

For Immediate Release: Monday, March 18, 2013
Contact: Lena' Lewis, 619 201-1554



NEWS RELEASE

MAYOR BOB FILNER ENCOURAGES DIALOGUE REGARDING TOURISM MARKETING DISTRICT PROPOSAL

(San Diego) -- Mayor Bob Filner asked for dialogue today in the Tourism Marketing District controversy, during a news conference where he explained the provisions of his proposal for TMD funds and why it better protects the City of San Diego.

“I want the people of San Diego to know I have been trying for months to reach a compromise with the hotel giants to make sure we get a fair deal. I take my responsibility as a caretaker of the City’s financial future very seriously,” said Mayor Filner.

Under the Mayor’s TMD proposal, funds that have been on hold would be released almost immediately as opposed to the current proposal where the funds would not be released until further protections are incorporated. The proposal also restores indemnification for elected officials and allocates \$5 million in funding for the Balboa Park 2015 Centennial Celebration. Mayor Filner’s proposal also calls for prohibiting marketing entities from receiving TMD funds if they pay salaries exceeding \$160,000 per year, in an effort to ensure taxpayer dollars don’t go to fund exorbitant executive salaries.

The Mayor is also calling for more transparency and accountability by requiring disclosure of more documents on the San Diego Tourism Marketing District Corporation website, as well as requiring the SDTMDC to encourage member hotels to pay employees a living wage.

“I hope my proposal will get fair consideration and that we will be able to find common ground that is in the best interest of the City. The current proposal on the table is a sweetheart deal for the big hoteliers, I’m looking out for the taxpayer,” said Mayor Filner.

###

Attachments:

TMD Operating Agreement – Comparative Analysis

Comparative Analysis – TMD Agreements

SDTMDC Operating Agreement (11-12)

TMD Operating Agreement (executed) (3.12.13)

TMD Operating Agreement

COMPARATIVE ANALYSIS

ISSUE	SDTMDC DRAFT	FILNER AGREEMENT	CITATION
Release of TMD Funds	City Attorney Recommends: Sign the Agreement but release only waived funds or suspend funds until further protections are incorporated.	Immediate release of all funds because additional protections are already incorporated.	
Term of Agreement	Five Years	Up to Five Years	Sections 2.1, 2.2 and 5.2 (new)
Prop 26 Claw-Back	General Fund vulnerable to liability if TMD found unconstitutional and spent funds must be refunded; no indemnification for erroneous assessments.	General Fund protected by indemnification and insurance requirements.	Sections 6.1.2 and 7.2
Elected Official Liability	Deleted Elected Officials from indemnification that was provided in 2008 agreement.	Restores indemnification for Elected Officials.	Section 6.1.1
Balboa Park 2015 Centennial Celebration	No commitment.	Firm funding commitment.	Section 3.3 (new)
Use of Public Funds to Pay Exorbitant Salaries	Allows public funding for marketing entities to pay exorbitant executive salaries.	Prohibits marketing entities from receiving TMD funds if they pay salaries exceeding \$160,000 per year.	Section 3.6.1(b)
Encourages Hotels to Pay Living Wage	Does not even admit Living Wage Ordinance applies to SDTMDC, let alone to hotel members.	Requires SDTMDC to encourage member hotels to pay employees a Living Wage.	Section 10.7
Transparency and Accountability	Requires limited information be made publicly available.	Requires more robust disclosure of operating documents on the SDTMC website and requires Public Records Act accountability.	Section 3.6.1

COMPARATIVE ANALYSIS

TMD Agreements

On Tuesday, March 12, 2013, the Mayor executed an Operating Agreement with the San Diego Tourism Marketing District Corporation (“SDTMDC”) and delivered it to them for their consideration and execution. Attached is a copy of the executed agreement for reference.

The draft operating agreement that was included in the Council’s back-up materials last fall was flawed in a variety of ways that left the City’s General Fund unprotected and left each Councilmember individually exposed to liability.

For nearly four months the Mayor attempted to negotiate with the SDTMDC to address these and other problems in the draft agreement. To address these issues, he prepared and signed the attached modified agreement. Notably, the changes are not major. In a 32-page agreement, he added a total of approximately 600 words. What is important, however, is the substance of those changes, which are:

- The Mayor’s Agreement would result in the immediate release of all appropriate funds, not a limited release subject to waivers and no suspended disbursements resulting from the pending litigation.
- The Mayor’s Agreement allows a term of up to five years, consistent with the Council’s November Resolution, while providing the City the flexibility to terminate the agreement on 30-days notice if it needs to, following an initial one-year term. (Sections 2.1, 2.2 and 5.2)
- The Mayor’s Agreement protects the General Fund from subsequent claw-back of the assessments if the TMD is found to be unconstitutional by requiring the SDTMDC to indemnify the City for those funds and to maintain insurance that will cover the indemnification. (Sections 6.1.2 and 7.2)
- The Mayor’s Agreement protects you as individual Councilmembers by requiring indemnification for elected officials (which the SDTMDC removed from their draft agreement). (Section 6.1.1)
- The Mayor’s Agreement provides significant funding support for the 2015 Balboa Park Centennial celebration with no need for the commitment of additional General Fund allocations going forward. (Section 3.3)
- The Mayor’s Agreement makes sure that applicants for public TMD funds are not allowed to use those funds to pay exorbitant, gold-plated executive salaries. (Section 3.6.1(b))
- The Mayor’s Agreement requires the SDTMDC to encourage the TMD hotels to pay a Living Wage to all of their employees, contractors and subcontractors by posting that policy statement on their website. (Section 10.7).

- The Mayor's Agreement promotes openness, transparency and accountability for the public's funds by requiring more of SDTMDC's operating information and funding records be available on its website and subject to Public Records Act requests. (Section 3.6.1)

These are reasonable and necessary changes. This a sound foundation for the Mayor and the City Council to proceed in a unified fashion to protect the public interest.

Attachments

**AGREEMENT FOR THE OPERATION OF
THE SAN DIEGO TOURISM MARKETING DISTRICT**

This Agreement [Agreement] is made between the City of San Diego, a municipal corporation [City], and the San Diego Tourism Marketing District Corporation [Corporation], a non-profit mutual benefit corporation registered with the Secretary of State of the State of California, hereinafter collectively referred to as the "Parties."

RECITALS

WHEREAS, on May 22, 2007, the Council of the City of San Diego adopted Ordinance O-19622 N.S. [Ordinance], an ordinance amending Chapter 6, Article 1 of the San Diego Municipal Code [Code] by adding Division 25, the San Diego Tourism Marketing District Procedural Ordinance; and

WHEREAS, on October 6, 2011, the Council adopted Ordinance O-20096, an ordinance amending Chapter 6, Article 1, Division 25, of the Code; and

WHEREAS, following the procedures included in the Ordinance, the Council initiated renewal of the Tourism Marketing District [District] and held a public hearing on _____, 2012, wherein a weighted majority of the proposed business assesseses were verified as not casting ballots in opposition to the establishment of the District; and

WHEREAS, the Council of the City of San Diego ordered: 1) the renewal of the District; 2) the levying of assessments on assessed businesses; and 3) authorized the Mayor to enter into a contract with a non-profit corporation for the operation of the District; and

WHEREAS, in 2007 the tourism industry formed the San Diego Tourism Marketing District Corporation (formerly the San Diego Tourism Promotion Corporation), a non-profit mutual benefit corporation, for the purpose, among other things, of contracting with the City to operate the District;

NOW, THEREFORE, in consideration of the above recitals and the mutual covenants and conditions set forth in this Agreement, and for good and valuable consideration, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

ARTICLE I

DEFINITIONS

For the purposes of this Agreement, the terms listed below are defined as follows:

- 1.1 Plan – The Tourism Marketing District Management Plan, prepared by the industry proponents of the District pursuant to San Diego Municipal Code section 61.2507, outlining the anticipated operations of the District and establishing a set of budgetary guidelines, including proposed budget line items, for the thirty-nine-and-one-half-year

duration of the District. The Plan was approved by the San Diego City Council on _____, 2012 by Resolution Number R-_____.

- 1.2 Tourism Marketing District or District – The San Diego Tourism Marketing District, as renewed by City Council Resolution No. _____.
- 1.3 Annual Report of Activities – A prospective report, as defined in the Plan, due for submission to the City each year during operation of the District, detailing the proposed activities and budget for the following fiscal year, submitted by Corporation and approved by the City Council. This Report of Activities shall be accompanied by an Interim Performance Report detailing performance up through the quarter immediately preceding the date on which the Interim Report is submitted to the City.
- 1.4 Annual Performance Report – Report prepared by the Corporation, which summarizes the Corporation’s goals, accomplishments, returns on investment, and expenditures for the preceding fiscal year or part thereof. Separate due dates for a preliminary version of the report and a final version of the report shall annually be established in accordance with Sections 3.5.1 (i) and (j).
- 1.5 Subcontractor – Any entity or contractor to the Corporation, other than the City, that furnishes supplies and/or services (other than office space, standard commercial supplies, or printing services) to Corporation in connection with this Agreement. It is anticipated that the Corporation will engage subcontractors for the marketing, promotional and outreach activities undertaken in furtherance of the goals of the District. Subcontractor goods and services may be solicited either through a competitive application process or through an open procurement process in accordance with SDMC §22.3203 et. seq. and as specified in Exhibit B.
- 1.6 District Fund – A City of San Diego fund, established and administered by the City for the receipt of District revenue (assessments, penalties and interest) and from which revenue may be disbursed to the Corporation for activities and to the City for eligible City oversight and administrative functions.
- 1.7 Funding Allocations –Funding Allocations are delineated in the Plan’s Budget Guidelines and designate benefit categories to which funding allocations shall be made. Funding allocations may only be adjusted as provided for in the Plan.
- 1.8 Milestone Report – A retroactive and prospective report to be prepared by the Corporation every five fiscal years. The Milestone Report shall be inclusive of the required annual report for the immediately preceding fiscal year. The report shall include any proposed changes to benefit categories; general activities to be provided for the next five years; an estimate of the cost of providing activities over the next five years; the method and basis of levying the assessment; the estimated amount of any surplus or deficit revenues to be carried over from one year to the next; and the estimated amount of contributions from sources other than the assessment. The due date for Milestone Reports shall be agreed upon annually by the Corporation and City, and shall provide

sufficient time for review and submission to city committees. Separate due dates for a preliminary version of the report and a final version of the report may be established.

- 1.9 Reconciliation Report – A report accounting for the use of District revenue, described in Exhibit A. Reconciliation Reports shall be submitted to the City no less than 45 days after the first disbursement and on no less than a monthly basis thereafter.

ARTICLE II

EFFECTIVE DATE; TERM OF AGREEMENT

- 2.1 Upon the execution of this Agreement by the Parties and approval of this Agreement by the City Attorney in accordance with Charter Section 40, this Agreement shall be effective as of November 26, 2012 [Effective Date] and continue for five years until November 25, 2017 [Term], unless terminated earlier in accordance with the terms of this Agreement.
- 2.2 This Agreement may be extended beyond the Term for three (3) ten-year terms followed by one five-year (5) term by mutual agreement of the Parties.

ARTICLE III

OBLIGATIONS OF CORPORATION

3.1 General Obligations

- 3.1.1 Corporation shall perform all services necessary for the proper management of the District. Specifically, Corporation shall perform in a professional and prudent manner, and in accordance with the provisions of this Agreement, the Plan (attached hereto as Exhibit C and incorporated herein) and the Annual Report of Activities and Milestone Report, under the direction of the Board of Directors of Corporation.
- 3.1.2 The total amount to be disbursed to Corporation by City under this Agreement shall not exceed the amount of District assessments collected plus penalties collected on delinquent assessments by City and interest earned in the City's pooled investment fund on assessments held by the City and shall conform with the Plan's Budget Guidelines.
- 3.1.3 Any request for modifications to the Plan shall be submitted to the San Diego City Council for consideration in accordance with San Diego Municipal Code section 61.2501, et.seq, as amended from time to time.
- 3.1.4 Corporation shall follow the Budget Guidelines set forth in the Plan.

- 3.2 **Funding Allocations.** Corporation shall make Funding Allocations in accordance with

the Plan. Administrative costs to be recovered by City shall be billed directly to the District Fund administered by City Comptroller. City shall provide Corporation a summary of and accounting for the administrative costs billed to District on no less than a monthly basis. Any modification of these Funding Allocations may only be accomplished as provided for in the Plan. Any modification of the Plan may only be accomplished pursuant to San Diego Municipal Code sections 61.2519 and 61.2520, as amended from time to time.

- 3.3 **Funding Exclusions.** Corporation shall not fund any acquisition, construction, maintenance or installation of any tangible property, facilities, equipment, programs, or any other items specifically prohibited in the Plan. Notwithstanding any other provision of this Agreement, Corporation shall not be obligated to provide services nor make payments to relieve the City of obligations that are not expressly covered by this Agreement and the Plan. Corporation's obligations are solely to provide the services enumerated in the Plan, and under this Agreement, and such obligations exist solely to the extent District assessment revenues are fully available for expenditure for those purposes.
- 3.4 **Renewal Costs.** Corporation shall allow City to recover renewal costs from the District Fund for mutually agreed upon costs justified by a business case analysis by allowing the City to reimburse itself from the District assessments collected in FY2013. Such reimbursement shall be completed no later than August 31, 2013. Litigation costs pertaining to the defense of the District may be paid from District funds in addition to the recovery of administration and oversight costs.
- 3.5 **Specific Obligations**
- 3.5.1 Notwithstanding any and all obligations in the Plan or elsewhere in this Agreement, Corporation shall do the following to the reasonable satisfaction of City:
- a) Establish measurable target outcomes for marketing programs and services, including return-on-investment and other criteria;
 - b) Establish and regularly update a clearly defined process to be used in soliciting applications from, and awarding funds to, various entities for marketing and sales promotions to increase hotel room night consumption and market District lodging businesses as tourist, meeting, and event destinations.. The process will articulate the required qualifications of applicants, the targeted return-on-investment, and the measurement of results, among other criteria;
 - c) Establish a clearly defined process for reviewing and evaluating the success of marketing programs and services and the degree to which these programs and services are of benefit to all assessed businesses;

- d) Make available on at least a quarterly basis, reports to City on the target and actual outcomes for the period to date (by benefit category, type of activities, specific marketing initiative, entity funded, and detailing the way in which assessed businesses are benefited) along with details of funds expended;
- e) Allocate assessment revenue on an annualized basis in accordance with the Plan and as outlined herein;
- f) Allocate, on an annualized basis in accordance with the Plan, all other revenue (interest and penalties deposited by the City into the District Fund, and Incidental Revenue, as defined in section 4.7 of this Agreement, generated by Corporation on disbursed District funds)
- g) Distribute an electronic or other form of communication, at least quarterly to every business assessed in the District announcing news, reports and other documents available on the Corporation's website, and include on the website, among other things, a directory of Corporation's current Board Members. If requested by an assessed business, the communication shall be made available in appropriate alternative formats.
- h) Hold no fewer than six regularly scheduled open meetings each year, noticed and conducted in compliance with the Ralph M. Brown Act, that afford assessed businesses an opportunity to provide input to the Board. Such meetings shall include one annual meeting at which the election of officers is held and results of Board elections are ratified;
- i) Prepare an Annual Performance Report, summarizing Corporation's goals, accomplishments, return-on-investments, and expenditures for the preceding fiscal year or part thereof, to be distributed to each assessed business in the District, by October 31 (or as otherwise mutually agreed upon annually by the Corporation and City but providing sufficient time to meet Council/Committee docketing deadlines) for each year following the District's first full fiscal year of operations. Every fifth year a Milestone Report is to be prepared and submitted in lieu of the Annual Performance Report;
- j) Prepare a prospective Report of Activities, as required under the San Diego Municipal Code section 61.2521 as amended from time to time, to be delivered to the City by April 1 each year (or as otherwise mutually agreed upon annually by the Corporation and City but providing sufficient time to meet Council/Committee docketing and budgeting deadlines) during the duration of the Agreement, along with an Interim Performance Report in keeping with the Corporation's obligations to District assessed businesses and the City. Every fifth year a Milestone Report is to be prepared in lieu of the Report of Activities;

- k) A cost allocation methodology shall be approved periodically by the Corporation and made known to its contractors to be used in determining eligible Direct, Indirect, and General & Administration expenses and appropriate per diem, travel, and overhead rates.

The cost allocation methodology approved by the Corporation shall be modeled on OMB Circular A-122 (or successor document) in determining the Direct, Indirect, and General & Administrative expenses to be applied to District funding, notwithstanding that certain District specific expense may be treated as exceptions to OMB Circular A-122 with supporting analysis.

- l) Ensure that District funds are applied only toward the equivalent of coach airfare, and only when use of public air carrier transport is required in order to perform the Corporation's obligations under the Plan and this Agreement. District funds may not be applied toward any upgrades;
- m) Ensure that District funds are applied using the U.S General Services Administration rates (GSA rates) per day, per person, for meals, incidentals, and lodging while on official travel (when the provision for travel is required in order to perform the Corporation's obligations under the Plan and this Agreement). District funds may not be used to pay for any alcoholic beverages. These same limitations shall apply when lodging in San Diego is provided for out-of-town visitors on District business.
- n) Ensure that, in the event meals are provided to hosted individuals within the scope of business development, or sales and marketing, documentation of the following shall be included with the reconciliation report provided to City: (i) the purpose of the meeting, (ii) conformance to the Plan, (iii) the benefit or anticipated benefit to assessed businesses and (iv) a list of hosted individuals . All expenditures for meals shall comply with the approved cost allocation methodology.
- o) Ensure that, should Corporation or Corporation's subcontractors decide to provide financial sponsorship of events, Corporation's Board makes a determination of the need for the sponsorship, that the amount of the sponsorship is a just and reasonable expenditure of District funds at the time it is authorized, approved or ratified, that the expenditure is in conformance with the Plan, and that the benefit or anticipated benefit to assessed businesses is identified and documented. If alcoholic beverages are consumed during event sponsorships, they may not be paid for with District assessment funds; and
- p) Ensure that, should Corporation's subcontractors request reimbursement from District funds for travel, meals, the hosting of meals, out-of-town and

in-town lodging and sponsorships, as discussed herein, these costs shall have been anticipated in any scope of work, statement of activities or budget materials submitted to Corporation prior to the execution of a subcontract. All pre-authorized subcontractor expenditures are limited in the same manner as Corporation's expenditures are limited herein.

3.5.2 Promotional Materials And Obligations

3.5.2.1 **Promotion Material Requirements.** Corporation shall include the following language on all promotional materials (including, but not limited to, brochures, newsletters, advertising, facts sheets, news releases, and Internet web sites): "Funded in part (or in whole) by the San Diego Tourism Marketing District Corporation with City of San Diego Tourism Marketing District Assessment Funds." Such acknowledgment shall be prominently displayed on all such promotional materials. A copy of page or pages, of promotional material displaying required language, or other equivalent proof, is required to be included in reconciliation report.

3.5.2.2 **Product Endorsements.** To the extent applicable, Corporation shall comply with the provisions of City Administrative Regulation 95.65, as amended from time to time regarding product endorsements. Corporation shall not create any advertisement or writing that identifies or refers to the City as the user of a product or service, without first obtaining the prior written approval of the City.

3.5.2.3 **City's Promotional Obligations.** City shall make available an annual statement of TOT revenues consistent and in compliance with San Diego Municipal Code section 35.0128 and shall provide monthly reports on TOT revenue to Corporation.

3.6 Obligations Regarding Budget Preparation

3.6.1 City and Corporation agree to timely carry out all actions reasonably necessary to process the annual budget for the Corporation's operations. The Parties shall also cooperate on an ongoing basis to ensure that the functions of the Corporation, as identified in this Agreement, are timely and adequately funded, so as to avoid disruption in programs and services.

3.6.2 Pursuant to the Plan, the Board shall develop and adopt an annual budget for the Corporation. Said budget shall be adopted by the Board and annually incorporated into the Annual Report of Activities or Milestone Report, for approval by the San Diego City Council. The budget shall be filed with the City prior to the end of each City fiscal in accordance with section 3.5.1(j) of this Agreement. The City fiscal year begins on July 1st of each calendar year.

3.6.3. Prior to adoption by the Board and submission to the City Council, Corporation

and City shall work cooperatively to ensure mutual agreement between the City and Corporation on all aspects of Corporation's proposed budget. Nothing in this section shall prevent the Parties from agreeing to subsequent modifications to the line items within the District budget in any given year, as long as the parties mutually agree to such modification in writing, and so long as the modifications do not require a modification of the Plan pursuant to San Diego Municipal Code sections 61.2521 and 61.2522, as amended from time to time.

ARTICLE IV

REVENUES, DISBURSEMENTS, ADVANCES, RECONCILIATION INELIGIBLE EXPENDITURES

- 4.1 **Revenues.** All funds collected pursuant to the District Resolution shall be timely deposited and appropriately credited by City to the District Fund.
- 4.1.1 City shall provide, on a mutually agreed upon monthly cycle, reports of District activity processed by the City. Reports shall include the following: assessment revenues collected by month; assessment revenues earned by month; penalty revenues collected, interest earned on District fund through City's pooled investments, detailed breakdown of City administrative expenses; any advances or transfers from District Fund; any adjustments posted to the District Fund; and reconciliation of funds held by City to Fund balance. Information provided by City shall be adequate to allow for an independent calculation and estimate of the District's monthly earnings.
- 4.1.2 The total assessment revenues from the District will vary depending upon the gross room revenues, minus exempt revenues, collected by hotel businesses subject to the District assessment. Assessment revenues are projected under the Plan throughout the term of the Agreement.
- 4.1.3 City shall provide no less than annually a report of revenue audit outcomes including the number of businesses audited and the amounts of deficiencies and overpayments, along with the number of accounts and amounts referred to Collections and the outcomes.
- 4.2 **Disbursements.**
- 4.2.1 City will disburse District funds to Corporation on a monthly basis and with a payment term of no more than Net 20. On the last working day of each month, the City will determine the revenue posted during the month from assessments, penalties, and interest in the District Fund and will distribute that amount of funds, minus the City's administrative fees (or reasonable estimate thereof) and a withholding equal to the percent annually budgeted for contingencies to Corporation on or before the twenty-fifth day of the following month pursuant to the procedures described in Exhibit A.

- 4.2.2 Any expenditures by Corporation which are not within the prescribed limitations of this Agreement, the Plan, San Diego Municipal Code sections 61.2501, et.seq., and applicable laws, rules, and regulations governing this Agreement, as amended from time to time, are not chargeable to the District Fund and shall be borne solely by Corporation.
- 4.2.3 Upon written request from Corporation, the City may make additional disbursements of District funds to Corporation for up to 100% of a documented expense to implement any activity specified within the approved Report of Activities subject to availability of funds. The written request shall indicate a vote in the affirmative by the Board to request such an additional disbursement and include detail of the amount, timing, and proposed use of such funds. Any such disbursement will be based on available cash at the time of the request, subject to certification of funds availability by the City Comptroller.
- 4.2.4 Corporation shall submit a Reconciliation Report accounting for the use of the additional disbursement, as described in Exhibit A within 60 days of the receipt of the additional disbursement. If the Reconciliation Report is not submitted within this timeframe then the disbursed funds must be returned to the City in the form of a check marked payable to the City Treasurer, noting the District's name in the memo line, and City staff will deposit the check back into the District Fund. If neither the Reconciliation Report nor the repayment check is received by the City then the monthly disbursements may be suspended pending receipt of the required Reconciliation Report or repayment check. In the case of an extraordinary event or circumstance beyond the control of the Parties, such as an act of God, then City may, at its sole discretion, establish a new timeline and/or repayment process.
- 4.2.5 Corporation may advance District funds to recipient organizations subject to City's receipt of the funding agreement which shall provide for each of the following:
- a) Language specifying the permitted use of such advances, and any other language required by this Agreement;
 - b) Authorization by Corporation and recipient organization for the City to audit the use of any advanced funds;
 - c) Receipt by the Corporation and City of a full accounting by recipient organization and verified by Corporation of any District funds previously advanced to recipient organization; and
 - d) Advances to recipient organizations shall be returned or accounted for annually but no later than on or before the expiration of this Agreement or the expiration of the agreement between the Corporation and the recipient organization, whichever comes sooner, (or upon termination, if earlier),

either as a reduction of the final request for reimbursement, or as a transfer of funds from recipient organization to the City.

- 4.2.6 All disbursements to Corporation shall be accounted for annually and any non-reconciled or unexpended funds shall be returned to City on or before the expiration of this Agreement (or upon termination, if earlier).

4.3 **Reconciliation**

- 4.3.1 Corporation shall submit to the City Reconciliation Report(s) accounting for the use of the District assessment funds, as described in Exhibit A, The Reconciliation Report(s) shall be submitted to the City within 45 of the disbursement of funds and no less than monthly thereafter. Failure to timely submit Reconciliation Report(s) may result in, among other things, cessation of future disbursements until such time as the overdue report is received and reviewed by City staff, and deemed to be in compliance with the requirements of this Agreement.
- 4.3.2 District assessment funds may only be used for activities as authorized and approved by City Council in the Annual Report of Activities. Any expenditure that is not consistent with the Annual Report of Activities, or is not supported with proper documentation described herein and in Exhibit A, shall be considered an ineligible expenditure and may result in, among other things, cessation of future disbursements, reduction of future disbursements, or termination of this Agreement. Nothing in this section shall waive or deny any right or remedy, at law or in equity, existing as of the date of this Agreement or hereinafter enacted or established, that may be available to the City against Corporation.
- 4.3.3 Corporation shall not use District funds in its operations, directly or indirectly, during any period of federal, state, or local debarment, suspension, or ineligibility of Corporation, when Corporation has been noticed, or should have known of such debarment, suspension, or ineligibility.
- 4.3.4 In the event that Corporation is holding District funds at the end of the preceding fiscal year, then Corporation may use such funds only for activities as authorized and approved by City Council in the Report of Activities. Corporation shall submit to the City a Reconciliation Report detailing the actual amount of carry forward District Funds held by Corporation at June 30, as described in Exhibit A, by August 31. Corporation shall submit to the City a Reconciliation Report accounting for the use of these carry forward Assessment Funds held by Corporation, as described in Exhibit A, by October 31. If the documentation is not submitted within this timeframe then the District funds held as of June 30 must be returned to the City in the form of a check marked payable to the City Treasurer and noting the District's name in the memo line and City staff will deposit the check back into the District Fund. If neither the Reconciliation Report nor the repayment check is received by the City then the monthly disbursements may be

suspended pending receipt of the required Reconciliation Report or repayment check.

- 4.3.5 All Reconciliation Reports shall be accompanied by the following statement: “(Corporation’s Name) hereby certifies that all staff time expended and reimbursements requested are for services performed in accordance with the Agreement between The City of San Diego and (Corporation’s Name) for the management of the District”. All Reconciliation Reports shall be signed by an officer of Corporation (not the Executive Director).
- 4.3.6 The final disbursement to Corporation may be withheld until all outstanding reports are received. Once the final disbursement to Corporation has been made under this Agreement, Contractor shall have 120 days to submit the Final Expenditure Report to City which accounts for all previously unreconciled disbursements plus the final disbursement and shall include a summary of the activities Corporation has performed pursuant to this Agreement.
- 4.3.7 Within 60 days of receipt of Reconciliation Reports, City shall approve the report or request additional information.

4.4 **Ineligible Expenses for District Reconciliation /Reimbursement**

- 4.4.1 Corporation and Corporation’s subcontractors shall not use District funds for alcoholic beverages. Corporation’s subcontractors shall not use District funds for travel, meals, lodging, or entertainment expenses, unless directly attributable to providing District programs and authorized by Corporation in advance, as provided for elsewhere in this Agreement.
- 4.4.2 If Corporation receives (or has received) additional funding for its activities from a source or sources other than through the City’s allocation of District funds, and the use of said additional funds requires that Corporation make an accounting to, or be subject to, an audit by such other source, then Corporation shall charge those cost of such audit to the appropriate non-District funding source at the time incurred. Any cost incurred in connection with the Corporation which is properly chargeable to, and actually claimed for compensation under, a funding source other than the City, shall not be allowed as a chargeable cost under this Agreement.
- 4.4.3 Corporation shall not request reimbursement for, or submit as part of a Reconciliation Report, any expenditure that has been or may be properly charged to a funding source other than District assessment funds.
- 4.4.4 Corporation shall not request reimbursement for, or submit as part of a Reconciliation Report, any expenditure that has been or may be properly charged to a funding agency other than the City.

4.4.5 Corporation and Corporation's subcontractors shall not be paid for any expenditure that has been (or should be) properly charged to a funding source other than the District assessment fund, nor paid for expenditures which are ineligible under applicable City policies, the Plan, or this Agreement, unless approved, in writing, by the City. A payment request that is not consistent with the Corporation's budget or the Corporation's prospective Annual Report of Activities or Milestone Report, except as provided in this Section, or that is not supported with proper documentation as required herein, shall be considered an ineligible expenditure.

4.5 **Adjustments Between Budgetary Line Items.** Any Corporation requests for adjustments between line items that exceed fifteen percent (15 %) of budgeted line item, as described in the Annual Report of Activities approved by City Council, shall be submitted to City in writing. Corporation's expenditure of additional funds in that budgetary line item may only occur if City provides written approval. City, at its sole discretion, may consider such an adjustment an amendment to the Annual Report of Activities and require City Council authorization for approval.

4.6 **Partial Performance.** In the event Corporation performs less than all services required under this Agreement in a proper and timely manner, the City will reimburse Corporation only the reasonable costs of those services actually performed by Corporation during that payment period, as determined by the City.

4.7 **Incidental Revenue.** Should Corporation use District funds to generate Incidental Revenue, Corporation may only use such revenue to improve the services performed by Corporation under this Agreement. "Incidental Revenue" means revenues generated by Corporation from receipt or use of District funds, including, but not limited to interest income earned by Corporation on District funds deposited into an interest bearing account. Corporation shall separately account for any and all Incidental Revenue accrued and/or used by Corporation. Corporation shall also submit to the City an Annual Incidental Revenue Report accounting for the receipt and use of all Incidental Revenue during the preceding fiscal year, as described in Exhibit A, by August 31.

ARTICLE V

SUSPENSION AND TERMINATION

5.1 Suspension or Disallowance of Payments

5.1.1 Notwithstanding any other provision of this Agreement, if Corporation fails to comply with any material term or condition of this Agreement, City's remedies include, without limitation, each of the following:

- a) Suspending one or more payments to Corporation, pending correction of the activity or action not in compliance; and/or

- b) Disallowing funds for all or part of the cost of the activity or action not in compliance.
- 5.1.2 If City notifies Corporation that City has suspended payments or disallowed funds, Corporation shall not expend any funds related to, or connected with, any area of controversy or conflict that resulted in the suspension or disallowance of funding.
- 5.1.3 Notwithstanding any other provision of this Agreement, if the validity of the District, District activities, District establishment, District renewal, or this agreement becomes the subject of litigation, City may, at its sole discretion and upon written notice to Corporation, suspend or reduce one or more payments to Corporation, pending final adjudication of the litigation. The written notice from the City shall include the total anticipated amount of District revenue available to be disbursed to Corporation during the period of litigation, including the amount of District revenue available for defense of the litigation, if any, so that Corporation may adjust its budget and Funding Allocations accordingly. During such litigation all District revenue that is collected by the City and not disbursed to Corporation shall remain in the District Fund.
- 5.2 **Termination for Curable Default.** City may send written notice (delivered in accordance with the provisions of the Notice section herein) to Corporation if Corporation fails to comply with any term or condition of this Agreement. The written notice shall include a description of Corporation's default. If Corporation fails to cure the default within sixty (60) calendar days of the date Corporation receives the written notice, the City may immediately terminate this Agreement. City may suspend one or more payments to Corporation during the sixty (60) calendar day notice period.
- 5.3 **Termination for Incurable Default.** The City may immediately terminate this Agreement upon written notice (delivered in accordance with the notice provisions herein) to Corporation if:
- a) Corporation makes material misrepresentations in regard to information furnished to City pursuant to this Agreement, regardless of whether Corporation had knowledge or intent with respect to the misrepresentation;
 - b) Corporation, or any of its officers or directors, engages in conduct that results in Corporation, or any of its officers or directors, being convicted of a felony that materially and adversely affects Corporation's performance of its obligations under this Agreement;
 - c) Corporation misappropriates funds;
 - d) Corporation files a voluntary petition in bankruptcy, is adjudicated

bankrupt, or makes a general assignment for the benefit of creditors;
and/or

- e) Corporation is unable or unwilling to comply with any additional terms or conditions concerning the operation of the District that may be required by newly enacted (or amended) federal, state, and/or local laws.

5.4 **Continuing Responsibilities**

5.4.1 In the event this Agreement is terminated, Corporation shall complete any and all additional work necessary for the orderly filing of documents and closing of Corporation's performance of its obligations and duties under this Agreement. For services rendered in completing the work, Corporation shall be entitled to fair and reasonable compensation for the services performed by Corporation before the effective date of termination. After filing of documents and completion of performance, Corporation shall deliver to the City all data and records (including, but not limited to, all documents and/or work product) prepared and/or completed directly in connection with, or related to, Corporation's performance under this Agreement. By accepting payment for completion, as well as filing and delivering documents as called for in this Section, Corporation discharges the City of all of the City's payment obligations and liabilities under this Agreement.

5.4.2 Upon the expiration or termination of this Agreement, Corporation shall transfer to City any District assessment funds on hand at the time of the expiration or termination, and any accounts receivable attributable to Corporation's use of District assessment funds.

5.5 **Rights and Remedies.** City's termination of this Agreement shall terminate each and every right of Corporation, and any person claiming any rights by or through Corporation under this Agreement. The rights and remedies of City enumerated in this Article are cumulative and shall not limit, waive, or deny any of City's rights under any other provision of this Agreement. Nor does this Article otherwise waive or deny any right or remedy, at law or in equity, existing as of the Effective Date of this Agreement or hereinafter enacted or established, that may be available to City against Corporation.

ARTICLE VI

INDEMNIFICATION

6.1 **Indemnification and Hold Harmless Agreement.**

6.1.1 To the fullest extent permitted by law, Corporation shall defend, indemnify, protect, and hold harmless the City, and all of the City's officers, agents, and employees, from and against any and all "Indemnified Claims" as defined herein. The "Indemnified Claims" shall refer collectively to: (i) actions, suits, proceedings, or claims, including but not limited to any and all administrative,

constitutional, or any other challenges to the validity, establishment, or renewal of the District; (ii) any and all liability, damages, injuries, losses, costs, or expenses, including, without limitation, consultants' and attorneys' fees arising out of or related to, in full or in part, or in any respect whatsoever the District, its formation, this Agreement, or by the acts or omissions of Corporation, its officers, employees, representatives, agents, and/or Subcontractors in performing work or services whether or not such work and/or services are required or authorized herein; and (iii) all expenses of investigating and defending against same, including, without limitation, attorney fees and costs. City may, at its own election, conduct the defense or participate in the defense of any Indemnified Claim. If City elects to conduct its own defense, participate in its own defense, or obtain independent legal counsel in defense of any Indemnified Claim, Corporation shall pay the City for all costs related thereto, including, without limitation, reasonable fees and costs.

6.1.2 The Corporation's obligation to indemnify and hold harmless the City pursuant to paragraph 6.1.1 above shall not include liability, damages (including, without limitation, penalties, fines, and monetary sanctions), injuries, losses, costs, or expenses (including, without limitation, consultants' and attorneys' fees) due to errors or problems with assessment amounts.

6.3 **City to Control Defense.** City shall control the defense (including the selection of qualified legal counsel) of any proceeding which gives rise to a right of defense and indemnification under this Article.

6.4 **Settlement.** Corporation shall notify City in writing of any settlement or compromise discussion associated with any proceeding covered by this Article and shall provide the City an opportunity to participate in such discussion. Corporation shall not settle or compromise any proceeding covered by this Article without first obtaining written consent to such settlement or compromise from the City.

6.5 **District Revenue to Pay Costs of Defense.** The cost of defense of any actions, suits, proceedings, or claims which challenge the validity, establishment, or renewal of the District may be paid for with District revenue, subject to the limitations of section 5.1.3 of this Agreement.

6.6 **Enforcement Costs.** Corporation shall pay City any and all costs City incurs enforcing the indemnity and defense provisions set forth herein.

ARTICLE VII

INSURANCE

7.1 **Corporation's Duty to Maintain Insurance.** At all times during this Agreement, Corporation shall maintain and comply with the insurance requirements set forth in this Article VII. Corporation shall provide to City insurance certificates reflecting evidence

of all insurance coverage required under this article. Notwithstanding any provision of this Agreement to the contrary, Corporation's failure or refusal to obtain, maintain or renew insurance as required by this Agreement, or failure to provide proof of insurance, shall be a default of this Agreement. If a default under this Article occurs, City shall be permitted to suspend payments during such default period, and Corporation shall be permitted to cure the default, pursuant to Article V herein.

7.2. **Types of insurance.** At all times during the term of this Agreement, the Corporation shall maintain insurance coverage as follows:

Commercial General Liability (CGL). Insurance written on an ISO Occurrence form CG 00 01 07 98 or an equivalent form providing coverage at least as broad which shall cover liability arising from any and all personal injury or property damage in the amount of \$ 1 million per occurrence and subject to an annual aggregate of \$2 million. There shall be no endorsement or modification of the CGL limiting the scope of coverage for either insured vs. insured claims or contractual liability. All defense costs shall be outside the limits of the policy.

Commercial Automobile Liability. For all of the Corporation's automobiles including owned, hired and non-owned automobiles, the Corporation shall keep in full force and effect, automobile insurance written on an ISO form CA 00 01 12 90 or a later version of this form or an equivalent form providing coverage at least as broad for bodily injury and property damage for a combined single limit of \$1 million per occurrence. Insurance certificate shall reflect coverage for any automobile (any auto).

Workers' Compensation. For all of the Corporation's employees who are subject to this Agreement and to the extent required by the applicable state or federal law, the Corporation shall keep in full force and effect, a Workers' Compensation policy. That policy shall provide a minimum of \$1 million of employers' liability coverage, and the Corporation shall provide an endorsement that the insurer waives the right of subrogation against the City and its respective elected officials, officers, employees, agents and representatives.

7.3. **Deductibles.** All deductibles on any policy shall be the responsibility of the Corporation and shall be disclosed to the City at the time the evidence of insurance is provided.

7.4. **Acceptability of Insurers.** Except for the State Compensation Insurance Fund, all insurance required by this Agreement shall only be carried by insurance companies with a rating of at least "A-, VI" by A.M. Best Company, that are authorized by the California Insurance Commissioner to do business in the State of California, and that have been approved by the City. The City will accept insurance provided by non-admitted, "surplus lines" carriers only if the carrier is authorized to do business in the State of California and is included on the List of Eligible Surplus Lines Insurers (LESLI list). All policies of insurance carried by non-admitted carriers are subject to all of the requirements for

policies of insurance provided by admitted carriers described herein.

7.5. Required Endorsements. The following endorsements to the policies of insurance are required to be provided to the City before any work is initiated under this Agreement.

Commercial General Liability Insurance Endorsements:

ADDITIONAL INSURED. To the fullest extent allowed by law including but not limited to California Insurance Code Section 11580.04, the policy or policies must be endorsed to include as an Insured the City of San Diego and its respective elected officials, officers, employees, agents and representatives with respect to liability arising out of (a) ongoing operations performed by Corporation or on Corporation's behalf, (b) Corporation's products, (c) Corporation's work, including but not limited to completed operations performed by Corporation or on Corporation's behalf, or (d) premises owned, leased, controlled or used by Corporation.

PRIMARY AND NON-CONTRIBUTORY COVERAGE. The policy or policies must be endorsed to provide that the insurance afforded by the Commercial General Liability policy or policies is primary to any insurance or self-insurance of the City of San Diego and its elected officials, officers, employees, agents and representatives as respects operations of the Named Insured. Any insurance maintained by the City of San Diego and its elected officials, officers, employees, agents and representatives shall be in excess of Corporation's insurance and shall not contribute to it.

SEVERABILITY OF INTEREST. The policy or policies must be endorsed to provide that the Corporation's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability and shall provide cross-liability coverage.

Automobile Liability Insurance Endorsements:

ADDITIONAL INSURED. To the fullest extent allowed by law, including but not limited to California Insurance Code Section 11580.04, the policy or policies must be endorsed to include as an Insured the City of San Diego and its respective elected officials, officers, employees, agents and representatives with respect to liability arising out of automobile owned, leased, hired or borrowed by or on behalf of the Corporation.

SEVERABILITY OF INTEREST. The policy or policies must be endorsed to provide that Corporation's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability and shall provide cross-liability coverage.

Worker's Compensation Insurance Endorsements:

WAIVER OF SUBROGATION. The Worker's Compensation policy or policies must be endorsed to provide that the insurer will waive all rights of subrogation against the City

and its respective elected officials, officers, employees, agents and representatives for losses paid under the terms of this policy or these policies which arise from work performed by the Named Insured for the City.

- 7.6. **Continuity Of Coverage.** All policies shall be in effect on or before the first day of the Term. At least thirty (30) days prior to the expiration of each insurance policy, Corporation shall furnish a certificate(s) showing that a new or extended policy has been obtained which meets the requirements of this Agreement.
- 7.7. **Modification.** To assure protection from and against the kind and extent of risk existing by the obligations under this Agreement, City, at its discretion, may require the revision of amounts and coverage at any time during the Term by giving Corporation thirty (30) days prior written notice. Corporation shall also obtain any additional insurance required by the City for changed circumstances or City's reasonable re-evaluation of risk levels related to Corporation's obligations under this Agreement.
- 7.8. **Additional Insurance.** The Corporation may obtain additional insurance not required by this Agreement.
- 7.9. **Excess Insurance.** All policies providing excess coverage to the City shall follow the form of the primary policy or policies including but not limited to all endorsements.
- 7.10. **Bonding Requirements for Corporation Employees and Officers.** Corporation shall carry a Fidelity Bond that includes, but is not limited to, Employee Dishonesty, Theft, Forgery, and Computer Related Crime. All officers, agents, and employees of the Corporation who handle funds of the Corporation in any manner, and any other officers, agents, and employees of the Corporation specifically designated by the Board of Directors, shall execute fidelity bonds in favor of the Corporation in the penal sums as established by the Board of Directors. Each fidelity bond shall be executed by the officer, agent, or employee as principal and by a corporate surety company approved by the Board of Directors for Corporation, provided, however, that blanket bonds may be employed in lieu of individual bonds in the case of employees.

ARTICLE VIII

COMPLIANCE WITH LAWS AND POLICIES

8.1 Conflicts of Interest

- 8.1.1 Under San Diego Municipal Code [Code] section 61.2504, and in keeping with state law codified in California Streets and Highways Code section 36614.5, the Corporation is a private entity and may not be considered a public entity for any purpose, nor may its board members or staff be considered to be public officials for any purpose. Nothing in this Section shall be construed to create any additional duties or obligations, on the part of Corporation or City, beyond those obligations to follow existing law, as updated from time to time during the course

of this Agreement. Obligations and duties assumed by Corporation under the Plan, including those related to planning of District activities and allocation of District funds, shall not create in Corporation officials the obligations of a "consultant" as defined in the California Code of Regulations, Title 2, section 18701(a)(2).

- 8.1.2 Corporation shall at all times comply with all federal, state, and local laws, including conflict of interest laws, statutes, ordinances, regulations, and policies of City related to public contracts and procurement practices to the extent applicable.
- 8.1.3 The Parties are unaware of any financial or economic interest of any public officer or employee of City relating to this Agreement. If such a financial and/or economic interest is determined to exist, the City shall immediately notify Corporation. Corporation and City shall investigate the nature of the interest and Corporation or City shall take all necessary actions to clear the conflict, including initiating action against the officer, employee or Corporation.
- 8.1.4 Corporation shall establish, and make known to its agents and employees, appropriate safeguards to prohibit employees from using their positions for a purpose that is, or that gives the appearance of being, motivated by the desire for private gain for themselves or others, particularly those with whom they have family, business, and/or other relationships.
- 8.1.5 Corporation Board members and officers are intended and understood to represent and further the economic interest of City's lodging industry and have a fundamental duty to advance the general welfare of the lodging industry in a manner which may incidentally or indirectly benefit themselves or their business interests. Such incidental or indirect benefits shall not be considered to violate the duties assigned to the Corporation, its Board or officers under the terms of this Agreement.
- 8.1.6 Corporation's personnel, employed in performing the obligations and duties under this Agreement, shall not accept gratuities, or any other favors, from any Subcontractor or potential Subcontractor. Corporation shall not recommend or specify any product, supplier, or Corporation with whom Corporation has a direct or indirect financial or organizational interest or relationship that would violate conflict of interest laws, regulations, or policies.
- 8.1.7 If Corporation violates any conflict of interest law, or any of the provisions of this Section, City shall issue a notice to cure. City and Corporation shall then take actions to cure said violation. Should the Corporation fail to adequately cure the violation, then the City may immediately terminate this Agreement. Further, any such violation shall subject Corporation to liability to the City for attorney's fees and all damages sustained as a result of the violation.

ARTICLE IX

DATA AND RECORDS

- 9.1 **General.** Corporation shall maintain, and require its Subcontractors to maintain, all administrative and financial records required in connection with the operations of the District (including, but not limited to, all books, accounting records, financial statements, invoices, receipts, payroll records, personnel records, and any other data and records pertaining to all matters covered in this Agreement) during the term of this Agreement.
- 9.2 **Accounting Records**
- 9.2.1 Corporation shall maintain, keep or cause to be kept and require its Subcontractors to maintain, keep or cause to be kept true, complete and accurate accounting records, books, and financial statements in accordance with Generally Accepted Accounting Practices [GAAP] in the industry. The financial statements must be audited by an independent Certified Public Accountant in accordance with Generally Accepted Auditing Standards. The Corporation shall provide the City with full annual audited financial statements within five months after the end of each Fiscal Year.
- 9.2.2 Within thirty (30) calendar days of any written request by the City for accounting records, Corporation shall at its sole cost and expense make available to the City, for review and audit, all Project-related accounting records, documents, and any other financial data and records. Upon the City's request, Corporation shall submit exact duplicates of the originals for all requested records to the City.
- 9.2.3 All auditing records and statements must include a statement of expenditures of Corporation funds, certified by an independent Certified Public Accountant, identified in the same expenditure classifications as contained in the Corporation's approved budget and shall comport to the extent possible with the budget amounts as set forth in the Plan and annual budgets. All statements must also include a statement of compliance with the terms of this Agreement and must be signed by the executive officer of Corporation.
- 9.2.4 Failure to comply with the requirements of this section could result in suspension of any payments or possible future funding; provided, however, that the City shall not suspend any current or future payments until it has first given the Corporation written notice in accordance with the Termination for Curable Default section.
- 9.3 **Inspection and Photocopying.** At any time during normal business hours and as often as the City deems necessary, Corporation shall permit, and require its Subcontractors to permit, the City, or its authorized agents, to inspect and photocopy, at a reasonable location within the County of San Diego (e.g., the offices of Corporation), all books, accounting records, invoices, receipts, payroll records, personnel records, and any other Project data and records pertaining to all matters covered in this Agreement, for the

purposes of auditing, monitoring, and/or evaluating Corporation's performance of its obligations and/or duties in connection with the Agreement and Plan. The City may retain copies of the same, with appropriate safeguards, if such retention is deemed necessary by the City in its sole discretion.

- 9.4 **Storage Period.** Corporation shall store, and require its Subcontractors to store, all Project data and records for a period of not less than five years after submission of the final expenditure report for the contract period, or five years after submission of the final expenditure report upon earlier termination of this Agreement, or until all audit findings have been resolved, whichever is longest. All such data and records shall be kept at Corporation's (or relevant Subcontractor's) regular place of business. At any time during the storage period, Corporation shall permit, and require each of its Subcontractors to permit, the City, or their authorized agents to examine all such data and records, for the purposes described herein. After the storage period has expired, or all audit findings have been resolved, whichever is later, Corporation shall provide City with thirty (30) calendar days written notice of its intent to dispose of any Project data and records. Corporation shall not take any action to dispose of such data and records without the prior written consent of the City.
- 9.5 **Original Documents.** Notwithstanding the foregoing, upon the termination of this Agreement for any reason, the City may request that Corporation deliver, and Corporation shall deliver, within fifteen (15) calendar days of any such request by the City, the originals of all such data and records to the City. Corporation may retain copies of all data and records delivered to the City.
- 9.6 **Ownership of Documents.** Once Corporation has received any reimbursement from the City for Corporation's performance of its obligations and/or duties under this Agreement, all data and records (including, but not limited to, all documents prepared and/or work product completed directly in connection with, or related to, Corporation's performance under this Agreement) shall be the property of the City. The City's ownership of such documents includes the use, reproduction, and/or reuse of such documents, as well as all incidental rights, whether or not the work for which the documents were prepared has been performed. This Section shall apply whether the Agreement is terminated by the completion of the Project, the expiration of this Agreement, or upon termination of this Agreement, if earlier, in accordance with the terms of this Agreement. Nothing in this Section shall limit Corporation's ability to retain copies of any documents over which City claims ownership, nor shall this Section be applied to original copies of Corporation's articles of incorporation, bylaws, or any Corporation documents that are not related to Corporation's performance of obligations and duties under this Agreement and the Plan.

ARTICLE X

CITY POLICY PROVISIONS

- 10.1. **Nondiscrimination.** Corporation shall not discriminate in any manner against any person

or persons on account of race, color, religion, gender, sexual orientation, medical status, national origin, age, marital status, or physical disability in Corporation's activities pursuant to this Agreement, including but not limited to the providing of goods, services, facilities, privileges, advantages, and accommodations, and the obtaining and holding of employment.

- 10.2. **Compliance with City's Equal Opportunity Contracting Program.** Corporation shall comply with City Council Ordinance No.18173 (San Diego Municipal Code sections 22.2701 through 22.2708, as amended), EQUAL EMPLOYMENT OPPORTUNITY OUTREACH PROGRAM, a copy of which is on file in the Office of the City Clerk and by this reference is incorporated into this Agreement. Corporation and all of its subcontractors are individually responsible to abide by its contents. Corporation shall comply with Title VII of the Civil Rights Act of 1964, as amended; Executive Orders 11246, 11375, and 12086; the California Fair Employment Practices Act; and any other applicable federal and state laws and regulations hereafter enacted. Corporation shall not discriminate against any employee or applicant for employment on any basis prohibited by law. On or before the Effective Date, Corporation shall submit a current Work Force Report or a current Equal Employment Opportunity (EEO) Plan as required by Section 22.2705 of the San Diego Municipal Code, which sets forth the actions Corporation will take to achieve City's commitment to equal employment opportunities. Corporation shall insert the foregoing provisions in all contracts and subcontracts for any work covered by this Agreement so the provisions will be binding upon each Corporation and subcontractor. Compliance with EEO provisions will be implemented, monitored, and reviewed by City's Equal Opportunity Contracting Program staff. Corporation's failure to comply with the requirements of this section and/or submitting false information in response to these requirements shall be a default of this Agreement, and City may bar Corporation from participating in City contracts for a period of not less than one (1) year.
- 10.3. **Local Business and Employment.** Corporation acknowledges that City seeks to promote employment and business opportunities for local residents and firms in all City contracts. Corporation shall, to the extent legally possible, solicit applications for employment, and bids and proposals for contracts and subcontracts, for work associated with this Agreement from local residents and firms as opportunities occur. Corporation shall hire qualified local residents and firms whenever feasible.
- 10.4. **City Employee Participation Policy.** Corporation shall be in default of this Agreement if Corporation employs an individual who, within the twelve months immediately preceding the employment, did in his/her capacity as a City officer or employee participate in negotiations with or otherwise have an influence on the recommendation made to the City Council in connection with the Corporation's selection for this Agreement. This provision does not apply to members of the City Council.
- 10.5. **Drug-free Workplace.** Corporation shall be required to abide by the omnibus drug legislation passed by Congress on November 18, 1988, by adopting and enforcing a policy to maintain a drug-free workplace by doing all of the following:

10.5.1. Publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of controlled substances are prohibited in the workplace and specifying the actions that will be taken against employees for violations of the prohibition; and

10.5.2. Establish a drug-free awareness program to inform employees about all of the following:

- a) The dangers of drug abuse in the workplace;
- b) Corporation's policy of maintaining a drug-free workplace;
- c) Any available drug counseling, rehabilitation, and employee-assistance programs; and
- d) The penalties that may be imposed upon employees for drug abuse violations.

10.5.3. Corporation shall include in each of its contracts related to this Agreement language obligating each subcontractor to comply with the provisions of this section to maintain a drug-free workplace. Corporation, and each of its subcontractors, shall be individually responsible for their own drug-free workplace program.

10.6. **Disabled Access Compliance.** Corporation shall at all times comply with the 1990 Americans with Disabilities Act ("ADA") and Title 24 of the California Code of Regulations (commonly known as the "building code") as defined in Section 18910 of the California Health and Safety Code and any other applicable federal, state, or local regulations hereafter enacted protecting the rights of people with disabilities.

10.7. **Living Wage Ordinance.** Corporation may be required to comply, and require each of its Subcontractors to comply, with the provisions of the City's Living Wage Ordinance, codified in San Diego Municipal Code [Code] sections 22.4201, et seq., in performing its obligations and/or duties under this Agreement. To the extent Corporation believes that it or its Subcontractors may be exempt from compliance pursuant to Code section 22.4215(b)(1), or any other exemption, Corporation may apply to City's Living Wage Administrator for determination of exemption.

ARTICLE XI

GENERAL PROVISIONS

11.1. **Compliance with Law.** Corporation shall at all times comply with all applicable laws, statutes, ordinances, and regulations of City, county, state, and federal governments. Corporation shall comply with all notices issued by City under the authority of all current or future laws, statutes, ordinances, or regulations.

- 11.2. **Mandatory Disclosure of Business Interests.** Pursuant to section 225 of The City Charter of the City of San Diego, California (“Charter”), Corporation and each of its subcontractors shall make a full and complete disclosure of the name and identity of any and all persons directly or indirectly involved in any transaction pursuant to this Agreement and the precise nature of all interests of all persons therein. Corporation’s failure to fully disclose all of the information required by Charter section 225, or Corporation’s failure to require each of its subcontractors to fully disclose such information, shall be a default of this Agreement. Exhibit B attached hereto and incorporated herein delineates the obligations of Corporation pursuant to Charter section 225.
- 11.3. **No Political Activity.** Corporation shall not use, and shall require its subcontractors not to use, any of the funds received pursuant to this Agreement, or any personnel or material paid for with funds pursuant to this agreement, for political activity. The term “political activity” shall mean a communication made to any electorate in support of, or in opposition to, a ballot measure or candidate in any federal, state or local government election.
- 11.4. **Open Meetings and Brown Act Compliance.** All meetings of a majority of the members of the Corporation’s board of directors shall be open and public. The Corporation shall comply with the Ralph M. Brown Act, California Government Code section 54950, *et. seq.* An agenda containing the date, time, and location of the meeting, and a general description of each item of business to be discussed or transacted, shall be posted in a place freely accessible to the public at least 72 hours prior to the meeting. The agenda shall also be sent to each member of the Corporation’s board, and every member of the public requesting notification of the meetings, by facsimile, via the United States Postal Service, or electronic mail, at the time of the posting of the agenda.
- 11.5. **California Public Records Act.** Corporation shall comply with the provisions of the California Public Records Act, codified in California Government Code sections 6250-6270, for all documents and records pertaining to all matters in connection with this Agreement.
- 11.6. **Notices.** Any notice required or permitted to be given under this Agreement shall be in writing and may be served personally or sent via the United States Postal Service, postage prepaid, or reliable overnight courier, addressed to the parties as follows:

If to Corporation:

San Diego Tourism Marketing District Corporation
8880 Rio San Diego Drive, Suite 800
San Diego, CA 92108

With a copy by First Class Mail to: Civitas Advisors Inc.
7700 College Town Drive, Suite 111
Sacramento, CA 95826

If to City:

City of San Diego
Attn: Economic Development Division
1200 Third Avenue, Suite 1400
San Diego, CA 92101

With a copy by First Class Mail to: San Diego City Attorney
Attn: Real Property Section
1200 Third Avenue, Suite 1100
San Diego, California 92101-4106

Any party entitled or required to receive notice under this Agreement may by like notice designate a different address to which notices shall be sent. Notice shall be effective upon personal service or five (5) days after deposit with the United States Postal Service.

- 11.7. **Severability.** If any term, covenant, condition, or provision of this Agreement is found invalid, void, or unenforceable by a court of competent jurisdiction, the remaining provisions shall remain in full force and effect.
- 11.8. **Unavoidable Delay.** If the performance of any act required of City or Corporation is directly prevented or delayed by reason of strikes, lockouts, labor disputes, unusual governmental delays, acts of God, fire, floods, epidemics, freight embargoes, or other causes beyond the reasonable control of the party required to perform the act, the obligated party shall be excused from performing that act for the period equal to the period of the prevention or delay. If Corporation or City claims the existence of a delay, the party claiming the delay shall notify the other party in writing of the fact within ten (10) days after the beginning of the claimed delay.
- 11.9. **Legal Proceedings.** If any party brings an action or proceeding against another party under this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party all reasonable costs and expenses thereof, including without limitation reasonable attorney fees and costs. The "prevailing party" shall be that party who obtains substantially the result sought, whether by settlement, dismissal, or judgment.
- 11.10. **Number and Gender.** Words of any gender used in this Agreement shall include any other gender, and words in the singular number shall include the plural, when the tense requires.
- 11.11. **Captions.** The section headings, and captions for various articles and paragraphs shall not be held to define, limit, augment, or describe the scope, content, or intent of any or all parts of this Agreement. The numbers of the paragraphs and pages of this Agreement may not be consecutive. The lack of consecutive numbers shall have no effect on the

enforceability of this Agreement.

- 11.12. **Entire Understanding.** This Agreement contains the entire understanding of the parties. City and Corporation, by signing this Agreement, agree that there is no other written or oral understanding between them with respect to the subject matter of this Agreement. Each party has relied on its own advice from its own attorneys, and the terms, covenants, and conditions of the Agreement itself. Each party to this Agreement agrees that no other party, agent, or attorney of any other party has made any promise, representation, or warranty whatsoever which is not contained in this Agreement. The failure or refusal of any party to read the Agreement or other documents and obtain legal or other advice relevant to this transaction constitutes a waiver of any objection, contention, or claim that might have been based on such actions.
- 11.13. **Drafting Ambiguities.** This Agreement is, in all respects, intended by each party hereto to be deemed and construed to have been jointly prepared by the Parties. The Parties hereby expressly agree that any uncertainty or ambiguity existing in this Agreement shall not be interpreted against either of them. Except as expressly limited by this paragraph, all other applicable rules of contract interpretation intended by law shall apply in full to this Agreement.
- 11.14. **Modifications.** This Agreement shall not be modified, altered or amended unless the modification, alteration or amendment is in writing and signed by all parties to this Agreement. Any and all amendments to this Agreement require City Council approval.
- 11.15. **Time is of Essence; Provisions Binding on Successors.** Time is of the essence of all of the terms, covenants, and conditions of this Agreement. Except as otherwise provided in this Agreement, all of the terms, covenants, and conditions of this Agreement shall apply to, benefit, and bind the successors and assigns of the respective parties, jointly and individually.
- 11.16. **Waiver.** City's failure to insist upon the strict performance of any of Corporation's obligations under this Agreement, in one or more instance(s), shall not be construed as a waiver of any such obligation, and the same shall remain in full force and effect. City's waiver of a default shall not be a waiver of any other default. Any waiver of a default must be in a writing executed by City to constitute a valid and binding waiver. City's delay or failure to exercise a right or seek a remedy shall not be deemed a waiver of that or any other right or remedy under this Agreement. The exercise of any particular right or the use of any particular remedy for any default shall not waive the use of any other right or remedy for the same default or for another or later default. City's failure to discover a default or take prompt action to require the cure of any default shall not result in an equitable estoppel, but City may at any and all times require the cure of the default.
- 11.17. **Survival.** Any obligation which accrues under this Agreement prior to its expiration or termination shall survive the expiration or earlier termination of this Agreement.
- 11.18. **Governing Law.** This Agreement shall be governed, construed, and enforced in

accordance with the laws of the State of California.

- 11.19. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which when executed shall be deemed an original, but all of which together shall constitute one and the same instrument.
- 11.20. **Consents, Approvals.** Neither City nor Corporation may unreasonably withhold or unreasonably delay any consent or approval required by this Agreement.
- 11.21. **City's Consent, Discretion.** Whenever required under this Agreement, City's consent or approval shall mean the written consent or approval of the San Diego City Manager, or his or her designee ("City Manager"), unless otherwise expressly provided, without need for further resolution by the City Council. City's discretionary acts hereunder shall be made in the City Manager's discretion, unless otherwise expressly provided. All references to "City Manager" herein shall be deemed to refer to the Mayor of San Diego or his or her designee for the duration City operates under the mayor-council (commonly referred to as "strong mayor") form of governance pursuant to Article XV of the City of San Diego City Charter.

[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

- 11.22. **Authority.** Each individual executing this Agreement on behalf of another person or

legal entity represents and warrants that he/she is authorized to execute and deliver this Agreement on behalf of such person or entity in accordance with duly adopted resolutions or other authorizing actions necessary and proper and under such legal entity's articles, charter, bylaws, or other written rules of conduct or governing agreement, and that this Agreement is binding upon such person or entity in accordance with its terms. Each person executing this Agreement on behalf of another person or legal entity shall provide City with evidence, satisfactory to City, that such authority is valid, and such entity is a valid, qualified corporation, limited liability company, partnership, or other unincorporated association in good standing in its home state and that such entity is qualified to do business in California.

IN WITNESS WHEREOF, this Agreement is executed to be effective as of the Effective Date:

Date: _____ SAN DIEGO TOURISM MARKETING DISTRICT CORPORATION, a California non-profit corporation

BY: _____
Name: C. Terry Brown
Title: Chairman of the Board

Date: _____ THE CITY OF SAN DIEGO, a California municipal corporation

BY: _____
Name: _____
Title: _____

APPROVED AS TO FORM AND LEGALITY:

Date: _____ JAN GOLDSMITH City Attorney

BY: _____
Name: _____
Title: _____

EXHIBIT A

DISTRICT DISBURSEMENTS AND DISTRICT ASSESSMENT FUNDS RECONCILIATION PROCEDURES

Disbursements in advance of City receipt of required documentation will be provided monthly based on the revenue posted into the District fund during that month as determined by City staff at month end.

On the last working day of each month, City staff shall determine the revenue posted during the month from assessments, interest, and penalties, which is to be disbursed to Corporation.

OSB staff will then submit a payment request in SAP for that amount within two working days and include a copy of the "invoice" document which details the relevant approved resolution and agreement authorizing the monthly disbursement in advance of City staff receiving documentation as to the actual expenditures. Attached to the invoice document shall be a document indicating how the amount for disbursement was derived.

Information as to the amount to be disbursed shall be provided to Corporation within 4 working days of the month start.

City Comptroller's staff will review the request and, if appropriate, release the payment in accordance with the Vendor Payment Term (NET20 or less).

Reconciliation Reports shall be submitted to the City no less than 45 days after the first disbursement and on no less than a monthly basis thereafter.

Only District-related activity expenses as approved by City Council in the annual Report of Activities may be submitted to document the use of the District funds disbursed in advance of said documentation. Failure to submit a report or reports within 10 days of the due date will result in advance payments being halted until overdue reports are received and reviewed by City staff, and deemed to be in compliance with the requirements of this Agreement.

The required reports and documents to be submitted with each Reconciliation Report are:

- Cover letter/signed form indicating the amount of eligible District expenses during the period, and any disbursement accrued for a future purpose.
- Summary Profit and Loss Report* for the period.
- Cash Disbursement Report* for all transactions during the period.
- Custom Journal Report* for all transactions during the period indicating the split of each expenditure between the various funding sources (classes).
- Transaction Detail by Account Report* for each City Funding source.
- Banks Statement(s) – include all pages.
- Bank Reconciliation Report.
- Cash Deposit Report of all checks deposited (including all funds received from the City).
- Monthly Activity Report based on the Council-approved Report of Activities.

- One copy of the invoice and checks. Only those invoices and checks that pertain to City funding sources are to be submitted. These documents shall be provided in the same order as the list on the Custom Journal Report.
- A copy of the check and invoice or receipt (or reference to contract for periodic payments of ongoing same amount, e.g. rent) detailing the services/products for each expense must be submitted. All invoices shall itemize the eligible expenditures and include the names and rates of pay for contracted personnel who have performed services on behalf of the District, the hours worked, and details of any reasonable and necessary out-of-pocket expenses. Statements alone are not acceptable, but may be submitted in addition to the invoice or receipt.
- When past due expenses are being submitted then the prior invoice(s) reflecting the amount owed must also be included since only fully documented expenses may be accepted.
- Checks and invoices are not to be stapled together.
- Include payroll statements that detail all withholdings and taxes if salaries are included in the Council-approved Report of Activities.
- Proof of payments to State and Federal agencies are required if the taxes/fringe benefits are to be considered as eligible expenses.
- For refreshments for public board/committee/taskforce meetings, submit an agenda and the sign-in sheet for each meeting.
- For mileage, include a log that has the starting and ending mileage and the destination for each trip.
- Please note that late fees, finance charges (for late payments), citations, other penalties, nonsufficient fund bank fees, gifts, donations, gift cards, and alcohol purchases are deemed as ineligible expenses.
- One copy of the Board Meeting Minutes and Attendance sheets.

Once the payment request is authorized by the City Comptroller's Office and the number of days pursuant to the NET payment term have passed from the date of the "invoice" document, payment will be made in one of the following ways depending on whether the Corporation has registered for the ACH payment program:

- Checks are cut daily by the City Comptroller's Office and mailed out via U.S. Postal Service the next working day and may take up to four days to be delivered; or
- ACH payments are generally deposited into the receiving bank account the next working day (in the morning).

* References to Quickbooks reports.

EXHIBIT B

CONFLICT OF INTEREST AND PROCUREMENT POLICY FOR NONPROFIT CORPORATIONS CONTRACTING WITH THE CITY OF SAN DIEGO FOR ADMINISTRATION OF A BUSINESS IMPROVEMENT DISTRICT

Purpose

It is important for the City and its citizens to have confidence in the integrity of nonprofit corporations which contract with the City to administer programs, and which receive funding from or through the City.

This policy is not intended to supersede, negate or otherwise invalidate any statute, ordinance or policy, but is intended to supplement existing authorities governing these subjects.

Board Roster

Corporation shall provide, within 30 days of execution of an agreement, a list of the names of all board members and their business affiliations. In the event that the board membership changes, the Corporation shall provide the City with an updated list.

Procedures for Procurement of Goods and Services

All procurement of goods and services by nonprofit associations contracting with the City for administration of a Business Improvement District shall comply with Divisions 30-36 of Article 2, Chapter 2, of the San Diego Municipal Code, and all other laws and policies applicable to the City's procurement of such goods and services.

When a *contract* provides for an expenditure greater than \$5,000, but equal to or less than \$10,000, the Nonprofit Corporation may award the *contract* but shall seek competitive prices either orally or in writing.

When a *contract* provides for an expenditure greater than \$10,000 but equal to or less than \$50,000, the Nonprofit Corporation may award the *contract* but shall solicit written price quotations from at least five potential sources.

When a *contract* provides for an expenditure greater than \$50,000 but equal to or less than \$1,000,000, the Nonprofit Corporation may award the *contract* only after advertising it for a minimum of one day in the City Official Newspaper.

Remedies

A violation of any provision of this policy shall be grounds for termination of the corporation's contract with the City, after notice and opportunity to cure pursuant to Article V Section 5.2. A contract or transaction entered into in violation of the conflict of interest and procurement provisions of this policy shall be void and unenforceable, and shall not entitle the corporation or the Corporation to any reimbursement or payment for goods or services provided pursuant to the void contract.

EXHIBIT C

SAN DIEGO TOURISM MARKETING DISTRICT MANAGEMENT PLAN

**AGREEMENT FOR THE OPERATION OF
THE SAN DIEGO TOURISM MARKETING DISTRICT**

This Agreement [Agreement] is made between the City of San Diego, a municipal corporation [City], and the San Diego Tourism Marketing District Corporation [Corporation], a non-profit mutual benefit corporation registered with the Secretary of State of the State of California, hereinafter collectively referred to as the “Parties.”

RECITALS

WHEREAS, on May 22, 2007, the Council of the City of San Diego adopted Ordinance O-19622 N.S. [Ordinance], an ordinance amending Chapter 6, Article 1 of the San Diego Municipal Code [Code] by adding Division 25, the San Diego Tourism Marketing District Procedural Ordinance; and

WHEREAS, on October 6, 2011, the Council adopted Ordinance O-20096, an ordinance amending Chapter 6, Article 1, Division 25, of the Code; and

WHEREAS, following the procedures included in the Ordinance, the Council initiated renewal of the Tourism Marketing District [District] and held a public hearing on November 26, 2012, wherein a weighted majority of the proposed business assesseses were verified as not casting ballots in opposition to the establishment of the District; and

WHEREAS, the Council of the City of San Diego ordered: 1) the renewal of the District; 2) the levying of assessments on assessed businesses; and 3) authorized the Mayor to enter into a contract with a non-profit corporation for the operation of the District; and

WHEREAS, in 2007 the tourism industry formed the San Diego Tourism Marketing District Corporation (formerly the San Diego Tourism Promotion Corporation), a non-profit mutual benefit corporation, for the purpose, among other things, of contracting with the City to operate the District;

NOW, THEREFORE, in consideration of the above recitals and the mutual covenants and conditions set forth in this Agreement, and for good and valuable consideration, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

ARTICLE I

DEFINITIONS

For the purposes of this Agreement, the terms listed below are defined as follows:

- 1.1 Plan – The Tourism Marketing District Management Plan, prepared by the industry proponents of the District pursuant to San Diego Municipal Code section 61.2507, outlining the anticipated operations of the District and establishing a set of budgetary guidelines, including proposed budget line items, for the thirty-nine-and-one-half-year

duration of the District. The Plan was approved by the San Diego City Council on November 27, 2012 by Resolution Number R-307843.

- 1.2 Tourism Marketing District or District – The San Diego Tourism Marketing District, as renewed by City Council Resolution No. R-307843.
- 1.3 Annual Report of Activities – A prospective report, as defined in the Plan, due for submission to the City each year during operation of the District, detailing the proposed activities and budget for the following fiscal year, submitted by Corporation and approved by the City Council. This Report of Activities shall be accompanied by an Interim Performance Report detailing performance up through the quarter immediately preceding the date on which the Interim Report is submitted to the City.
- 1.4 Annual Performance Report – Report prepared by the Corporation, which summarizes the Corporation’s goals, accomplishments, returns on investment, and expenditures for the preceding fiscal year or part thereof. Separate due dates for a preliminary version of the report and a final version of the report shall annually be established in accordance with Sections 3.5.1 (i) and (j).
- 1.5 Subcontractor – Any entity or contractor to the Corporation, other than the City, that furnishes supplies and/or services (other than office space, standard commercial supplies, or printing services) to Corporation in connection with this Agreement. It is anticipated that the Corporation will engage subcontractors for the marketing, promotional and outreach activities undertaken in furtherance of the goals of the District. Subcontractor goods and services may be solicited either through a competitive application process or through an open procurement process in accordance with SDMC §22.3203 et. seq. and as specified in Exhibit B.
- 1.6 District Fund – A City of San Diego fund, established and administered by the City for the receipt of District revenue (assessments, penalties and interest) and from which revenue may be disbursed to the Corporation for activities and to the City for eligible City oversight and administrative functions.
- 1.7 Funding Allocations –Funding Allocations are delineated in the Plan’s Budget Guidelines and designate benefit categories to which funding allocations shall be made. Funding allocations may only be adjusted as provided for in the Plan.
- 1.8 Milestone Report – A retroactive and prospective report to be prepared by the Corporation every five fiscal years. The Milestone Report shall be inclusive of the required annual report for the immediately preceding fiscal year. The report shall include any proposed changes to benefit categories; general activities to be provided for the next five years; an estimate of the cost of providing activities over the next five years; the method and basis of levying the assessment; the estimated amount of any surplus or deficit revenues to be carried over from one year to the next; and the estimated amount of contributions from sources other than the assessment. The due date for Milestone Reports shall be agreed upon annually by the Corporation and City, and shall provide

sufficient time for review and submission to city committees. Separate due dates for a preliminary version of the report and a final version of the report may be established.

- 1.9 Reconciliation Report – A report accounting for the use of District revenue, described in Exhibit A. Reconciliation Reports shall be submitted to the City no less than 45 days after the first disbursement and on no less than a monthly basis thereafter.

ARTICLE II

EFFECTIVE DATE; TERM OF AGREEMENT

- 2.1 Upon the execution of this Agreement by the Parties and approval of this Agreement by the City Attorney in accordance with Charter Section 40, this Agreement shall be effective as of November 26, 2012 [Effective Date] and continue for one year until November 25, 2013 [Term], unless terminated earlier in accordance with the terms of this Agreement.
- 2.2 This Agreement may be extended beyond the Term month-to-month until terminated pursuant to paragraph 5.2 of this Agreement, not to exceed a total contract period of five years.

ARTICLE III

OBLIGATIONS OF CORPORATION

3.1 General Obligations

- 3.1.1 Corporation shall perform all services necessary for the proper management of the District. Specifically, Corporation shall perform in a professional and prudent manner, and in accordance with the provisions of this Agreement, the Plan (attached hereto as Exhibit C and incorporated herein) and the Annual Report of Activities and Milestone Report, under the direction of the Board of Directors of Corporation.
- 3.1.2 The total amount to be disbursed to Corporation by City under this Agreement shall not exceed the amount of District assessments collected plus penalties collected on delinquent assessments by City and interest earned in the City's pooled investment fund on assessments held by the City and shall conform with the Plan's Budget Guidelines.
- 3.1.3 Any request for modifications to the Plan shall be submitted to the San Diego City Council for consideration in accordance with San Diego Municipal Code section 61.2501, et.seq, as amended from time to time.
- 3.1.4 Corporation shall follow the Budget Guidelines set forth in the Plan.

- 3.2 **Funding Allocations.** Corporation shall make Funding Allocations in accordance with the Plan. Administrative costs to be recovered by City shall be billed directly to the District Fund administered by City Comptroller. City shall provide Corporation a summary of and accounting for the administrative costs billed to District on no less than a monthly basis. Any modification of these Funding Allocations may only be accomplished as provided for in the Plan. Any modification of the Plan may only be accomplished pursuant to San Diego Municipal Code sections 61.2519 and 61.2520, as amended from time to time.
- 3.3 **Fixed Funding Allocations.** Beginning with the Effective Date of this Agreement, and so long as this Agreement remains in effect, as and when TMD assessment revenues are available for these purposes, Corporation shall provide an allocation of funds to Balboa Park Centennial Inc., to market and support the Balboa Park 2015 Centennial Celebration for the benefit of the assessed businesses in the District, in the following amounts: \$5 million for event planning, production and marketing, and \$1 million for international, multi-cultural marketing for ethnic tourism.
- 3.4 **Funding Exclusions.** Corporation shall not fund any acquisition, construction, maintenance or installation of any tangible property, facilities, equipment, programs, or any other items specifically prohibited in the Plan. Notwithstanding any other provision of this Agreement, Corporation shall not be obligated to provide services nor make payments to relieve the City of obligations that are not expressly covered by this Agreement and the Plan. Corporation's obligations are solely to provide the services enumerated in the Plan, and under this Agreement, and such obligations exist solely to the extent District assessment revenues are fully available for expenditure for those purposes.
- 3.5 **Renewal Costs.** Corporation shall allow City to recover renewal costs from the District Fund for mutually agreed upon costs justified by a business case analysis by allowing the City to reimburse itself from the District assessments collected in FY2013. Such reimbursement shall be completed no later than August 31, 2013. Litigation costs pertaining to any litigation associated with the District may be paid from District funds in addition to the recovery of administration and oversight costs.
- 3.6 **Specific Obligations**
- 3.6.1 Notwithstanding any and all obligations in the Plan or elsewhere in this Agreement, Corporation shall do the following to the reasonable satisfaction of City:
- a) Establish measurable target outcomes for marketing programs and services, including return-on-investment and other criteria;
 - b) Establish and regularly update a clearly defined process to be used in soliciting applications from, and awarding funds to, various entities for marketing and sales promotions to increase hotel room night consumption

and market District lodging businesses as tourist, meeting, and event destinations. The process will articulate the required qualifications of applicants, the targeted return-on-investment, and the measurement of results, among other criteria, including but not limited to, that no applicant shall qualify for District funds if any of its employees are paid more than \$160,000 per year;

- c) Establish a clearly defined process for reviewing and evaluating the success of marketing programs and services and the degree to which these programs and services are of benefit to all assessed businesses;
- d) Make available on at least a quarterly basis, reports to City on the target and actual outcomes for the period to date (by benefit category, type of activities, specific marketing initiative, entity funded, and detailing the way in which assessed businesses are benefited) along with details of funds expended;
- e) Allocate assessment revenue on an annualized basis in accordance with the Plan and as outlined herein;
- f) Allocate, on an annualized basis in accordance with the Plan, all other revenue (interest and penalties deposited by the City into the District Fund, and Incidental Revenue, as defined in section 4.7 of this Agreement, generated by Corporation on disbursed District funds)
- g) Distribute an electronic or other form of communication, at least quarterly to every business assessed in the District announcing news, reports and other documents available on the Corporation's website, and include on the website, among other things, a directory of Corporation's current Board Members; the Corporation's invoices to the City for disbursement of District funds; the salaries and benefits of the Corporation's employees; and a quarterly and cumulative list of all of the Corporation's expenses. If requested by an assessed business, the communication shall be made available in appropriate alternative formats.
- h) Hold no fewer than six regularly scheduled open meetings each year, noticed and conducted in compliance with the Ralph M. Brown Act, that afford assessed businesses an opportunity to provide input to the Board. Such meetings shall include one annual meeting at which the election of officers is held and results of Board elections are ratified;
- i) Prepare an Annual Performance Report, summarizing Corporation's goals, accomplishments, return-on-investments, and expenditures for the preceding fiscal year or part thereof, to be distributed to each assessed business in the District, by October 31 (or as otherwise mutually agreed upon annually by the Corporation and City but providing sufficient time to

meet Council/Committee docketing deadlines) for each year following the District's first full fiscal year of operations. Every fifth year a Milestone Report is to be prepared and submitted in lieu of the Annual Performance Report. Both the Annual Performance Reports and the Milestone Report shall be posted on the Corporation's website;

- j) Prepare a prospective Report of Activities, as required under the San Diego Municipal Code section 61.2521 as amended from time to time, to be delivered to the City by April 1 each year (or as otherwise mutually agreed upon annually by the Corporation and City but providing sufficient time to meet Council/Committee docketing and budgeting deadlines) during the duration of the Agreement, along with an Interim Performance Report in keeping with the Corporation's obligations to District assessed businesses and the City. Every fifth year a Milestone Report is to be prepared in lieu of the Report of Activities. Both the prospective Report of Activities and the Milestone Report shall be posted on the Corporation's website;
- k) A cost allocation methodology shall be approved periodically by the Corporation and made known to its contractors to be used in determining eligible Direct, Indirect, and General & Administration expenses and appropriate per diem, travel, and overhead rates.

The cost allocation methodology approved by the Corporation shall be modeled on OMB Circular A-122 (or successor document) in determining the Direct, Indirect, and General & Administrative expenses to be applied to District funding, notwithstanding that certain District specific expense may be treated as exceptions to OMB Circular A-122 with supporting analysis. The cost allocation methodology shall be posted on the Corporation's website

- l) Ensure that District funds are applied only toward the equivalent of coach airfare, and only when use of public air carrier transport is required in order to perform the Corporation's obligations under the Plan and this Agreement. District funds may not be applied toward any upgrades;
- m) Ensure that District funds are applied using the U.S General Services Administration rates (GSA rates) per day, per person, for meals, incidentals, and lodging while on official travel (when the provision for travel is required in order to perform the Corporation's obligations under the Plan and this Agreement). District funds may not be used to pay for any alcoholic beverages. These same limitations shall apply when lodging in San Diego is provided for out-of-town visitors on District business.
- n) Ensure that, in the event meals are provided to hosted individuals within the scope of business development, or sales and marketing, documentation

of the following shall be included with the reconciliation report provided to City: (i) the purpose of the meeting, (ii) conformance to the Plan, (iii) the benefit or anticipated benefit to assessed businesses and (iv) a list of hosted individuals . All expenditures for meals shall comply with the approved cost allocation methodology. All cost reconciliation reports provided to the City shall be posted on the Corporation's website.

- o) Ensure that, should Corporation or Corporation's subcontractors decide to provide financial sponsorship of events, Corporation's Board makes a determination of the need for the sponsorship, that the amount of the sponsorship is a just and reasonable expenditure of District funds at the time it is authorized, approved or ratified, that the expenditure is in conformance with the Plan, and that the benefit or anticipated benefit to assessed businesses is identified and documented. If alcoholic beverages are consumed during event sponsorships, they may not be paid for with District assessment funds; and
- p) Ensure that, should Corporation's subcontractors request reimbursement from District funds for travel, meals, the hosting of meals, out-of-town and in-town lodging and sponsorships, as discussed herein, these costs shall have been anticipated in any scope of work, statement of activities or budget materials submitted to Corporation prior to the execution of a subcontract. All pre-authorized subcontractor expenditures are limited in the same manner as Corporation's expenditures are limited herein.
- q) Ensure that the Corporation complies with the California Public Records Act, California Government Code, Chapter 3.5, §§6250, et seq.

3.6.2 Promotional Materials And Obligations

3.6.2.1 **Promotion Material Requirements.** Corporation shall include the following language on all promotional materials (including, but not limited to, brochures, newsletters, advertising, facts sheets, news releases, and Internet web sites): "Funded in part (or in whole) by the San Diego Tourism Marketing District Corporation with City of San Diego Tourism Marketing District Assessment Funds." Such acknowledgment shall be prominently displayed on all such promotional materials. A copy of page or pages, of promotional material displaying required language, or other equivalent proof, is required to be included in reconciliation report.

3.6.2.2 **Product Endorsements.** To the extent applicable, Corporation shall comply with the provisions of City Administrative Regulation 95.65, as amended from time to time regarding product endorsements. Corporation shall not create any advertisement or writing that identifies or refers to the City as the user of a product or service, without first obtaining the prior written approval of the City.

3.6.2.3 **City's Promotional Obligations.** City shall make available an annual statement of TOT revenues consistent and in compliance with San Diego Municipal Code section 35.0128 and shall provide monthly reports on TOT revenue to Corporation.

3.7 **Obligations Regarding Budget Preparation**

3.7.1 City and Corporation agree to timely carry out all actions reasonably necessary to process the annual budget for the Corporation's operations. The Parties shall also cooperate on an ongoing basis to ensure that the functions of the Corporation, as identified in this Agreement, are timely and adequately funded, so as to avoid disruption in programs and services.

3.7.2 Pursuant to the Plan, the Board shall develop and adopt an annual budget for the Corporation. Said budget shall be adopted by the Board and annually incorporated into the Annual Report of Activities or Milestone Report, for approval by the San Diego City Council. The budget shall be filed with the City prior to the end of each City fiscal in accordance with section 3.5.1(j) of this Agreement. The City fiscal year begins on July 1st of each calendar year.

3.7.3 Prior to adoption by the Board and submission to the City Council, Corporation and City shall work cooperatively to ensure mutual agreement between the City and Corporation on all aspects of Corporation's proposed budget. Nothing in this section shall prevent the Parties from agreeing to subsequent modifications to the line items within the District budget in any given year, as long as the parties mutually agree to such modification in writing, and so long as the modifications do not require a modification of the Plan pursuant to San Diego Municipal Code sections 61.2521 and 61.2522, as amended from time to time.

ARTICLE IV

REVENUES, DISBURSEMENTS, ADVANCES, RECONCILIATION INELIGIBLE EXPENDITURES

4.1 **Revenues.** All funds collected pursuant to the District Resolution shall be timely deposited and appropriately credited by City to the District Fund.

4.1.1 City shall provide, on a mutually agreed upon monthly cycle, reports of District activity processed by the City. Reports shall include the following: assessment revenues collected by month; assessment revenues earned by month; penalty revenues collected, interest earned on District fund through City's pooled investments, detailed breakdown of City administrative expenses; any advances or transfers from District Fund; any adjustments posted to the District Fund; and

reconciliation of funds held by City to Fund balance. Information provided by City shall be adequate to allow for an independent calculation and estimate of the District's monthly earnings.

- 4.1.2 The total assessment revenues from the District will vary depending upon the gross room revenues, minus exempt revenues, collected by hotel businesses subject to the District assessment. Assessment revenues are projected under the Plan throughout the term of the Agreement.
- 4.1.3 City shall provide no less than annually a report of revenue audit outcomes including the number of businesses audited and the amounts of deficiencies and overpayments, along with the number of accounts and amounts referred to Collections and the outcomes.

4.2 **Disbursements.**

- 4.2.1 City will disburse District funds to Corporation on a monthly basis and with a payment term of no more than Net 20. On the last working day of each month, the City will determine the revenue posted during the month from assessments, penalties, and interest in the District Fund and will distribute that amount of funds, minus the City's administrative fees (or reasonable estimate thereof) and a withholding equal to the percent annually budgeted for contingencies to Corporation on or before the twenty-fifth day of the following month pursuant to the procedures described in Exhibit A.
- 4.2.2 Any expenditures by Corporation which are not within the prescribed limitations of this Agreement, the Plan, San Diego Municipal Code sections 61.2501, et.seq., and applicable laws, rules, and regulations governing this Agreement, as amended from time to time, are not chargeable to the District Fund and shall be borne solely by Corporation.
- 4.2.3 Upon written request from Corporation, the City may make additional disbursements of District funds to Corporation for up to 100% of a documented expense to implement any activity specified within the approved Report of Activities subject to availability of funds. The written request shall indicate a vote in the affirmative by the Board to request such an additional disbursement and include detail of the amount, timing, and proposed use of such funds. Any such disbursement will be based on available cash at the time of the request, subject to certification of funds availability by the City Comptroller.
- 4.2.4 Corporation shall submit a Reconciliation Report accounting for the use of the additional disbursement, as described in Exhibit A within 60 days of the receipt of the additional disbursement. If the Reconciliation Report is not submitted within this timeframe then the disbursed funds must be returned to the City in the form of a check marked payable to the City Treasurer, noting the District's name in the memo line, and City staff will deposit the check back into the District Fund. If

neither the Reconciliation Report nor the repayment check is received by the City then the monthly disbursements may be suspended pending receipt of the required Reconciliation Report or repayment check. In the case of an extraordinary event or circumstance beyond the control of the Parties, such as an act of God, then City may, at its sole discretion, establish a new timeline and/or repayment process.

- 4.2.5 Corporation may advance District funds to recipient organizations subject to City's receipt of the funding agreement which shall provide for each of the following:
- a) Language specifying the permitted use of such advances, and any other language required by this Agreement;
 - b) Authorization by Corporation and recipient organization for the City to audit the use of any advanced funds;
 - c) Receipt by the Corporation and City of a full accounting by recipient organization and verified by Corporation of any District funds previously advanced to recipient organization; and
 - d) Advances to recipient organizations shall be returned or accounted for annually but no later than on or before the expiration of this Agreement or the expiration of the agreement between the Corporation and the recipient organization, whichever comes sooner, (or upon termination, if earlier), either as a reduction of the final request for reimbursement, or as a transfer of funds from recipient organization to the City.
- 4.2.6 All disbursements to Corporation shall be accounted for annually and any non-reconciled or unexpended funds shall be returned to City on or before the expiration of this Agreement (or upon termination, if earlier).

4.3 **Reconciliation**

- 4.3.1 Corporation shall submit to the City Reconciliation Report(s) accounting for the use of the District assessment funds, as described in Exhibit A, The Reconciliation Report(s) shall be submitted to the City within 45 of the disbursement of funds and no less than monthly thereafter. Failure to timely submit Reconciliation Report(s) may result in, among other things, cessation of future disbursements until such time as the overdue report is received and reviewed by City staff, and deemed to be in compliance with the requirements of this Agreement.
- 4.3.2 District assessment funds may only be used for activities as authorized and approved by City Council in the Annual Report of Activities. Any expenditure that is not consistent with the Annual Report of Activities, or is not supported with proper documentation described herein and in Exhibit A, shall be considered

an ineligible expenditure and may result in, among other things, cessation of future disbursements, reduction of future disbursements, or termination of this Agreement. Nothing in this section shall waive or deny any right or remedy, at law or in equity, existing as of the date of this Agreement or hereinafter enacted or established, that may be available to the City against Corporation.

- 4.3.3 Corporation shall not use District funds in its operations, directly or indirectly, during any period of federal, state, or local debarment, suspension, or ineligibility of Corporation, when Corporation has been noticed, or should have known of such debarment, suspension, or ineligibility.
- 4.3.4 In the event that Corporation is holding District funds at the end of the preceding fiscal year, then Corporation may use such funds only for activities as authorized and approved by City Council in the Report of Activities. Corporation shall submit to the City a Reconciliation Report detailing the actual amount of carry forward District Funds held by Corporation at June 30, as described in Exhibit A, by August 31. Corporation shall submit to the City a Reconciliation Report accounting for the use of these carry forward Assessment Funds held by Corporation, as described in Exhibit A, by October 31. If the documentation is not submitted within this timeframe then the District funds held as of June 30 must be returned to the City in the form of a check marked payable to the City Treasurer and noting the District's name in the memo line and City staff will deposit the check back into the District Fund. If neither the Reconciliation Report nor the repayment check is received by the City then the monthly disbursements may be suspended pending receipt of the required Reconciliation Report or repayment check.
- 4.3.5 All Reconciliation Reports shall be accompanied by the following statement: "(Corporation's Name) hereby certifies that all staff time expended and reimbursements requested are for services performed in accordance with the Agreement between The City of San Diego and (Corporation's Name) for the management of the District". All Reconciliation Reports shall be signed by an officer of Corporation (not the Executive Director).
- 4.3.6 The final disbursement to Corporation may be withheld until all outstanding reports are received. Once the final disbursement to Corporation has been made under this Agreement, Contractor shall have 120 days to submit the Final Expenditure Report to City which accounts for all previously unreconciled disbursements plus the final disbursement and shall include a summary of the activities Corporation has performed pursuant to this Agreement.
- 4.3.7 Within 60 days of receipt of Reconciliation Reports, City shall approve the report or request additional information.

4.4 **Ineligible Expenses for District Reconciliation/Reimbursement**

- 4.4.1 Corporation and Corporation's subcontractors shall not use District funds for alcoholic beverages. Corporation's subcontractors shall not use District funds for travel, meals, lodging, or entertainment expenses, unless directly attributable to providing District programs and authorized by Corporation in advance, as provided for elsewhere in this Agreement.
- 4.4.2 If Corporation receives (or has received) additional funding for its activities from a source or sources other than through the City's allocation of District funds, and the use of said additional funds requires that Corporation make an accounting to, or be subject to, an audit by such other source, then Corporation shall charge those cost of such audit to the appropriate non-District funding source at the time incurred. Any cost incurred in connection with the Corporation which is properly chargeable to, and actually claimed for compensation under, a funding source other than the City, shall not be allowed as a chargeable cost under this Agreement.
- 4.4.3 Corporation shall not request reimbursement for, or submit as part of a Reconciliation Report, any expenditure that has been or may be properly charged to a funding source other than District assessment funds.
- 4.4.4 Corporation shall not request reimbursement for, or submit as part of a Reconciliation Report, any expenditure that has been or may be properly charged to a funding agency other than the City.
- 4.4.5 Corporation and Corporation's subcontractors shall not be paid for any expenditure that has been (or should be) properly charged to a funding source other than the District assessment fund, nor paid for expenditures which are ineligible under applicable City policies, the Plan, or this Agreement, unless approved, in writing, by the City. A payment request that is not consistent with the Corporation's budget or the Corporation's prospective Annual Report of Activities or Milestone Report, except as provided in this Section, or that is not supported with proper documentation as required herein, shall be considered an ineligible expenditure.
- 4.5 **Adjustments Between Budgetary Line Items.** Any Corporation requests for adjustments between line items that exceed fifteen percent (15 %) of budgeted line item, as described in the Annual Report of Activities approved by City Council, shall be submitted to City in writing. Corporation's expenditure of additional funds in that budgetary line item may only occur if City provides written approval. City, at its sole discretion, may consider such an adjustment an amendment to the Annual Report of Activities and require City Council authorization for approval.
- 4.6 **Partial Performance.** In the event Corporation performs less than all services required under this Agreement in a proper and timely manner, the City will reimburse Corporation

only the reasonable costs of those services actually performed by Corporation during that payment period, as determined by the City.

- 4.7 **Incidental Revenue.** Should Corporation use District funds to generate Incidental Revenue, Corporation may only use such revenue to improve the services performed by Corporation under this Agreement. "Incidental Revenue" means revenues generated by Corporation from receipt or use of District funds, including, but not limited to interest income earned by Corporation on District funds deposited into an interest bearing account. Corporation shall separately account for any and all Incidental Revenue accrued and/or used by Corporation. Corporation shall also submit to the City an Annual Incidental Revenue Report accounting for the receipt and use of all Incidental Revenue during the preceding fiscal year, as described in Exhibit A, by August 31.

ARTICLE V

SUSPENSION AND TERMINATION

5.1 Suspension or Disallowance of Payments

- 5.1.1 Notwithstanding any other provision of this Agreement, if Corporation fails to comply with any material term or condition of this Agreement, City's remedies include, without limitation, each of the following:
- a) Suspending one or more payments to Corporation, pending correction of the activity or action not in compliance; and/or
 - b) Disallowing funds for all or part of the cost of the activity or action not in compliance.
- 5.1.2 If City notifies Corporation that City has suspended payments or disallowed funds, Corporation shall not expend any funds related to, or connected with, any area of controversy or conflict that resulted in the suspension or disallowance of funding.
- 5.1.3 Notwithstanding any other provision of this Agreement, if the validity of the District, District activities, District establishment, District renewal, or this agreement becomes the subject of litigation, City may, at its sole discretion and upon written notice to Corporation, suspend or reduce one or more payments to Corporation, pending final adjudication of the litigation. The written notice from the City shall include the total anticipated amount of District revenue available to be disbursed to Corporation during the period of litigation, including the amount of District revenue available for defense of the litigation, if any, so that Corporation may adjust its budget and Funding Allocations accordingly. During such litigation all District revenue that is collected by the City and not disbursed to Corporation shall remain in the District Fund.

5.2 **Termination for Convenience.** Following the end of the Term, this Agreement may be continued month-to-month pursuant to Section 2.2 herein. During the continuation period, the City may, at its sole discretion, terminate all or any portion of the Agreement by giving 30-days written notice to the Corporation. The termination will be effective upon the date shown in the notice.

5.3 **Termination for Curable Default.** City may send written notice (delivered in accordance with the provisions of the Notice section herein) to Corporation if Corporation fails to comply with any term or condition of this Agreement. The written notice shall include a description of Corporation's default. If Corporation fails to cure the default within sixty (60) calendar days of the date Corporation receives the written notice, the City may immediately terminate this Agreement. City may suspend one or more payments to Corporation during the sixty (60) calendar day notice period.

5.4 **Termination for Incurable Default.** The City may immediately terminate this Agreement upon written notice (delivered in accordance with the notice provisions herein) to Corporation if:

- a) Corporation makes material misrepresentations in regard to information furnished to City pursuant to this Agreement, regardless of whether Corporation had knowledge or intent with respect to the misrepresentation;
- b) Corporation, or any of its officers or directors, engages in conduct that results in Corporation, or any of its officers or directors, being convicted of a felony that materially and adversely affects Corporation's performance of its obligations under this Agreement;
- c) Corporation misappropriates funds;
- d) Corporation files a voluntary petition in bankruptcy, is adjudicated bankrupt, or makes a general assignment for the benefit of creditors; and/or
- e) Corporation is unable or unwilling to comply with any additional terms or conditions concerning the operation of the District that may be required by newly enacted (or amended) federal, state, and/or local laws.

5.5 **Continuing Responsibilities**

5.5.1 In the event this Agreement is terminated, Corporation shall complete any and all additional work necessary for the orderly filing of documents and closing of Corporation's performance of its obligations and duties under this Agreement. For services rendered in completing the work, Corporation shall be entitled to fair and reasonable compensation for the services performed by Corporation before the effective date of termination. After filing of documents and completion of performance, Corporation shall deliver to the City all data and records (including,

but not limited to, all documents and/or work product) prepared and/or completed directly in connection with, or related to, Corporation's performance under this Agreement. By accepting payment for completion, as well as filing and delivering documents as called for in this Section, Corporation discharges the City of all of the City's payment obligations and liabilities under this Agreement.

5.5.2 Upon the expiration or termination of this Agreement, Corporation shall transfer to City any District assessment funds on hand at the time of the expiration or termination, and any accounts receivable attributable to Corporation's use of District assessment funds.

5.6 **Rights and Remedies.** City's termination of this Agreement shall terminate each and every right of Corporation, and any person claiming any rights by or through Corporation under this Agreement. The rights and remedies of City enumerated in this Article are cumulative and shall not limit, waive, or deny any of City's rights under any other provision of this Agreement. Nor does this Article otherwise waive or deny any right or remedy, at law or in equity, existing as of the Effective Date of this Agreement or hereinafter enacted or established, that may be available to City against Corporation.

ARTICLE VI

INDEMNIFICATION

6.1 **Indemnification and Hold Harmless Agreement.**

6.1.1 To the fullest extent permitted by law, Corporation shall defend, indemnify, protect, and hold harmless the City, and all of the City's elected officials, departments, officers, representatives, agents, and employees, from and against any and all "Indemnified Claims" as defined herein. The "Indemnified Claims" shall refer collectively to: (i) actions, suits, proceedings, or claims, including but not limited to any and all administrative, constitutional, or any other challenges to the validity, establishment, or renewal of the District; (ii) any and all liability, damages, injuries, losses, costs, or expenses, including, without limitation, consultants' and attorneys' fees arising out of or related to, directly or indirectly connected with, or are caused or claimed to be caused by, in full or in part, or in any respect whatsoever the District, its formation, this Agreement, or by the acts or omissions of Corporation, its officers, employees, representatives, agents, and/or Subcontractors in performing work or services without regard to whether such work and/or services are required or authorized herein; and (iii) all expenses of investigating and defending against same, including, without limitation, attorneys' fees and costs. City may, at its own election, conduct the defense or participate in the defense of any Indemnified Claim. If City elects to conduct its own defense, participate in its own defense, or obtain independent legal counsel in defense of any Indemnified Claim, Corporation shall pay the City for all costs related thereto, including, without limitation, reasonable fees and costs.

- 6.1.2 The Corporation's obligation to indemnify and hold harmless the City pursuant to paragraph 6.1.1 above shall include liability, damages (including, without limitation, penalties, fines, interest, and monetary sanctions), injuries, losses, costs, or expenses (including, without limitation, consultants' and attorneys' fees) due to errors or problems with assessment amounts, or a finding that the District is unconstitutional or in any way illegal.
- 6.3 **City to Control Defense.** City shall control the defense (including the selection of qualified legal counsel) of any proceeding which gives rise to a right of defense and indemnification under this Article.
- 6.4 **Settlement.** Corporation shall notify City in writing of any settlement or compromise discussion associated with any proceeding covered by this Article and shall provide the City an opportunity to participate in such discussion. Corporation shall not settle or compromise any proceeding covered by this Article without first obtaining written consent to such settlement or compromise from the City.
- 6.5 **District Revenue to Pay Costs of Defense.** The cost of defense of any actions, suits, proceedings, or claims which challenge the validity, establishment, or renewal of the District may be paid for with District revenue, subject to the limitations of section 5.1.3 of this Agreement.
- 6.6 **Enforcement Costs.** Corporation shall pay City any and all costs City incurs enforcing the indemnity and defense provisions set forth herein.

ARTICLE VII

INSURANCE

- 7.1 **Corporation's Duty to Maintain Insurance.** At all times during this Agreement, Corporation shall maintain and comply with the insurance requirements set forth in this Article VII. Corporation shall provide to City insurance certificates reflecting evidence of all insurance coverage required under this article. Notwithstanding any provision of this Agreement to the contrary, Corporation's failure or refusal to obtain, maintain or renew insurance as required by this Agreement, or failure to provide proof of insurance, shall be a default of this Agreement. If a default under this Article occurs, City shall be permitted to suspend payments during such default period, and Corporation shall be permitted to cure the default, pursuant to Article V herein.
- 7.2. **Types of insurance.** At all times during the term of this Agreement, the Corporation shall maintain insurance coverage as follows:

Commercial General Liability (CGL). Insurance written on an ISO Occurrence form CG 00 01 07 98 or an equivalent form providing coverage at least as broad which shall cover liability arising from any and all personal injury or property damage in the amount of \$1 million per occurrence and subject to an annual aggregate of \$2 million. There shall be

no endorsement or modification of the CGL limiting the scope of coverage for either insured vs. insured claims or contractual liability. All defense costs shall be outside the limits of the policy.

Commercial Specific Liability (CSL). The Corporation shall be required to maintain in full force and effect insurance adequate to cover Corporation's indemnification obligation set forth in section 6.1.2 above.

Commercial Automobile Liability. For all of the Corporation's automobiles including owned, hired and non-owned automobiles, the Corporation shall keep in full force and effect, automobile insurance written on an ISO form CA 00 01 12 90 or a later version of this form or an equivalent form providing coverage at least as broad for bodily injury and property damage for a combined single limit of \$1 million per occurrence. Insurance certificate shall reflect coverage for any automobile (any auto).

Workers' Compensation. For all of the Corporation's employees who are subject to this Agreement and to the extent required by the applicable state or federal law, the Corporation shall keep in full force and effect, a Workers' Compensation policy. That policy shall provide a minimum of \$1 million of employers' liability coverage, and the Corporation shall provide an endorsement that the insurer waives the right of subrogation against the City and its respective elected officials, officers, employees, agents and representatives.

- 7.3. **Deductibles.** All deductibles on any policy shall be the responsibility of the Corporation and shall be disclosed to the City at the time the evidence of insurance is provided.
- 7.4. **Acceptability of Insurers.** Except for the State Compensation Insurance Fund, all insurance required by this Agreement shall only be carried by insurance companies with a rating of at least "A-, VI" by A.M. Best Company, that are authorized by the California Insurance Commissioner to do business in the State of California, and that have been approved by the City. The City will accept insurance provided by non-admitted, "surplus lines" carriers only if the carrier is authorized to do business in the State of California and is included on the List of Eligible Surplus Lines Insurers (LESLI list). All policies of insurance carried by non-admitted carriers are subject to all of the requirements for policies of insurance provided by admitted carriers described herein.
- 7.5. **Required Endorsements.** The following endorsements to the policies of insurance are required to be provided to the City before any work is initiated under this Agreement.

Commercial General Liability Insurance Endorsements:

ADDITIONAL INSURED. To the fullest extent allowed by law including but not limited to California Insurance Code Section 11580.04, the policy or policies must be endorsed to include as an Insured the City of San Diego and its respective elected officials, officers, employees, agents and representatives with respect to liability arising out of (a) ongoing operations performed by Corporation or on Corporation's behalf, (b)

Corporation's products, (c) Corporation's work, including but not limited to completed operations performed by Corporation or on Corporation's behalf, or (d) premises owned, leased, controlled or used by Corporation.

PRIMARY AND NON-CONTRIBUTORY COVERAGE. The policy or policies must be endorsed to provide that the insurance afforded by the Commercial General Liability policy or policies is primary to any insurance or self-insurance of the City of San Diego and its elected officials, officers, employees, agents and representatives as respects operations of the Named Insured. Any insurance maintained by the City of San Diego and its elected officials, officers, employees, agents and representatives shall be in excess of Corporation's insurance and shall not contribute to it.

SEVERABILITY OF INTEREST. The policy or policies must be endorsed to provide that the Corporation's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability and shall provide cross-liability coverage.

Commercial Specific Liability Insurance Endorsements:

ADDITIONAL INSURED. To the fullest extent allowed by law including but not limited to California Insurance Code Section 11580.04, the policy or policies must be endorsed to include as an Insured the City of San Diego and its respective elected officials, officers, employees, agents and representatives with respect to liability arising out of Corporation's indemnification obligations set forth in section 6.1.2 herein.

PRIMARY AND NON-CONTRIBUTORY COVERAGE. The policy or policies must be endorsed to provide that the insurance afforded by the Commercial Specific Liability policy or policies is primary to any insurance or self-insurance of the City of San Diego and its elected officials, officers, employees, agents and representatives as respects operations of the Named Insured. Any insurance maintained by the City of San Diego and its elected officials, officers, employees, agents and representatives shall be in excess of Corporation's insurance and shall not contribute to it.

SEVERABILITY OF INTEREST. The policy or policies must be endorsed to provide that the Corporation's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability and shall provide cross-liability coverage.

Automobile Liability Insurance Endorsements:

ADDITIONAL INSURED. To the fullest extent allowed by law, including but not limited to California Insurance Code Section 11580.04, the policy or policies must be endorsed to include as an Insured the City of San Diego and its respective elected officials, officers, employees, agents and representatives with respect to liability arising out of automobile owned, leased, hired or borrowed by or on behalf of the Corporation.

SEVERABILITY OF INTEREST. The policy or policies must be endorsed to provide that Corporation's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability and shall provide cross-liability coverage.

Worker's Compensation Insurance Endorsements:

WAIVER OF SUBROGATION. The Worker's Compensation policy or policies must be endorsed to provide that the insurer will waive all rights of subrogation against the City and its respective elected officials, officers, employees, agents and representatives for losses paid under the terms of this policy or these policies which arise from work performed by the Named Insured for the City.

- 7.6. **Continuity Of Coverage.** All policies shall be in effect on or before the first day of the Term. At least thirty (30) days prior to the expiration of each insurance policy, Corporation shall furnish a certificate(s) showing that a new or extended policy has been obtained which meets the requirements of this Agreement.
- 7.7. **Modification.** To assure protection from and against the kind and extent of risk existing by the obligations under this Agreement, City, at its discretion, may require the revision of amounts and coverage at any time during the Term by giving Corporation thirty (30) days prior written notice. Corporation shall also obtain any additional insurance required by the City for changed circumstances or City's reasonable re-evaluation of risk levels related to Corporation's obligations under this Agreement.
- 7.8. **Additional Insurance.** The Corporation may obtain additional insurance not required by this Agreement.
- 7.9. **Excess Insurance.** All policies providing excess coverage to the City shall follow the form of the primary policy or policies including but not limited to all endorsements.
- 7.10. **Bonding Requirements for Corporation Employees and Officers.** Corporation shall carry a Fidelity Bond that includes, but is not limited to, Employee Dishonesty, Theft, Forgery, and Computer Related Crime. All officers, agents, and employees of the Corporation who handle funds of the Corporation in any manner, and any other officers, agents, and employees of the Corporation specifically designated by the Board of Directors, shall execute fidelity bonds in favor of the Corporation in the penal sums as established by the Board of Directors. Each fidelity bond shall be executed by the officer, agent, or employee as principal and by a corporate surety company approved by the Board of Directors for Corporation, provided, however, that blanket bonds may be employed in lieu of individual bonds in the case of employees.

ARTICLE VIII

COMPLIANCE WITH LAWS AND POLICIES

8.1 Conflicts of Interest

- 8.1.1 Under San Diego Municipal Code [Code] section 61.2504, and in keeping with state law codified in California Streets and Highways Code section 36614.5, the Corporation is a private entity and may not be considered a public entity for any purpose, nor may its board members or staff be considered to be public officials for any purpose. Nothing in this Section shall be construed to create any additional duties or obligations, on the part of Corporation or City, beyond those obligations to follow existing law, as updated from time to time during the course of this Agreement. Obligations and duties assumed by Corporation under the Plan, including those related to planning of District activities and allocation of District funds, shall not create in Corporation officials the obligations of a “consultant” as defined in the California Code of Regulations, Title 2, section 18701(a)(2).
- 8.1.2 Corporation shall at all times comply with all federal, state, and local laws, including conflict of interest laws, statutes, ordinances, regulations, and policies of City related to public contracts and procurement practices to the extent applicable.
- 8.1.3 The Parties are unaware of any financial or economic interest of any public officer or employee of City relating to this Agreement. If such a financial and/or economic interest is determined to exist, the City shall immediately notify Corporation. Corporation and City shall investigate the nature of the interest and Corporation or City shall take all necessary actions to clear the conflict, including initiating action against the officer, employee or Corporation.
- 8.1.4 Corporation shall establish, and make known to its agents and employees, appropriate safeguards to prohibit employees from using their positions for a purpose that is, or that gives the appearance of being, motivated by the desire for private gain for themselves or others, particularly those with whom they have family, business, and/or other relationships.
- 8.1.5 Corporation Board members and officers are intended and understood to represent and further the economic interest of City’s lodging industry and have a fundamental duty to advance the general welfare of the lodging industry in a manner which may incidentally or indirectly benefit themselves or their business interests. Such incidental or indirect benefits shall not be considered to violate the duties assigned to the Corporation, its Board or officers under the terms of this Agreement.

- 8.1.6 Corporation's personnel, employed in performing the obligations and duties under this Agreement, shall not accept gratuities, or any other favors, from any Subcontractor or potential Subcontractor. Corporation shall not recommend or specify any product, supplier, or Corporation with whom Corporation has a direct or indirect financial or organizational interest or relationship that would violate conflict of interest laws, regulations, or policies.
- 8.1.7 If Corporation violates any conflict of interest law, or any of the provisions of this Section, City shall issue a notice to cure. City and Corporation shall then take actions to cure said violation. Should the Corporation fail to adequately cure the violation, then the City may immediately terminate this Agreement. Further, any such violation shall subject Corporation to liability to the City for attorney's fees and all damages sustained as a result of the violation.

ARTICLE IX

DATA AND RECORDS

- 9.1 **General.** Corporation shall maintain, and require its Subcontractors to maintain, all administrative and financial records required in connection with the operations of the District (including, but not limited to, all books, accounting records, financial statements, invoices, receipts, payroll records, personnel records, and any other data and records pertaining to all matters covered in this Agreement) during the term of this Agreement.
- 9.2 **Accounting Records**
- 9.2.1 Corporation shall maintain, keep or cause to be kept and require its Subcontractors to maintain, keep or cause to be kept true, complete and accurate accounting records, books, and financial statements in accordance with Generally Accepted Accounting Practices [GAAP] in the industry. The financial statements must be audited by an independent Certified Public Accountant in accordance with Generally Accepted Auditing Standards. The Corporation shall provide the City with full annual audited financial statements within five months after the end of each Fiscal Year.
- 9.2.2 Within thirty (30) calendar days of any written request by the City for accounting records, Corporation shall at its sole cost and expense make available to the City, for review and audit, all Project-related accounting records, documents, and any other financial data and records. Upon the City's request, Corporation shall submit exact duplicates of the originals for all requested records to the City.
- 9.2.3 All auditing records and statements must include a statement of expenditures of Corporation funds, certified by an independent Certified Public Accountant, identified in the same expenditure classifications as contained in the Corporation's approved budget and shall comport to the extent possible with the budget amounts as set forth in the Plan and annual budgets. All statements must

also include a statement of compliance with the terms of this Agreement and must be signed by the executive officer of Corporation.

- 9.2.4 Failure to comply with the requirements of this section could result in suspension of any payments or possible future funding; provided, however, that the City shall not suspend any current or future payments until it has first given the Corporation written notice in accordance with the Termination for Curable Default section.
- 9.3 **Inspection and Photocopying.** At any time during normal business hours and as often as the City deems necessary, Corporation shall permit, and require its Subcontractors to permit, the City, or its authorized agents, to inspect and photocopy, at a reasonable location within the County of San Diego (e.g., the offices of Corporation), all books, accounting records, invoices, receipts, payroll records, personnel records, and any other Project data and records pertaining to all matters covered in this Agreement, for the purposes of auditing, monitoring, and/or evaluating Corporation's performance of its obligations and/or duties in connection with the Agreement and Plan. The City may retain copies of the same, with appropriate safeguards, if such retention is deemed necessary by the City in its sole discretion.
- 9.4 **Storage Period.** Corporation shall store, and require its Subcontractors to store, all Project data and records for a period of not less than five years after submission of the final expenditure report for the contract period, or five years after submission of the final expenditure report upon earlier termination of this Agreement, or until all audit findings have been resolved, whichever is longest. All such data and records shall be kept at Corporation's (or relevant Subcontractor's) regular place of business. At any time during the storage period, Corporation shall permit, and require each of its Subcontractors to permit, the City, or their authorized agents to examine all such data and records, for the purposes described herein. After the storage period has expired, or all audit findings have been resolved, whichever is later, Corporation shall provide City with thirty (30) calendar days written notice of its intent to dispose of any Project data and records. Corporation shall not take any action to dispose of such data and records without the prior written consent of the City.
- 9.5 **Original Documents.** Notwithstanding the foregoing, upon the termination of this Agreement for any reason, the City may request that Corporation deliver, and Corporation shall deliver, within fifteen (15) calendar days of any such request by the City, the originals of all such data and records to the City. Corporation may retain copies of all data and records delivered to the City.
- 9.6 **Ownership of Documents.** Once Corporation has received any reimbursement from the City for Corporation's performance of its obligations and/or duties under this Agreement, all data and records (including, but not limited to, all documents prepared and/or work product completed directly in connection with, or related to, Corporation's performance under this Agreement) shall be the property of the City. The City's ownership of such documents includes the use, reproduction, and/or reuse of such documents, as well as all incidental rights, whether or not the work for which the documents were prepared has

been performed. This Section shall apply whether the Agreement is terminated by the completion of the Project, the expiration of this Agreement, or upon termination of this Agreement, if earlier, in accordance with the terms of this Agreement. Nothing in this Section shall limit Corporation's ability to retain copies of any documents over which City claims ownership, nor shall this Section be applied to original copies of Corporation's articles of incorporation, bylaws, or any Corporation documents that are not related to Corporation's performance of obligations and duties under this Agreement and the Plan.

ARTICLE X

CITY POLICY PROVISIONS

- 10.1. **Nondiscrimination.** Corporation shall not discriminate in any manner against any person or persons on account of race, color, religion, gender, sexual orientation, medical status, national origin, age, marital status, or physical disability in Corporation's activities pursuant to this Agreement, including but not limited to the providing of goods, services, facilities, privileges, advantages, and accommodations, and the obtaining and holding of employment.
- 10.2. **Compliance with City's Equal Opportunity Contracting Program.** Corporation shall comply with City Council Ordinance No.18173 (San Diego Municipal Code sections 22.2701 through 22.2708, as amended), EQUAL EMPLOYMENT OPPORTUNITY OUTREACH PROGRAM, a copy of which is on file in the Office of the City Clerk and by this reference is incorporated into this Agreement. Corporation and all of its subcontractors are individually responsible to abide by its contents. Corporation shall comply with Title VII of the Civil Rights Act of 1964, as amended; Executive Orders 11246, 11375, and 12086; the California Fair Employment Practices Act; and any other applicable federal and state laws and regulations hereafter enacted. Corporation shall not discriminate against any employee or applicant for employment on any basis prohibited by law. On or before the Effective Date, Corporation shall submit a current Work Force Report or a current Equal Employment Opportunity (EEO) Plan as required by Section 22.2705 of the San Diego Municipal Code, which sets forth the actions Corporation will take to achieve City's commitment to equal employment opportunities. Corporation shall insert the foregoing provisions in all contracts and subcontracts for any work covered by this Agreement so the provisions will be binding upon each Corporation and subcontractor. Compliance with EEO provisions will be implemented, monitored, and reviewed by City's Equal Opportunity Contracting Program staff. Corporation's failure to comply with the requirements of this section and/or submitting false information in response to these requirements shall be a default of this Agreement, and City may bar Corporation from participating in City contracts for a period of not less than one (1) year.
- 10.3. **Local Business and Employment.** Corporation acknowledges that City seeks to promote employment and business opportunities for local residents and firms in all City contracts. Corporation shall, to the extent legally possible, solicit applications for employment, and bids and proposals for contracts and subcontracts, for work associated

with this Agreement from local residents and firms as opportunities occur. Corporation shall hire qualified local residents and firms whenever feasible.

- 10.4. **City Employee Participation Policy.** Corporation shall be in default of this Agreement if Corporation employs an individual who, within the twelve months immediately preceding the employment, did in his/her capacity as a City officer or employee participate in negotiations with or otherwise have an influence on the recommendation made to the City Council in connection with the Corporation's selection for this Agreement. This provision does not apply to members of the City Council.
- 10.5. **Drug-free Workplace.** Corporation shall be required to abide by the omnibus drug legislation passed by Congress on November 18, 1988, by adopting and enforcing a policy to maintain a drug-free workplace by doing all of the following:
 - 10.5.1. Publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of controlled substances are prohibited in the workplace and specifying the actions that will be taken against employees for violations of the prohibition; and
 - 10.5.2. Establish a drug-free awareness program to inform employees about all of the following:
 - a) The dangers of drug abuse in the workplace;
 - b) Corporation's policy of maintaining a drug-free workplace;
 - c) Any available drug counseling, rehabilitation, and employee-assistance programs; and
 - d) The penalties that may be imposed upon employees for drug abuse violations.
 - 10.5.3. Corporation shall include in each of its contracts related to this Agreement language obligating each subcontractor to comply with the provisions of this section to maintain a drug-free workplace. Corporation, and each of its subcontractors, shall be individually responsible for their own drug-free workplace program.
- 10.6. **Disabled Access Compliance.** Corporation shall at all times comply with the 1990 Americans with Disabilities Act ("ADA") and Title 24 of the California Code of Regulations (commonly known as the "building code") as defined in Section 18910 of the California Health and Safety Code and any other applicable federal, state, or local regulations hereafter enacted protecting the rights of people with disabilities.
- 10.7. **Living Wage Ordinance.** Corporation is required to comply, and require each of its Subcontractors to comply, with the provisions of the City's Living Wage Ordinance,

codified in San Diego Municipal Code [Code] sections 22.4201, et seq., in performing its obligations and/or duties under this Agreement. To the extent Corporation believes that it or its Subcontractors may be exempt from compliance pursuant to Code section 22.4215(b)(1), or any other exemption, Corporation may apply to City's Living Wage Administrator for determination of exemption. Corporation agrees to promote and encourage the assessed businesses in the District to pay a Living Wage, consistent with the City's Living Wage Ordinance, to all of their employees, contractors and subcontractors. The Corporation's promotion and encouragement shall include, but not be limited to, posting this information on its website.

ARTICLE XI

GENERAL PROVISIONS

- 11.1. **Compliance with Law.** Corporation shall at all times comply with all applicable laws, statutes, ordinances, and regulations of City, county, state, and federal governments. Corporation shall comply with all notices issued by City under the authority of all current or future laws, statutes, ordinances, or regulations.
- 11.2. **Mandatory Disclosure of Business Interests.** Pursuant to section 225 of The City Charter of the City of San Diego, California ("Charter"), Corporation and each of its subcontractors shall make a full and complete disclosure of the name and identity of any and all persons directly or indirectly involved in any transaction pursuant to this Agreement and the precise nature of all interests of all persons therein. Corporation's failure to fully disclose all of the information required by Charter section 225, or Corporation's failure to require each of its subcontractors to fully disclose such information, shall be a default of this Agreement. Exhibit B attached hereto and incorporated herein delineates the obligations of Corporation pursuant to Charter section 225.
- 11.3. **No Political Activity.** Corporation shall not use, and shall require its subcontractors not to use, any of the funds received pursuant to this Agreement, or any personnel or material paid for with funds pursuant to this agreement, for political activity. The term "political activity" shall mean a communication made to any electorate in support of, or in opposition to, a ballot measure or candidate in any federal, state or local government election.
- 11.4. **Open Meetings and Brown Act Compliance.** All meetings of a majority of the members of the Corporation's board of directors shall be open and public. The Corporation shall comply with the Ralph M. Brown Act, California Government Code section 54950, et. seq. An agenda containing the date, time, and location of the meeting, and a general description of each item of business to be discussed or transacted, shall be posted in a place freely accessible to the public at least 72 hours prior to the meeting. The agenda shall also be sent to each member of the Corporation's board, and every member of the public requesting notification of the meetings, by facsimile, via the United States Postal Service, or electronic mail, at the time of the posting of the agenda.

11.5. **California Public Records Act.** Corporation shall comply with the provisions of the California Public Records Act, codified in California Government Code sections 6250-6270, for all documents and records pertaining to all matters in connection with this Agreement.

11.6. **Notices.** Any notice required or permitted to be given under this Agreement shall be in writing and may be served personally or sent via the United States Postal Service, postage prepaid, or reliable overnight courier, addressed to the parties as follows:

If to Corporation: San Diego Tourism Marketing District
Corporation
8880 Rio San Diego Drive, Suite 800
San Diego, CA 92108

With a copy by First Class Mail to: Civitas Advisors Inc.
7700 College Town Drive, Suite 111
Sacramento, CA 95826

If to City: City of San Diego
Attn: Economic Development Division
1200 Third Avenue, Suite 1400
San Diego, CA 92101

With a copy by First Class Mail to: San Diego City Attorney
Attn: Real Property Section
1200 Third Avenue, Suite 1100
San Diego, California 92101-4106

Any party entitled or required to receive notice under this Agreement may by like notice designate a different address to which notices shall be sent. Notice shall be effective upon personal service or five (5) days after deposit with the United States Postal Service.

11.7. **Severability.** If any term, covenant, condition, or provision of this Agreement is found invalid, void, or unenforceable by a court of competent jurisdiction, the remaining provisions shall remain in full force and effect.

11.8. **Unavoidable Delay.** If the performance of any act required of City or Corporation is directly prevented or delayed by reason of strikes, lockouts, labor disputes, unusual governmental delays, acts of God, fire, floods, epidemics, freight embargoes, or other causes beyond the reasonable control of the party required to perform the act, the obligated party shall be excused from performing that act for the period equal to the period of the prevention or delay. If Corporation or City claims the existence of a delay, the party claiming the delay shall notify the other party in writing of the fact within ten (10) days after the beginning of the claimed delay.

- 11.9. **Legal Proceedings.** If any party brings an action or proceeding against another party under this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party all reasonable costs and expenses thereof, including without limitation reasonable attorney fees and costs. The “prevailing party” shall be that party who obtains substantially the result sought, whether by settlement, dismissal, or judgment.
- 11.10. **Number and Gender.** Words of any gender used in this Agreement shall include any other gender, and words in the singular number shall include the plural, when the tense requires.
- 11.11. **Captions.** The section headings, and captions for various articles and paragraphs shall not be held to define, limit, augment, or describe the scope, content, or intent of any or all parts of this Agreement. The numbers of the paragraphs and pages of this Agreement may not be consecutive. The lack of consecutive numbers shall have no effect on the enforceability of this Agreement.
- 11.12. **Entire Understanding.** This Agreement contains the entire understanding of the parties. City and Corporation, by signing this Agreement, agree that there is no other written or oral understanding between them with respect to the subject matter of this Agreement. Each party has relied on its own advice from its own attorneys, and the terms, covenants, and conditions of the Agreement itself. Each party to this Agreement agrees that no other party, agent, or attorney of any other party has made any promise, representation, or warranty whatsoever which is not contained in this Agreement. The failure or refusal of any party to read the Agreement or other documents and obtain legal or other advice relevant to this transaction constitutes a waiver of any objection, contention, or claim that might have been based on such actions.
- 11.13. **Drafting Ambiguities.** This Agreement is, in all respects, intended by each party hereto to be deemed and construed to have been jointly prepared by the Parties. The Parties hereby expressly agree that any uncertainty or ambiguity existing in this Agreement shall not be interpreted against either of them. Except as expressly limited by this paragraph, all other applicable rules of contract interpretation intended by law shall apply in full to this Agreement.
- 11.14. **Modifications.** This Agreement shall not be modified, altered or amended unless the modification, alteration or amendment is in writing and signed by all parties to this Agreement. Any and all amendments to this Agreement require City Council approval.
- 11.15. **Time is of Essence; Provisions Binding on Successors.** Time is of the essence of all of the terms, covenants, and conditions of this Agreement. Except as otherwise provided in this Agreement, all of the terms, covenants, and conditions of this Agreement shall apply to, benefit, and bind the successors and assigns of the respective parties, jointly and individually.

- 11.16. **Waiver.** City's failure to insist upon the strict performance of any of Corporation's obligations under this Agreement, in one or more instance(s), shall not be construed as a waiver of any such obligation, and the same shall remain in full force and effect. City's waiver of a default shall not be a waiver of any other default. Any waiver of a default must be in a writing executed by City to constitute a valid and binding waiver. City's delay or failure to exercise a right or seek a remedy shall not be deemed a waiver of that or any other right or remedy under this Agreement. The exercise of any particular right or the use of any particular remedy for any default shall not waive the use of any other right or remedy for the same default or for another or later default. City's failure to discover a default or take prompt action to require the cure of any default shall not result in an equitable estoppel, but City may at any and all times require the cure of the default.
- 11.17. **Survival.** Any obligation which accrues under this Agreement prior to its expiration or termination shall survive the expiration or earlier termination of this Agreement.
- 11.18. **Governing Law.** This Agreement shall be governed, construed, and enforced in accordance with the laws of the State of California.
- 11.19. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which when executed shall be deemed an original, but all of which together shall constitute one and the same instrument.
- 11.20. **Consents, Approvals.** Neither City nor Corporation may unreasonably withhold or unreasonably delay any consent or approval required by this Agreement.
- 11.21. **City's Consent, Discretion.** Whenever required under this Agreement, City's consent or approval shall mean the written consent or approval of the San Diego City Manager, or his or her designee ("City Manager"), unless otherwise expressly provided, without need for further resolution by the City Council. City's discretionary acts hereunder shall be made in the City Manager's discretion, unless otherwise expressly provided. All references to "City Manager" herein shall be deemed to refer to the Mayor of San Diego or his or her designee for the duration City operates under the mayor-council (commonly referred to as "strong mayor") form of governance pursuant to Article XV of the City of San Diego City Charter.

[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

11.22. **Authority.** Each individual executing this Agreement on behalf of another person or legal entity represents and warrants that he/she is authorized to execute and deliver this Agreement on behalf of such person or entity in accordance with duly adopted resolutions or other authorizing actions necessary and proper and under such legal entity's articles, charter, bylaws, or other written rules of conduct or governing agreement, and that this Agreement is binding upon such person or entity in accordance with its terms. Each person executing this Agreement on behalf of another person or legal entity shall provide City with evidence, satisfactory to City, that such authority is valid, and such entity is a valid, qualified corporation, limited liability company, partnership, or other unincorporated association in good standing in its home state and that such entity is qualified to do business in California.

IN WITNESS WHEREOF, this Agreement is executed to be effective as of the Effective Date:

Date: _____ SAN DIEGO TOURISM MARKETING DISTRICT CORPORATION, a California non-profit corporation

BY: _____
Name: C. Terry Brown
Title: Chairman of the Board

Date: 3/12/13 _____ THE CITY OF SAN DIEGO, a California municipal corporation

BY: Bob Filner _____
Name: Bob Filner
Title: Mayor

APPROVED AS TO FORM AND LEGALITY:

Date: _____ JAN GOLDSMITH City Attorney

BY: _____
Name: _____
Title: _____

EXHIBIT A

DISTRICT DISBURSEMENTS AND DISTRICT ASSESSMENT FUNDS RECONCILIATION PROCEDURES

Disbursements in advance of City receipt of required documentation will be provided monthly based on the revenue posted into the District fund during that month as determined by City staff at month end.

On the last working day of each month, City staff shall determine the revenue posted during the month from assessments, interest, and penalties, which is to be disbursed to Corporation.

OSB staff will then submit a payment request in SAP for that amount within two working days and include a copy of the “invoice” document which details the relevant approved resolution and agreement authorizing the monthly disbursement in advance of City staff receiving documentation as to the actual expenditures. Attached to the invoice document shall be a document indicating how the amount for disbursement was derived.

Information as to the amount to be disbursed shall be provided to Corporation within 4 working days of the month start.

City Comptroller’s staff will review the request and, if appropriate, release the payment in accordance with the Vendor Payment Term (NET20 or less).

Reconciliation Reports shall be submitted to the City no less than 45 days after the first disbursement and on no less than a monthly basis thereafter.

Only District-related activity expenses as approved by City Council in the annual Report of Activities may be submitted to document the use of the District funds disbursed in advance of said documentation. Failure to submit a report or reports within 10 days of the due date will result in advance payments being halted until overdue reports are received and reviewed by City staff, and deemed to be in compliance with the requirements of this Agreement.

The required reports and documents to be submitted with each Reconciliation Report are:

- Cover letter/signed form indicating the amount of eligible District expenses during the period, and any disbursement accrued for a future purpose.
- Summary Profit and Loss Report* for the period.
- Cash Disbursement Report* for all transactions during the period.
- Custom Journal Report* for all transactions during the period indicating the split of each expenditure between the various funding sources (classes).
- Transaction Detail by Account Report* for each City Funding source.
- Banks Statement(s) – include all pages.
- Bank Reconciliation Report.
- Cash Deposit Report of all checks deposited (including all funds received from the City).
- Monthly Activity Report based on the Council-approved Report of Activities.

- One copy of the invoice and checks. Only those invoices and checks that pertain to City funding sources are to be submitted. These documents shall be provided in the same order as the list on the Custom Journal Report.
- A copy of the check and invoice or receipt (or reference to contract for periodic payments of ongoing same amount, e.g. rent) detailing the services/products for each expense must be submitted. All invoices shall itemize the eligible expenditures and include the names and rates of pay for contracted personnel who have performed services on behalf of the District, the hours worked, and details of any reasonable and necessary out-of-pocket expenses. Statements alone are not acceptable, but may be submitted in addition to the invoice or receipt.
- When past due expenses are being submitted then the prior invoice(s) reflecting the amount owed must also be included since only fully documented expenses may be accepted.
- Checks and invoices are not to be stapled together.
- Include payroll statements that detail all withholdings and taxes if salaries are included in the Council-approved Report of Activities.
- Proof of payments to State and Federal agencies are required if the taxes/fringe benefits are to be considered as eligible expenses.
- For refreshments for public board/committee/taskforce meetings, submit an agenda and the sign-in sheet for each meeting.
- For mileage, include a log that has the starting and ending mileage and the destination for each trip.
- Please note that late fees, finance charges (for late payments), citations, other penalties, nonsufficient fund bank fees, gifts, donations, gift cards, and alcohol purchases are deemed as ineligible expenses.
- One copy of the Board Meeting Minutes and Attendance sheets.

Once the payment request is authorized by the City Comptroller's Office and the number of days pursuant to the NET payment term have passed from the date of the "invoice" document, payment will be made in one of the following ways depending on whether the Corporation has registered for the ACH payment program:

- Checks are cut daily by the City Comptroller's Office and mailed out via U.S. Postal Service the next working day and may take up to four days to be delivered; or
- ACH payments are generally deposited into the receiving bank account the next working day (in the morning).

* References to Quickbooks reports.

EXHIBIT B

CONFLICT OF INTEREST AND PROCUREMENT POLICY FOR NONPROFIT CORPORATIONS CONTRACTING WITH THE CITY OF SAN DIEGO FOR ADMINISTRATION OF A BUSINESS IMPROVEMENT DISTRICT

Purpose

It is important for the City and its citizens to have confidence in the integrity of nonprofit corporations which contract with the City to administer programs, and which receive funding from or through the City.

This policy is not intended to supersede, negate or otherwise invalidate any statute, ordinance or policy, but is intended to supplement existing authorities governing these subjects.

Board Roster

Corporation shall provide, within 30 days of execution of an agreement, a list of the names of all board members and their business affiliations. In the event that the board membership changes, the Corporation shall provide the City with an updated list.

Procedures for Procurement of Goods and Services

All procurement of goods and services by nonprofit associations contracting with the City for administration of a Business Improvement District shall comply with Divisions 30-36 of Article 2, Chapter 2, of the San Diego Municipal Code, and all other laws and policies applicable to the City's procurement of such goods and services.

When a *contract* provides for an expenditure greater than \$5,000, but equal to or less than \$10,000, the Nonprofit Corporation may award the *contract* but shall seek competitive prices either orally or in writing.

When a *contract* provides for an expenditure greater than \$10,000 but equal to or less than \$50,000, the Nonprofit Corporation may award the *contract* but shall solicit written price quotations from at least five potential sources.

When a *contract* provides for an expenditure greater than \$50,000 but equal to or less than \$1,000,000, the Nonprofit Corporation may award the *contract* only after advertising it for a minimum of one day in the City Official Newspaper.

Remedies

A violation of any provision of this policy shall be grounds for termination of the corporation's contract with the City, after notice and opportunity to cure pursuant to Article V Section 5.2. A contract or transaction entered into in violation of the conflict of interest and procurement provisions of this policy shall be void and unenforceable, and shall not entitle the corporation or the Corporation to any reimbursement or payment for goods or services provided pursuant to the void contract.

EXHIBIT C

SAN DIEGO TOURISM MARKETING DISTRICT MANAGEMENT PLAN