be amended from time to time, or any similar law.

**24.11. MacBride Principles Northern Ireland.** 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.

**24.12. Notification of Limitations on Contributions.** Lead Developer acknowledges its obligations under Section 1.126 of the San Francisco Campaign and Governmental Conduct Code, which prohibits any person who contracts with, or is seeking a contract with, any department of 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, for a grant, loan or loan guarantee, or for a development agreement, from making any campaign contribution to (i) a City elected official if the contract must be approved by that official, a board on which that official serves, or the board of a state agency on which an appointee of that official serves, (ii) a candidate for that City elective office, or (iii) a committee controlled by such elected official or a candidate for that office, at any time from the submission of a proposal for the contract until the later of either the termination of negotiations for such contract or twelve months after the date City approves the contract. The prohibition on contributions applies to (a) each prospective party to the contract, (b) each member of the contractor's board of directors, the contractor's chairperson, chief executive officer, chief financial officer and chief operating officer, (c) any person with an ownership interest of more than ten percent (10%) in the contractor, (d) any subcontractor listed in the bid or contract, and (e) any committee that is sponsored or controlled by the contractor. Lead Developer certifies that it has informed each such person of the limitation on contributions imposed by Section 1.126 by the time it submitted the Proposal, and has provided the names of the persons required to be informed to City.

**24.13. Sunshine Ordinance.** In accordance with Administrative Code Section 67.24(e), contracts, contractors' bids, leases, agreements, responses to requests for proposals, and all other records of communications between City and persons or firms seeking contracts will be open to inspection immediately after a contract has been awarded. Nothing in this provision requires the disclosure of a private person's or organization's net worth or other proprietary financial data submitted for qualification for a contract, lease, agreement or other benefit until and unless that person or organization is awarded the contract, lease, agreement or benefit. Information provided to City that is within the scope of this Section 24.13 (Sunshine Ordinance) will be made available to the public upon request.

**24.14. Conflicts of Interest.** Lead Developer acknowledges that it is familiar with the provisions of San Francisco Charter, Article III, Chapter 2, Section 15.103 of the City's Campaign and Governmental Conduct Code, and California Government Code Sections 87100 *et seq.* and Sections 1090 *et seq.*, certifies that it does not know of any facts that would constitute a violation of these provisions, and agrees that if Lead Developer becomes aware of any such fact during the PDA Term, Lead Developer will notify City immediately.

**24.15. Certification of Funds.** This Agreement is subject to the fiscal provisions of the City's Charter and the budget decisions of its Mayor and Board of Supervisors, each acting in its sole discretion. No funds will be available hereunder until prior written authorization certified by the City's Controller. The Controller cannot authorize payments unless funds have been certified as available in the budget or in a supplemental appropriation. This Agreement shall automatically terminate, without liability to City, if funds are not properly appropriated or certified by the Controller. City's obligations hereunder shall never exceed the amount certified by the Controller for the purpose and period stated in such certification. City, its employees and officers are not authorized to offer or promise any additional funding that would exceed the Termination Payment described in Section 16.3 (Termination Payments). Such additional funding requires lawful approval and certification by the Controller. Without such lawful approval and certification, City shall not be required to provide such additional funding.

**24.16. Art Commission Design Review; Art Enrichment Allocation.** The Facility will be subject to the requirements of San Francisco Charter Section 5.103 and Administrative Code Section 3.19. Lead Developer must work with the San Francisco Arts Commission, in



consultation with the City, to design and build the Facility in compliance with those requirements.

## **25. DISPUTE RESOLUTION PROCEDURES**

**25.1. General.** All Disputes shall be subject to the Dispute Resolution Procedures set forth in this Article 25 (Dispute Resolution Procedures), except for any decision, determination, judgment or other action of City that the Agreement states is subject to City's sole or absolute discretion (in which case the decision, determination, judgment or other action shall be final, binding and not subject to dispute resolution and shall not constitute a basis for any claim for additional monetary compensation, time extension or any other relief); and except for any other matter for which the Agreement expressly provide otherwise. The Parties agree to use reasonable efforts to resolve any Disputes under this Article 25 (Dispute Resolution Procedures) as quickly as possible.

**25.2. Claims.** Any claim by Lead Developer must be submitted to City in writing within ten (10) days after the occurrence of the event or condition giving rise to the potential claim, and the written submittal shall include the reasons Lead Developer believes the claim is valid and shall identify any additional compensation and/or time claimed, the elements of the Work affected by the event or condition giving rise to the claim, Lead Developer's proposed interpretation of Agreement terms, and other legal, equitable, or contractual relief claimed. Lead Developer shall also furnish any additional information relating to the claim as City may require to evaluate the claim. Failure to comply with these requirements shall constitute a waiver by Lead Developer of any right, equitable or otherwise, to bring any such claim against City.

**25.3. City Response to Lead Developer's Claim.** Within thirty (30) days of receipt of a claim, City shall render a decision or the Parties shall mutually agree to a date by which City will render a decision with respect to the claim. If no decision is made and no date is agreed within thirty (30) days of City's receipt of the claim, the claim shall be deemed rejected by City.

**25.4. Informal Dispute Resolution.** If Lead Developer wishes to dispute City's decision under Section 25.3 (City Response to Lead Developer's Claim) (including a deemed rejection of a claim), or if a Dispute arises that does not involve a claim, the Parties shall use their best efforts to resolve such Dispute by submission of the Dispute to the City Project Director and the LD Project Director for resolution. If a Dispute cannot be resolved at this administrative level, then the Parties shall present the Dispute to the Director of Transportation or his duly authorized representative and to an equivalent executive officer with the Lead Developer for resolution. If the Dispute cannot be resolved at this executive level, the Parties may mutually agree to proceed in accordance with Section 25.5 (Mediation).

### **25.5. Mediation.**

**(a) Mediation Request.** A Party may request non-binding mediation ("**Mediation**") by delivering a written request for Mediation ("**Mediation Request**") to the other Party. The Mediation Request must include a summary of the Dispute and the position of the Party submitting the request, together with any backup information or documentation that Party elects to provide. Within fifteen (15) days after receipt of the Mediation Request, the responding Party may agree to meet and confer promptly with the requesting Party to attempt to resolve the Dispute. In the absence of such agreement, or if the meet and confer does not resolve the matter promptly, the Party who requested Mediation may submit the Dispute for Mediation to JAMS in the City and County of San Francisco.

**(b) Selection of Mediator and Process.** The Parties will cooperate with JAMS and with one another in selecting a mediator from a JAMS panel of neutrals and in scheduling



the Mediation proceedings as quickly as feasible. The Parties agree to participate in the Mediation in good faith. Neither Party may commence or if commenced, continue, a civil action with respect to a Dispute submitted to Mediation until after the completion of the initial Mediation session. The initial Mediation session must occur within 30 days of the date that the Dispute was submitted for Mediation to JAMS, or within such other time period as may be agreed by the Parties. The Parties will each pay their own costs and expenses in connection with the Mediation, and the Party that requested Mediation will pay all costs and fees of the mediator. Without limiting the foregoing, the provisions of Sections 703.5 and 1115 through 1128 of the California Evidence Code, inclusive, will apply in connection with any Mediation.

(c) Use of Evidence. The provisions of Sections 1152 and 1154 of the California Evidence Code will apply to all settlement communications and offers to compromise made during the Mediation.

(d) Other Remedies. If the Dispute cannot be resolved through Mediation, each Party may pursue any rights and remedies available at law or under this Agreement.

**25.6. Continuing Performance.** Lead Developer shall proceed diligently with performance of this Agreement pending resolution of any Dispute, appeal, or action ensuing under this Agreement, including all Work that is the subject of any Dispute, except for any performance City determines in writing should be delayed, suspended, or terminated as a result of such Dispute. City will continue to perform its obligations for undisputed amounts.

## **26. MISCELLANEOUS**

**26.1. Compliance with Law.** Lead Developer shall keep itself fully informed of the City's Charter, codes, ordinances and duly adopted rules and regulations of the City and of all state, and federal laws in any manner affecting the Project or the performance of this Agreement, and must at all times comply with such local codes, ordinances, and regulations and all applicable laws as they may be amended from time to time. To the extent the Finance Plan approved by City includes any federal or state funding that prohibit any of City's contracting requirements in Article 24 (City Requirements), City agrees such requirements will be waived.

**26.2. California Law.** This Agreement must be construed and interpreted in accordance with the laws of the State of California and the City's Charter.

**26.3. Entire Agreement.** This Agreement contains all of the representations and the entire agreement between the Parties with respect to the subject matter of this Agreement. Any prior correspondence, memoranda, agreements, warranties, or written or oral representations relating to its subject matter are superseded by this Agreement. No prior drafts of this Agreement or changes from those drafts to the executed version of this Agreement may be introduced as evidence in any litigation or other dispute resolution proceeding by any party or other person, and no court or other body should consider those drafts in interpreting this Agreement.

**26.4. Amendments.** No amendment to this Agreement will be valid unless it is in writing and signed by all of the Parties.

**26.5. Severability.** Except as otherwise specifically provided in this Agreement, a judgment or court order invalidating any provision of this Agreement, or its application to any person, will not affect any other provision of this Agreement or its application to any other person or circumstance, and the remaining portions of this Agreement will continue in full force and effect, unless enforcement of this Agreement as invalidated would be unreasonable or

grossly inequitable under all of the circumstances or would frustrate the purposes of this Agreement.

**26.6. No Party Drafter; Captions.** The provisions of this Agreement will be construed as a whole according to their common meaning and not strictly for or against any party in order to achieve the objectives and purposes of the Parties. Any caption preceding the text of any Section, paragraph or subsection or in the table of contents is included only for convenience of reference and will be disregarded in the construction and interpretation of this Agreement.

**26.7. Interpretation.** Whenever required by the context, the singular shall include the plural and vice versa, the masculine gender shall include the feminine or neuter genders, and vice versa, and defined terms encompass all correlating forms of the terms (e.g., the definition of “waive” applies to “waiver,” “waived,” “waiving”). In this Agreement, the terms “include,” “included” and “including” will be deemed to be followed by the words “without limitation” or “but not limited to.” Provisions in this Agreement relating to number of days are calendar days unless otherwise specified, but if the last day of any period to give notice, reply to a notice, or to undertake any other action does not occur on a Business Day, then the last day for undertaking the action or giving or replying to the notice will be the next succeeding Business Day.

**26.8. Waiver.** None of the following will constitute a waiver of any breach under, or of City’s right to demand strict compliance with, this Agreement: (a) City’s failure to insist upon Lead Developer’s strict performance of any obligation under this Agreement; or (b) City’s failure to exercise any right, power, or remedy arising from Lead Developer’s failure to perform its obligations for any length of time. City’s consent to or approval of any act by Lead Developer requiring City’s consent or approval may not be deemed to waive or render unnecessary City’s consent to or approval of any subsequent act by Lead Developer. Any waiver by City of any default must be in writing and will not be a waiver of any other default concerning the same or any other provision of this Agreement.

**26.9. No Brokers.** Each Party represents that it has not engaged a broker or finder in connection with this Agreement or any of the Transaction Documents.

**26.10. Time is of the Essence.** Time is of the essence for each provision of this Agreement, including performance of the Performance Milestones.

**26.11. No Recording.** Neither this Agreement nor any memorandum or short form thereof may be recorded by Lead Developer.

**26.12. Notification of Legal Requests.** Lead Developer shall immediately notify City upon receipt of any subpoenas, service of process, litigation holds, discovery requests and other legal requests (“**Legal Requests**”) related to any City Confidential Information or City Data or that in any way might reasonably require access to the City Confidential Information or City Data, and in no event later than 24 hours after it receives the Legal Request. Lead Developer shall not respond to Legal Requests without first notifying City other than to notify the requestor that the information sought is potentially covered under a non-disclosure agreement. Lead Developer shall retain and preserve the City Confidential Information and City Data in accordance with the City’s instruction and requests, including, without limitation, any retention schedules and/or litigation hold orders provided by the City to Lead Developer, independent of where the City Confidential Information or City Data is stored.

**26.13. Joint and Several Liability.** If Lead Developer is a joint venture or partnership, each venturer or partner will be jointly and severally liable for Lead Developer’s obligations under this Agreement and City shall have no obligation to provide written notice of any Lead Developer default or failure under this Agreement to each venturer or partner.

**26.14. Relationship of the Parties.** Lead Developer, the Lead Developer Agents and their employees (collectively, the “Developer Parties”) are and shall at all times be and remain independent from City and none shall be deemed to be an agent or an employee of City. Nothing in this Agreement shall be construed to place the Parties in the relationship of partners or joint ventures. Neither Party shall have any right or power to obligate or bind the other in any manner whatsoever. This Agreement is not intended nor shall it be construed to create any third-party beneficiary rights in any third party. City is not a fiduciary and has no special responsibilities to Lead Developer beyond the obligations expressly set forth in this Agreement.

**26.15. Independent Contractor.** Lead Developer acknowledges and agrees that at all times, each of the Developer Parties shall be deemed at all times to be an independent contractor and is wholly responsible for the manner in which they perform the services and work Lead Developer is required to perform under this Agreement. Lead Developer agrees that none of the Developer Parties will (i) represent or hold themselves out to be employees of the City at any time, (ii) have employee status with City, and (iii) be entitled to participate in any plans, arrangements, or distributions by City pertaining to or in connection with any retirement, health or other benefits that City may offer its employees. Lead Developer acknowledges and agrees it is liable for the acts and omissions of itself and any of the other Developer Parties. Lead Developer shall be responsible for all obligations and payments, whether imposed by federal, state or local law, including FICA, income tax withholdings, unemployment compensation, insurance, and other similar responsibilities related to the performance of any the Work by any of the Developer Parties. Nothing in this Agreement shall be construed as creating an employment or agency relationship between City and any of the Developer Parties. Any terms in this Agreement referring to direction from City shall be construed as providing for direction as to policy and the result of the Work only, and not as to the means by which such a result is obtained. City does not retain the right to control the means or the method by which any of the Developer Parties performs work under this Agreement. Lead Developer agrees to maintain and make available to City, upon request and during regular business hours, accurate books and accounting records demonstrating Lead Developer’s compliance with this Section 26.15 (*Independent Contractor*). If City determines that Lead Developer or any of the other Developer Parties is not performing in accordance with the requirements of this Section 26.15 (*Independent Contractor*), City shall provide Lead Developer with written notice of that deficiency. Lead Developer shall remedy the deficiency within five (5) Business Days of Lead Developer’s receipt of such notice; provided, however, that if City believes that an action of Lead Developer or any of the other Developer Parties warrants immediate remedial action by Lead Developer, City shall contact Lead Developer and provide Lead Developer in writing with the reason for requesting such immediate action. Lead Developer’s failure to timely remediate, or cause any of the other Developer Parties to remediate, the deficiency described in the writing shall be a breach of Lead Developer’s obligations under this Agreement.

**26.16. Counterpart Signatures and Electronic Delivery.** This Agreement may be executed in one or more counterparts, each of which shall be an original but all of which together shall be deemed to constitute a single agreement. A signature delivered on any counterpart by facsimile or other electronic means shall for all purposes be deemed to be an original signature to this Agreement.

[SIGNATURES ON FOLLOWING PAGE]

Lead Developer and City have executed this Agreement as of the last date written below.


**LEAD DEVELOPER:**

POTRERO NEIGHBORHOOD COLLECTIVE  
LLC, a limited liability company organized under  
the laws of the State of Delaware.

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

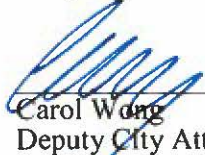
**CITY:**

CITY AND COUNTY OF SAN FRANCISCO,  
a municipal corporation, operating by and through  
the San Francisco Municipal Transportation  
Agency

By:  \_\_\_\_\_  
Jeffrey Tumlin  
Director of Transportation  
Date: NOVEMBER 2, 2022

**APPROVED AS TO FORM:**

David Chiu, City Attorney


By:  \_\_\_\_\_  
Carol Wong  
Deputy City Attorney



Lead Developer and City have executed this Agreement as of the last date written below.

**LEAD DEVELOPER:**

**POTRERO NEIGHBORHOOD COLLECTIVE  
LLC, a limited liability company organized under  
the laws of the State of Delaware.**

By:   
Name: Stuart Marks  
Its: Vice President  
Date: October 24, 2022

**CITY:**

**CITY AND COUNTY OF SAN FRANCISCO,  
a municipal corporation, operating by and through  
the San Francisco Municipal Transportation  
Agency**

By: \_\_\_\_\_  
Jeffrey Tumlin  
Director of Transportation  
Date: \_\_\_\_\_

**APPROVED AS TO FORM:**

David Chiu, City Attorney

By: \_\_\_\_\_  
Carol Wong  
Deputy City Attorney

