EXECUTION VERSION

MASTER DEVELOPMENT AGREEMENT

BY AND BETWEEN

COUNTY OF SANTA CLARA

AND

LOWE ENTERPRISES REAL ESTATE GROUP

SANTA CLARA COUNTY

CIVIC CENTER

Dated as of ______________________, 2016
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-x-

16200.002-2444287
MASTER DEVELOPMENT AGREEMENT
COUNTY OF SANTA CLARA
CIVIC CENTER

THIS MASTER DEVELOPMENT AGREEMENT (this “Agreement”) is entered into effective as of the date last signed by all of the parties below by and between the COUNTY OF SANTA CLARA, a political subdivision of the State of California (“County”) and LOWE ENTERPRISES REAL ESTATE GROUP, a California corporation, with its principal offices located at 11777 San Vicente Boulevard, Suite 900, Los Angeles, CA 90049 (“Developer” or “Lowe”). County and Developer are each a “Party” and collectively the “Parties” to this Agreement.

RECITALS

A. County is the fee owner of that certain real property collectively known as the San Jose Civic Center Campus, consisting of approximately fifty-five (55) acres (the “Site”) and depicted on the diagram (the “Site Map”) attached hereto as Exhibit A.

B. County’s administrative, operations, judicial and other facilities are housed in scattered locations and buildings throughout County of Santa Clara, and at the Site.

C. On May 1, 2013, County issued a Request for Qualifications/Request for Proposals (“RFQ/RFP”) seeking interested parties to collaborate with County on the development of the Site.

D. In response to County’s RFQ/RFP, Lowe and M. Arthur Gensler Jr. & Associates, Inc., a California corporation (“Gensler”) collectively submitted Qualifications to Assist with Master Planning, Pre-Development and Property Development dated July 19, 2013 (the “Lowe/Gensler RFQ/RFP Response”). The County’s RFQ/RFP and the Lowe/Gensler RFQ/RFP Response contemplated additional information and studies would be required prior to any final County decisions regarding the proposed Development.

E. On September 24, 2013, the Board of Supervisors of County (the “Board of Supervisors”) made a determination that County should move forward with negotiations with Lowe/Gensler on potential development of the Site and authorized staff to initiate such negotiations.

F. On December 10, 2013, the Board of Supervisors of Supervisors approved the Exclusive Negotiating Agreement (“ENA”) entered into between County and Lowe/Gensler for the purpose of negotiating the terms of this Agreement.

G. On or about February 4, 2014, County, Lowe and Gensler entered Pre-Development Facilities Agreement (“PFA”) in order to work through further negotiations over a potential “Master Development Agreement”, which PFA superseded and replaced the ENA. The term of the PFA was extended by execution and delivery by County of (1) that certain letter dated June 3, 2015 from Lowe to County RE: County of San Jose Civic Center – Pre-
Development Facilities Agreement; (2) that certain letter dated June 12, 2015 from Lowe to County RE: County of San Jose Civic Center – Pre-Development Facilities Agreement, countersigned by the County on July 2, 2015; (3) that certain letter dated October 6, 2015 from Lowe to County RE: County of San Jose Civic Center – Pre-Development Facilities Agreement, countersigned by the County on October 8, 2015 and (4) Amendment Number 1 to the Pre-Development Facilities Agreement executed by Lowe on January 3, 2016 and executed by the County January 26, 2016. The PFA included an outline of guiding principles attached as Attachment A thereto (the “Guiding Principles”), and which Guiding Principles informed the negotiation of this Agreement by the Parties. Except for those provisions which expressly survive the expiration and/or termination of the PFA, it is intended that this Agreement shall supersede and replace the PFA, the ENA and all other prior agreements or understandings in their entirety.

H. This Agreement is not subject to CEQA (as defined in Section 1.02(H) below) because County action in approving it is NOT a “project” as defined in CEQA Guidelines Section 15378 and therefore will not result in a physical change in the environment pursuant to CEQA Guidelines Section 15060(c)(2); however, (1) compliance with CEQA is a condition precedent to any action by County to cause development or construction on the Site under this Agreement; and (2) Lowe shall not have any right to develop or construct anything at the Site until County has concluded that it has fully complied with CEQA with respect to such development and construction.

NOW THEREFORE, for good and valuable consideration, the receipt and legal sufficiency of which are hereby acknowledged, and in consideration of the promises and agreements hereinafter set forth, the Parties agree to the foregoing and as follows:

ARTICLE I
GENERAL PROVISIONS

1.01 Parties to this Agreement

(A) County. County is a charter county, duly organized and existing under the laws of the State of California. “County” as referred to in this Agreement, means County of Santa Clara, a subdivision of the State of California.

County will identify in writing one person to perform the County Lead role and responsibilities as provided for in this Agreement. The County Lead may be replaced by County at County’s sole option, upon notice to Developer. The County Lead role may involve acting as liaison between County and Developer during the term of this Agreement. Any approvals required herein of County may be provided by County Lead or other County-designated representative. No County Lead may perform roles or make decisions not otherwise delegated to such person by the County Board of Supervisors by appropriate prior action. All approvals or consents of County or County Lead must be in writing to be effective. The County Lead may, if assigned by County management, coordinate the activities of County staff assigned to work with Developer.
(B) **Developer.** Developer is Lowe Enterprises Real Estate Group, a California corporation. Wherever the term "**Developer**" is used herein, such term shall include any permitted assignee or successor in interest as herein provided.

1.02 **Definitions.** Unless expressly defined elsewhere in this Agreement, the capitalized terms used herein shall for all purposes of this Agreement have the meanings given them in this Section 1.02.

(A) **“Applicable Law(s)”** means the applicable laws, rules, regulations, ordinances, codes, orders, decrees, requirements, resolutions, and policy statements (including, without limitation, those relating to land use, subdivision, zoning, the environment, labor relations, prevailing wage, notification of sale to employees, Hazardous Materials, occupational health and safety, water, earthquake hazard reduction and building and fire codes; and including all Environmental Laws and Labor Laws) of each and every Governmental Authority having jurisdiction over County, Developer or the Site.

(B) **“Basis of Design”** means the document(s) attached to each NCF Phase Business Plan, which set forth the general requirements, assumptions and qualifications for the County Building(s) and other improvements in an NCF Phase, as agreed to by County and Developer but consistent with the Entitlements, including the Master Plan and other Applicable Laws.

(C) **“Budgeted Staffing Costs”** means Developer’s projected staffing costs to be incurred with respect to a particular Phase as set forth with respect to Pre-Development Phase A and Pre-Development Phase B for the Initial NCF Phase, in the staffing plan attached hereto as **Exhibit J** and for each subsequent NCF Phase, in the staffing plan approved by County for such Phase pursuant to **Section 4.05** below. Each such staffing plan and Budgeted Staffing Costs pursuant thereto has or will, as applicable, take into account (i) the budgeted number of employees and hours to be worked, (ii) each such employee’s then current compensation rates paid by Developer (including salary, bonus, and benefits but excluding general and administrative overhead), and (iii) reasonable allocation of each employee’s time to the applicable Work versus other work performed by such employees. For purposes of calculating Developer’s Budgeted Staffing Costs, Developer’s staffing plan shall not include staffing for services being provided by third party vendors or consultants retained by Developer and included within Budgeted Third Party Costs and in each case shall not include Excluded Costs.

(D) **“Budgeted Third-Party Costs”** means the out-of-pocket costs proposed to be incurred by Developer for third-party consultants and vendors retained by Developer with respect to the Project for a particular Phase as set forth in the applicable Phase Budget approved by County for such Phase; provided, however, that for purposes of calculating Budgeted Third Party Costs for any Phase such costs shall not include, and Developer shall not be compensated for, costs for services associated with any third party vendors or consultants retained by Developer to provide construction management services, as described in **Section 2.13** below, with respect to any Phase E.

(E) **“Budgeted Value of the Minimum Developer County Buildings”** means the Cost of the Work, as determined pursuant to **Section 1.02(P)** below, of Project Improvements
with respect to County Buildings constructed by Developer of at least One Hundred Fifty Million Dollars ($150,000,000).

(F) “Business Day” means Monday through Friday, excluding County holidays.

(G) “Business Plan(s)” mean(s), as applicable, the Pre-Development Phase Business Plan, or any other Phase Business Plan as the context specifies or as otherwise mutually agreed by the parties.

(H) “CEQA” means the California Environmental Quality Act (California Public Resources Code §§21000 et seq.), and the State CEQA Guidelines (California Code of Regulations §§15000-15387), in each case as may be amended from time to time.

(I) “Change Order” is defined in Section 9.02(A) below.

(J) “City” means the City of San Jose, a political subdivision of the State of California.

(K) “Claims” is defined in Section 9.08 below.

(L) “Construction Contract” means a contract for construction of Project Improvements within Phase E of an NCF Phase, between Developer and Contractor. As used herein, the term “Construction Contract” also includes subcontract of any tier under any such Construction Contract.

(M) “Construction Management Fee” means the management fee to be earned by Developer for providing development and construction management services during each Phase E.

(N) “Contractor” means a general contractor, duly licensed by the State of California, Contractors State License Board, retained by Developer pursuant to a Construction Contract as an independent contractor to provide labor, materials, equipment and services necessary to complete construction of each Phase E. As used herein, the term “Contractor” also includes subcontractors of any tier under any such Construction Contract. A Contractor is a Developer Representative.

(O) “Contractor Contingency” means an amount set aside in the GMP budget for each Phase E under a Construction Contract equal to 2.5% of the Direct and Off-site Costs (excluding any fees paid to Developer) for costs associated with uncertainties and risks inherent in the construction process, to be utilized as-needed by Contractor in the timely execution and completion of the Work.

(P) “Cost of the Work” means the actual Direct Costs, Indirect Costs (including Development Management Fee and Construction Management Fee), and Off-site Costs of County-approved Work to be managed by Developer, for each Phase to be paid to Developer as provided in this Agreement. Notwithstanding the foregoing, in no event shall the Cost of the Work include any Excluded Costs. The Cost of the Work for each portion or Phase E of the Work shall not exceed the sum of the Indirect Costs and Guaranteed Maximum Price for that
portion or Phase, as established in accordance with Section 4.04(A) and increased or decreased in accordance as provided in Article IX of this Agreement.

(Q) “County Buildings” means those buildings and facilities which will be designed, developed and/or constructed, in whole or in part, on the Site, by Developer on the Site in accordance with the terms of this Agreement, pursuant to and in compliance with CEQA and the Master Plan.

(R) “County Contractors” means County contractors or consultants who are vendors, contractors, design professionals and any other person or entity retained by County to perform portions of the Project or any other Phase or Work, other than Developer, Gensler or any of the Developer Representatives.

(S) “County Indemnitees” means, individually and collectively, County, County’s elected and appointed officials, supervisors, directors, officers, employees, representatives, contractors, subcontractors, attorneys and their respective successors and assigns.

(T) “Critical Path” consists of the activities on any Phase Schedule or GMP Construction Schedule that comprise the longest path through the particular Phase to which such schedule relates, or the Work included in the GMP Construction Schedule, each of which has zero or negative total float. The duration of the Critical Path controls the duration of the entire Phase to which such Phase Schedule relates or the Work included to which such GMP Construction Schedule relates; any delay to any activity on the Critical Path may delay the completion of the Phase or the Work included in the GMP Construction Schedule.

(U) “Day” means calendar day.

(V) “Design Professional Agreement” means a written contract between Developer and a Design Professional with regard to the provision of consultant and other consulting services hereunder.

(W) “Design Professional” means a Developer Representative who is a design professional, including independent architects, engineers and other design professionals, competitively selected (or otherwise previously approved by County pursuant to Section 2.06) and recommended by Developer to be qualified to perform the required services, duly licensed in the State of California and who are approved by County, with whom Developer enters into Design Professional Agreements. Design Professionals include Gensler, the firm engaged by Developer to provide architectural and planning services in connection with the development of the Master Plan and to design the Project Improvements to be constructed on the Site and approved by County, as well as any engineering or other sub-consultants engaged by Developer or its Design Professionals in connection with performance of services in connection with the Project. The Design Professionals on Exhibit E attached hereto are hereby approved by County, provided that such listing shall be subject to review by County from time to time and revised if a conflict of interest with respect to such Design Professional subsequently arises.

(X) “Developer Contingency” means an amount equal to Six Percent (6%) of the Cost of the Work (excluding fees paid to Developer), which shall be included in each GMP and controlled by Developer but used only to pay for (a) Costs of the Work (which shall not include
any Excluded Costs), subject to County’s approval, which shall not be withheld unreasonably, or
(b) Change Orders to the extent same are not covered by Contractor Contingency.

(Y) “Developer Executive” means Richard G. Newman, Jr. or another Developer
executive officer selected by Developer and approved by County to lead Developer’s
performance of its obligations hereunder.

(Z) “Developer Lead” means Alan Chamorro or another person selected by
Developer and approved by County, designated by Developer to interface with County in
connection with the performance of its services hereunder, which individual(s) are subject to
County approval, not to be unreasonably withheld, and (b) authorized by Developer to make
decisions hereunder on behalf of Developer.

(AA) “Developer NDEC Costs” is defined in Section 15.22(D)(6).

(BB) “Developer Release” means a Release caused by, arising from or related to the
acts or omissions of Developer or any of the Developer Representatives.

(CC) “Developer Representatives” means Developer’s employees, agents,
shareholders, partners, officers, members, contractors, subcontractors, consultants and
representatives, and each of their respective employees, agents, shareholders, partners, members,
contractor, subcontractors, officers, consultants and representatives. Design Professionals, Other
Consultants, and Contractors are Developer Representatives.

(DD) “Direct Costs” include only the following:

1. The actual cost of constructing the Project Improvements included within
   the applicable NCF Phase during the Phase E relating to such NCF Phase, which shall include
   only the following:

   a. Contractor’s actual costs for labor, materials, equipment and
      services for Work in the applicable Phase E performed using Contractor’s own forces, if any;

   b. Contractor’s Subcontractor costs determined from selection of the
      lowest responsible bidder from competitive bids in accordance with Section 5.01(B) or as
      otherwise agreed between County and Developer;

   c. Contractor’s contingencies as set forth in the Construction
      Contract;

   d. Contractor’s cost of insurance, including, without limitation, the
      PLL Policy, and payment and performance bonds, including, without limitation, premiums,
      deductibles and collateral costs, where required by County;

   e. Contractor’s fees set forth in the Construction Contract.

2. The actual cost of purchase and installation of furniture, fixtures and
equipment as selected by County;
(EE) “Due Diligence Summary” means, as applicable, either the Initial NCF Phase Due Diligence Summary or a Subsequent NCF Phase Due Diligence Summary.

(FF) “Entitlement(s)” means collectively (or individually as the case may be) to County, City and other governmental entity approvals needed or required for the development and full build out of the Site (or applicable portion thereof) in accordance with the Master Plan, including, if applicable, a general plan amendment, a specific plan and/or specific plan amendment, zoning change, draft CEQA document, Final CEQA Document, tentative tract map, and/or any statutory development agreements; however, the specific nature of the required approvals and documents to be prepared may change from time to time as set forth in the most recent applicable NCF Phase Business Plan, including any updates thereto as approved by County Lead.

(GG) “Environmental Law(s)” means any federal, state, or local laws, ordinances, rules, regulations, requirements, orders, directives, guidelines, or permit conditions, in existence as of the date of this Agreement or as later enacted, promulgated, issued, modified or adopted, regulating or relating to Hazardous Materials, and all applicable judicial, administrative and regulatory decrees, judgments and orders and common law, including those relating to industrial hygiene, public safety, human health, or protection of the environment, or the reporting, licensing, permitting, use, presence, transfer, treatment, analysis, generation, manufacture, storage, discharge, release, disposal, transportation, investigation or remediation of Hazardous Materials. Environmental Laws shall include the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 U.S.C. § 9601, et seq.) (“CERCLA”); the Resource Conservation and Recovery Act, as amended, (42 U.S.C. § 6901, et seq.) (“RCRA”); the federal Water Pollution Control Act, as amended, (33 U.S.C. § 1251, et seq.); the Toxic Substances Control Act, as amended, (15 U.S.C. § 2601, et seq.); the Hazardous Materials Account Act (Chapter 6.8 of the California Health and Safety Code § 25300, et seq.); Chapter 6.5 commencing with § 25100 (Hazardous Waste Control) and Chapter 6.7 commencing with Section 25280 (Underground Storage of Hazardous Materials) of the California Health and Safety Code; and the California Water Code, § 13000, et seq.

(HH) “Excluded Areas” is defined in Section 4.01(A)(1) below.

(II) “Excluded Costs” means the following costs, for which Developer will be responsible without compensation or reimbursement and which are not Cost(s) of the Work:

1. Salaries and other compensation of Developer’s personnel stationed at Developer’s principal office or offices;

2. Any fees or reimbursements paid to any third party consultant retained by Developer to provide construction management services with respect to the Project or any portion thereof;

3. Expenses of Developer’s principal office, including Developer’s home office computer system and all hardware, software, maintenance, and similar expenses;

4. Developer's overhead and general and administrative expenses;
(5) Developer’s capital expenses, including interest on Developer’s capital employed for the Project;

(6) Costs due to the negligence or willful misconduct of Developer, of the negligence, willful misconduct, or professional error or omission of Design Professionals, Developer’s Other Consultants, Contractors, Subcontractors or suppliers with whom Developer or such parties have contracted, recognizing that Developer, Design Professionals, Developer’s Other Consultants and Contractors specialize in the type of development and construction included in the Project, or failure of Developer, Design Professional, Developer’s Other Consultants, Contractors, Subcontractors or suppliers to fulfill a specific responsibility set forth in this Agreement as a result of such party’s negligence, willful misconduct, or professional errors or omissions, including, without limitation, costs for the correction of damaged, defective or non-conforming Work and repairing or replacing damaged property not forming a portion of the Work;

(7) Costs incurred as a result of a delay that does not justify an extension under the GMP Construction Schedule if the Cost of the Work exceeds the Guaranteed Maximum Price;

(8) Costs which would cause the Guaranteed Maximum Price of any portion or Phase of the Work, as adjusted in accordance with this Agreement, to be exceeded, except as otherwise expressly provided herein;

(9) Costs resulting from either (a) Developer’s failure to perform in accordance with this Agreement or the Project Documents, or (b) Developer’s indemnity obligations;

(10) Any costs not specifically or expressly described or provided for in this Agreement other than as approved by County in writing as provided for in this Agreement.

(JJ) "Excusable Delay" means any unforeseen delay in the performance or completion of the Work due to (i) any failure by the County to respond to requests for approval or information delivered by Developer to County in accordance with the express requirements and time periods set forth in this Agreement; (ii) any grossly negligent or wrongful acts or omissions of County in its proprietary capacity under this Agreement which have a direct impact on the performance of Developer’s obligations hereunder; (iii) Force Majeure events; (iv) an order by County to stop Work where neither Developer, nor any Contractor was at fault; (v) a written order for a Minor Change in the Work issued by County; (vi) any suspension of Work by County without cause pursuant to Section 12.02 or (vii) any failure by County to implement its funding plan for a particular NCF Phase E or the failure by Board to approve or Board withdrawal of any previously approved appropriation of sufficient funds for the payment of the amounts set forth in the NCF Budget with respect to such Phase E by the time set forth for such implementation or appropriation in the NCF Phase Schedule for such Phase E. In no event shall the action or inaction of the County in its Governmental Capacity or County’s successful enforcement of the terms of this Agreement be deemed an Excusable Delay.
(KK) “Exhibits” means those exhibits which are identified the Table of Contents, which Exhibits are attached hereto and are incorporated herein by this reference.

(LL) “Final Approval” means (a) with respect to the Master Plan and Entitlements, adoption of all applicable ordinances and other approvals by County Board of Supervisors, including certification of the Final CEQA Document, (b) expiration of all applicable appeal periods or statute of limitations without appeal, challenge or action having been filed or taken, or, if an appeal, challenge or action is filed or taken, such appeal, challenge action has been finally and successfully resolved to the satisfaction of County, as solely determined by County, and (c) approval of the Master Plan by the County Board of Supervisors.

(MM) “Final CEQA Document” means a final environmental impact report, mitigated negative declaration or negative declaration covering the Master Plan, and/or any development or construction at the Site as approved, adopted and certified by the Board of Supervisors in accordance with CEQA and all other Applicable Laws. The initial Final CEQA Document, if so approved, adopted and certified by the Board of Supervisors, is anticipated to constitute a "project-level" CEQA document with respect to the Initial NCF Phase and a "programmatic" CEQA document with respect to all other portions of the Site. With respect to any subsequent NCF Phase, the term Final CEQA Document shall refer to such initial Final CEQA Document together with any project-level CEQA document concerning development or construction on the Project Site of such subsequent NCF Phase as approved, adopted and certified by the Board of Supervisors in accordance with such initial Final CEQA Document and CEQA.

(NN) “Force Majeure” means acts of God, acts of nature (including fire, flood, earthquake, storm, hurricane or other natural disaster), labor dispute or strikes, boycotts, lockouts, inability to procure materials not related to the price thereof, embargo, failure of power or telecommunication service, restrictive governmental laws and regulations enacted after the date of this Agreement, riots, civil unrest, acts of terrorism, insurrection, war, invasion, act of foreign enemies or hostilities (whether war is declared or not), declaration of a state or national emergency or other reasons of a like nature not within Developer’s control.

(OO) “Gensler” is defined in the Recitals.

(PP) “Governmental Authority(ies)” means, as applicable, the United States, the State of California, County (in its Governmental Capacity), the City, and any other political subdivision, agency or instrumentality exercising jurisdiction over County, Developer or the Site.

(QQ) “Governmental Capacity” means, (a) with respect to any action or decision of the Board of Supervisors, such action or decision is taken or made by the Board of Supervisors in the exercise of County's police powers, or (b) with respect to any other action of the County, its departments, commissions, agencies, and boards (including the Board of Supervisors) and the officers thereof, and their respective employees, contractors and agents, such action is taken pursuant to or in enforcement of any ordinances, notices, orders, rules, regulations, or other Applicable Laws now or hereafter enacted or adopted, and/or as amended from time to time, of County, its departments, commissions, agencies, and boards (including the Board of Supervisors) and the officers thereof, including, without limitation, any general plan, zoning ordinances or other County land use regulations, any of County’s duties, obligations, rights or
remedies thereunder or pursuant thereto, or the general police powers, rights, privileges and
discretion of County in the furtherance of the public health, welfare, and safety of the inhabitants
thereof, including, without limitation, the right under Applicable Laws to make and implement
independent judgments, decisions and/or acts with respect to planning and/or development
matters (including without limitation, approval or disapproval of plans and/or issuance or
withholding of building permits) whether or not consistent with the provisions of this
Agreement, any Exhibits attached hereto, or any other documents contemplated hereby

(RR) “Guaranteed Maximum Price” or “GMP” shall mean the aggregate sum of all
Costs of the Work that County and Developer agree on for a portion of the Work included in a
GMP Proposal as described in Section 4.04. Upon agreement on a Guaranteed Maximum Price,
the Guaranteed Maximum Price and its basis shall be set forth in a supplement to this Agreement
which shall not be deemed an amendment of this Agreement, but instead a statement of
contractual confirmation. Each Guaranteed Maximum Price shall be subject to additions and
deductions as provided in Article IX of this Agreement.

(SS) “Hazardous Material” shall include, but shall not be limited to: (a) any
chemical, compound, material, mixture, substance or other matter which has been defined, listed,
classified or determined by any regulation, order or rule, or any proposed regulation, order or
rule, promulgated by any Governmental Authority of appropriate jurisdiction, to constitute a
Hazardous Material, hazardous material, hazardous waste, extremely hazardous waste, infectious
waste, toxic substance, toxic pollutant, radioactive material, flammable explosive or other
designation intended to define, list or classify substances by reason of deleterious properties such
as ignitability, corrosivity, reactivity, carcinogenicity, toxicity, reproductive toxicity or “EP
toxicity”; (b) petroleum, natural gas, natural gas liquids, liquefied natural gas, synthetic gas
usable for fuel, ash produced by a resource recovery facility utilizing a municipal solid waste
stream, and drilling fluids, produced waters and other wastes associated with the exploration,
development or production of crude oil, natural gas or geothermal resources; and/or (c) those
substances included within the definitions of “Hazardous Materials,” “hazardous materials,”
“toxic substances,” or “solid waste” in CERCLA or RCRA; (d) those substances defined as
“hazardous wastes” in Section 25117 of the California Health & Safety Code, or as “Hazardous
Materials” in Section 25316 of the California Health & Safety Code, and in the regulations
promulgated pursuant to said laws; (c) those substances listed in the United States Department of
Transportation Table (49 C.F.R. § 172.101 and amendments thereto) or by the Environmental
Protection Agency (or any successor agency) as Hazardous Materials (40 C.F.R. part 302 and
amendments thereto); (d) any material, waste or substance which is (i) petroleum, (e) asbestos,
(f) polychlorinated biphenyls, (g) designated as a “Hazardous Material” pursuant to Section 311
of the Clean Water Act, 33 U.S.C. § 1251 et seq. (33 U.S.C. § 1321) or listed pursuant to Section
307 of the Clean Water Act (33 U.S.C. § 1317), (v) flammable explosives, or (vi) radioactive
materials; and (h) such other substances, materials and wastes which are or become classified as
hazardous or toxic under any of the Environmental Laws or any other applicable local, state or
federal law, or otherwise are or become regulated under any Environmental Law(s).

(TT) “Indirect Costs” include only:

(1) Actual cost incurred for Developer’s Design Professionals and
Developer’s Other Consultants (including all fees, costs and reimbursable expenses)
other than such costs incurred in Initial NCF Phase Pre-Development Phase A or Initial NCF Phase Pre-Development Phase B;

(2) Actual premiums paid for obtaining bonds required under this Agreement;

(3) Actual plan check and permit fees and costs;

(4) Actual fees and costs for testing and inspection required for the Work;

(5) Actual incremental cost of insurance specifically required under this Agreement (other than Contractor insurance costs included in Direct Costs);

(6) Actual costs of other portions of the Work performed by or on behalf of Developer to meet its obligations under this Agreement in connection with the Project;

(7) Actual costs of obtaining LEED certification;

(8) Construction Management Fee; and

(9) Development Management Fee.

(UU) “Infrastructure” means, streets, sidewalks, curbs, gutters, sewers, utilities, storm drain improvements, storm water retention facilities and other infrastructure improvements required by the Entitlements (including the conditions of approval thereof), as a condition to the construction of improvements on the Site.

(VV) “Infrastructure Plan” means the plan for the development and construction of the Infrastructure required for full buildout of the Site in accordance with the Master Plan and other Entitlements.

(WW) “Initial NCF Phase” means the first NCF Phase of County Buildings, the size of which will be determined by the Board of Supervisors pursuant to its approval of the Initial NCF Phase Business Plan pursuant to Section 4.05 below, presently contemplated to be located on the Richey Field, the due diligence, planning, entitlement, and design of which will be undertaken by Developer with respect to the entire Site (with respect to Pre-Development Phase A and Pre-Development Phase B) and the Initial NCF Phase (with respect to Pre-Development Phase A, Pre-Development Phase B and, Pre-Development Phase C, and Pre-Development Phase D) pursuant to Article IV below and Exhibit C attached hereto.

(XX) “Initial NCF Phase Due Diligence Summary” is defined in Section 4.01(A)(1).

(YY) “Initial NCF Phase Pre-Development Phase A” means the Pre-Development Phase A for the Initial NCF Phase. Notwithstanding such designation, the Initial NCF Phase Pre-Development Phase A covers activities relating to due diligence and master planning for the
entire Site as well as such activities for the Initial NCF Phase. Such activities, schedule and budgeted costs with respect to Initial Pre-Development Phase A are set forth in Exhibit C.

(ZZ) “Initial NCF Pre-Development Phase A Fee” is defined in Section 8.02(B).

(AAA) “Initial NCF Phase Pre-Development Phase B” means the Pre-Development Phase B for the Initial NCF Phase. Notwithstanding such designation, the Initial NCF Phase Pre-Development Phase B covers activities relating to support for County’s completion of CEQA review and securing entitlements for the proposed Master Plan for the entire Site as well as such activities for the Initial NCF Phase. Such activities, schedule and budgets costs with respect to Initial NCF Phase Pre-Development Phase B are set forth in Exhibit C.

(BBB) “Initial NCF Pre-Development Phase B Fee” is defined in Section 8.03(B).

(CCC) “Initial NCF Phase Pre-Development Phase C” means the Pre-Development Phase C for the Initial NCF Phase. Notwithstanding such designation, the Initial NCF Phase Pre-Development Phase C covers activities relating to schematic and development design for the Initial NCF Phase E.

(DDD) “Initial NCF Phase Pre-Development Phase D” means the Pre-Development Phase D for the Initial NCF Phase. Notwithstanding such designation, the Initial NCF Phase Pre-Development Phase D covers activities relating to creation of construction drawings for the Initial NCF Phase E.

(EEE) “Initial NCF Phase E” means Phase E for the Initial NCF Phase.

(FFF) “Initial Term” means the initial term of this Agreement, which shall begin on the Effective Date and continue for a period of seven (7) years after the date of Final Approval of the Master Plan by County, unless earlier terminated as provided in Article XII below.

(GGG) “Key People” means Developer Executive, Developer Lead and other key personnel necessary for performing the work contemplated herein.

(HHH) “Known Environmental Condition” means the presence of any Hazardous Materials in, on or under the Site and/or located within the existing improvements disclosed to Developer in the documentation described in Exhibit D or discovered by Developer’s due diligence examinations and investigations pursuant to Section 4.01(A) and the Pre-Development Phase Business Plan, including the Richey Environmental Condition, which, pursuant to applicable Environmental Laws, may require investigation, abatement and/or remediation as a condition to the development and construction of County Buildings.

(III) “Master Plan” refers to a plan prepared by County with the assistance and expertise of the Developer, subject to Board approval, proposing the Development, inclusive of a development plan, for the Property, which may describe, among other things, a mix of proposed land uses, a projected density and intensity range, a proposed circulation plan, proposed development standards and guidelines, and a preliminary infrastructure phasing plan. At County’s discretion, the Master Plan may be developed consistent with the requirements of a Specific Plan.
(JJJ) "Milestone" means, (i) with respect to Pre-Development Phase A, Pre-Development Phase B, and Pre-Development Phase C for the Initial NCF Phase, in Exhibit I attached hereto (ii) with respect to Pre-Development Phase D and Phase E for the Initial NCF Phase, in a milestone schedule set forth in the Initial NCF Phase Business approved by County for such Phase pursuant to Section 4.05 below; (iii) with respect to Pre-Development Phase A, Pre-Development Phase B, Pre-Development Phase C for any subsequent NCF Phase, in a milestone schedule set forth in a NCF Phase Business approved by County for such Phase pursuant to Section 4.05 below; and (iv) with respect to Pre-Development Phase D and Phase E for each subsequent NCF Phase, in a milestone schedule set forth in the NCF Phase Business approved by County for such Phase pursuant to Section 4.05 below.

(KKK) “Minimum Developer County Buildings” means County Buildings with aggregate County-approved Phase Budgets of at least the Budgeted Value of the Minimum Developer County Buildings (including requisite Infrastructure improvements and furniture, fixtures and equipment constructed concurrently, i.e., within the same Phase E with the applicable County Building(s)).

(LLL) “Modification” means Change Orders, Work Change Directives issued by County pursuant to Article IX hereof, and written amendments to this Agreement signed by both County and Developer.

(MMM) “NCF Phase” means any phase of design and construction of County Building(s) in which Developer is acting as developer and construction manager pursuant to this Agreement, including the Initial NCF Phase.

(NNN) “Notice to Proceed” means an express written authorization to Developer from County Lead to commence performance of the Phase described in the notice.

(OOO) “Offsite Costs”, in relation to any NCF Phase of construction of County Buildings, includes only the actual Direct Costs and Indirect Costs Developer incurs in connection with such NCF Phase for:

1. As approved by County, required infrastructure improvements (including the conditions of approval thereof), as a condition to the construction of such County Buildings not located within the portion of the Site on which such County Buildings will be constructed.

2. As approved by County, required traffic mitigations (including the conditions of approval thereof), as a condition to the construction of such County Buildings.

3. As approved by County, traffic mitigation “fair share” contributions required by other governmental authorities, if any (including the conditions of approval thereof), as a condition to the construction of such County Buildings.

4. Utility construction, expansion, replacement and/or relocation costs.

5. Development impact fees.
(6) Contingency (as approved by County and set forth in the applicable Construction Contract) for each of the costs enumerated in (1) through (5) above.

(PPP) “Other Consultant Agreement” means a written contract between Developer and an Other Consultant with regard to the provision of consultant services hereunder.

(QQQ) “Other Consultant” means a Developer Representative who is not a Design Professional, competitively selected (or otherwise previously approved by County pursuant to Section 2.06) and recommended by Developer to be qualified to perform the required services, duly licensed in the State of California, as applicable, and who is approved by County, with whom Developer enters into an Other Consultant Agreement. Other Consultants includes any consultants engaged by Other Consultants who are not Design Professionals in connection with performance of services in connection with the Project. The Other Consultants listed on Exhibit E attached hereto are hereby approved by County, provided that such listing shall be subject to review by County from time to time and revised if a conflict of interest with respect to such Other Consultant subsequently arises.

(RRR) “Permit List” means the schedule of permits, approvals, licenses and notices for each Phase. The Permit List shall identify the party responsible for each item, and shall be attached to each Phase Business Plan.

(SSS) “Phase” means, as the circumstances may require, each NCF Phase, Pre-Development Phase or Phase E.

(TTT) “Phase Budget” means the estimated total Cost of the Work for the applicable Phase set out in a particular Article below, including appropriate contingencies, where applicable and as needed. The Phase Budget for Initial NCF Phase Pre-Development Phase A and Initial NCF Pre-Development Phase B attached hereto as part of Exhibit C have been approved by County.

(UUU) “Phase E” means the construction phase with respect to each NCF Phase. Phase E with respect to the Initial NCF Phase is sometimes referred to herein as "Initial NCF Phase E".

(VVV) “PLL Policy” is defined in Section 4.03(F)(8).

(WWW) “PLL Policy-Covered Costs” is defined in Section 15.22(D)(1).

(XXX) “Pre-Development Phase” means, as the circumstances may require, each of Pre-Development Phase A, Pre-Development Phase B, Pre-Development Phase C and Pre-Development Phase D with respect to each NCF Phase.

(YYY) “Pre-Development Phase A” means the phase in which due diligence and other pre-development activities with respect to a proposed NCF Phase are conducted. Pre-Development Phase A with respect to the Initial NCF Phase is sometimes referred to herein as "Initial NCF Pre-Development Phase A".

(ZZZ) ”Pre-Development Phase A Fee” is defined in Section 8.02(C).
“Pre-Development Phase B” means the phase in which any supplemental Entitlements are necessary with respect to a proposed NCF Phase in addition to Entitlements obtained during the Initial Pre-Development Phase B. Pre-Development Phase B with respect to the Initial NCF Phase is sometimes referred to herein as “Initial NCF Pre-Development Phase B”.

"Pre-Development Phase B Fee” is defined in Section 8.03(C).

“Pre-Development Phase C” means the phase in which the schematic and development design and other related pre-development activities with respect to a proposed NCF Phase are conducted. Pre-Development Phase C with respect to the Initial NCF Phase is sometimes referred to herein as “Initial NCF Pre-Development Phase C”.

"Pre-Development Phase C Fee” is defined in Section 8.04.

“Pre-Development Phase D” means the phase in which construction documents are finalized and Construction Contract(s) stipulating a GMP are entered with respect to a proposed NCF Phase. Pre-Development Phase D with respect to the Initial NCF Phase is sometimes referred to herein as “Initial NCF Pre-Development Phase D”.

"Pre-Development Phase D Fee” is defined in Section 8.04.

“Pre-Development Phase Fee” means all or any portion, as applicable of the Pre-Development Phase A Fee, the Pre-Development Phase B Fee, Pre-Development Phase C Fee, and/or Pre-Development Phase D Fee with respect to any NCF Phase.

“Private Development Parcels” means the portions of the Site, if any, which are designated in the Master Plan to be disposed of, developed and used for private uses.

“Project” means the development, design and construction of County Buildings by Developer pursuant to this Agreement, including completion thereof and all Project Improvements associated therewith and delivery thereof to County in move-in condition, including completion and provision of all design, infrastructure, demolition, abatement, construction, labor, materials and services for such Project Improvements, including all labor, materials, infrastructure, utilities, equipment and services provided or to be provided by Developer to fulfill Developer’s obligations under this Agreement with respect to such County Buildings.

“Project Development” means the completed construction of the Project Improvements by Developer pursuant to this Agreement and in accordance with the requirements of this Agreement, including the Entitlements (including all conditions of approval thereof) and Applicable Law, from beginning to completion, inclusive of all necessary and requisite steps for final development, implementation and construction.

“Project Improvements” means County Building(s) and/or related Infrastructure to be developed and constructed by Developer under this Agreement, including all demolition, hazardous materials remediation and/or abatement, on-site
improvements, Off-Site Improvements, including all grading and other on-site work that is necessary to prepare the applicable portions of the Site for development of such Project Improvements.

(LLLL) “Project Documents” or “Project Documentation” means this Agreement, and, with respect to each NCF Phase, the Phase Construction Documents for such NCF Phase, including plans, specifications, estimates, programs, reports, models, and all other materials (in paper and electronic form), including all drafts and preliminary versions, prepared by Developer or any and all of Design Professionals or Developer’s Other Consultants, including Contractors, or on their behalf under this Agreement relating to or resulting from the Work and the Construction Contract(s), each as approved in writing by County.

(MMMM) “Project Site” means, as applicable, that portion of the Site on which an NCF Phase of Project Improvements is to be constructed by Developer pursuant to this Agreement and/or collectively all portions of the Site where NCF Phases of Project Improvements are constructed by Developer pursuant to this Agreement.

(NNNN) “Project Team” means the persons and entities that will prepare and process the Project, inclusive of County Lead, the Key People and other necessary County Contractors and/or Developer Representatives, as determined by County, in consultation with Developer.

(OOOO) “Release” means any contamination, exposure, deaths, injuries, illnesses, spills, releases, discharges, disposals, emissions, migrations from or relating to Hazardous Materials on, under or about any portion of any Project Site.

(PPPP) “Remediation” means, with respect to any Hazardous Materials located in, on, under or around any Project Site, the investigation, remediation, clean up, removal, decontamination, restoration, response to, and resolution thereof, (including, without limitation, preparation of any feasibility studies or reports and the performance of any and all closures), in accordance with all Environmental Laws, all other Applicable Laws, all Project Documentation relating to such Project Site, to the extent required to complete the Project Improvements on such Project Site.

(QQQQ) “Richey Field” means that portion of the Site legally described on Exhibit K, which parcel is part of the former Private George L. Richey U.S. Army Reserve Site, and the proposed location of the Initial NCF Phase.

(RRRR) “Savings” is defined in Section 15.22(B).

(SSSS) “Site” is that portion of that certain real property owned by County and more specifically described on Exhibit A for which a Master Plan will be developed.

(TTTT) “Strategic Facilities Process Phase” means the due diligence, planning and other pre-development activity conducted by Developer prior to the Effective Date of this Agreement.
(UUUU)  “Subcontractors” means the subcontractors, material suppliers and other vendors of any tier engaged by Contractor or otherwise to perform services in connection with the Work. Subcontractors are Developer Representatives.

(VVVV)  "Subsequent NCF Phase Due Diligence Summary” is defined in Section 4.01(B)(1) below.

(WWWW)  “Surety” means the issuer of any payment or performance bond delivered to County pursuant to Section 13.03 below.

(XXXX)  “Third Party Costs” means out-of-pocket costs for third-party consultants and vendors retained by Developer with respect to the Project for a particular Phase.

(YYYY)  “Work” means work completed in accordance with the terms and conditions of this Agreement, including but not limited to any and all planning, design, demolition, abatement, management, consultancy, construction, labor, goods, materials and other services contemplated herein.

ARTICLE II
RIGHT TO DEVELOP MINIMUM DEVELOPER COUNTY BUILDINGS AND RESPONSIBILITIES OF DEVELOPER

2.01 Right to Develop the Minimum Developer County Buildings. Subject to the terms and provisions of this Agreement, Developer shall have the right during the Initial Term to design and construct (either through development of new buildings or renovation of existing buildings) the Minimum Developer County Buildings. The design, development and construction of County Buildings by Developer over and above the Minimum Developer County Buildings shall be subject to County’s election in its sole and absolute determination.

2.02 Deposit.

(A)   Developer has or shall deposit with County certain nonrefundable payments to defray County’s costs incurred in connection with this Agreement, as follows:

   (1)   Initial Deposit Payment. Concurrently with its execution and delivery of the PFA, Developer deposited the sum of Ten Thousand Dollars ($10,000.00) with County (the “Initial Deposit”); and

   (2)   Second Deposit. Within three (3) Business Days after the execution and delivery of this Agreement by County, Developer will deposit an additional nonrefundable sum of Ninety Thousand Dollars ($90,000.00) with County (the “Second Deposit” and, together with the Initial Deposit, the “Deposit”).

(B)   County shall retain the Deposit for its use to defray County’s costs in documenting this Agreement and the transactions described herein. The Deposit shall be nonrefundable for any reason other than County’s termination of this Agreement without cause.
2.03 General Responsibilities of Developer. Developer shall provide development services hereunder to County, participate in and be an active member of the development team, contract with all needed Design Professionals and Other Consultants for the Master Plan (other than any consultants retained for the preparation of any CEQA document, with whom County will contract directly) and all other Contractors needed for Project Development and performance of Developer obligations under this Agreement. Developer acknowledges that County is relying on Developer to act in compliance with this Agreement and all Applicable Laws. The requirements of this Section and this Agreement shall also be specifically imposed upon and apply to each Design Professional (and shall be incorporated into each Design Professional Agreement) and each Contractor (and shall be incorporated into each Construction Contract) hired, used or contracted by Developer for purposes of fulfilling Developer’s obligations and responsibilities under this Agreement. Developer shall perform all Work, and coordinate Work of all Design Professionals, Developer’s Other Consultants, and all Contractors, in accordance with the terms of this Agreement and the applicable Business Plans, taking all reasonable and necessary steps and precautions to cause the Work to be performed to County’s reasonable satisfaction. Developer shall be responsible for the professional quality, technical assurance, timely completion and coordination of all Project Documentation and other Work furnished by Developer, each Design Professional, Other Consultant, and each Contractor under this Agreement. Developer shall perform, and shall require each Design Professional, Other Consultant, and each Contractor to perform, all work diligently, carefully, and in a good and workman-like manner; to furnish all labor, supervision, machinery, equipment, materials, and supplies necessary therefor, and to obtain and maintain all permits and licenses required of it and/or them by Governmental Authorities.

2.04 Conditions Affecting Developer’s Work. Other than as expressly set forth herein, Developer shall be responsible for taking all steps reasonably necessary to ascertain the nature and location of the Work to be performed under this Agreement and to investigate the general conditions that can affect the Work or the cost thereof. Other than as expressly set forth herein, any failure by Developer to do so will not relieve Developer from responsibility for successfully performing the Work without additional cost to County above the GMP for such Work. County assumes no responsibility for any understanding nor makes representations concerning the nature, location(s) or general conditions of the Site made by any of County Contractors or third parties prior to the execution of this Agreement.

2.05 Supervision. Developer will furnish, use and apply Developer’s professional skills, efforts, supervision and judgment in overseeing the Project Team in accordance with the terms of this Agreement. Developer will commit the resources and experienced personnel required to achieve County’s goals and objectives with respect to the Development as set forth in each applicable Business Plan, including, without limitation, any cooperation and coordination with County in connection with County’s efforts to obtain Final Approval. Developer shall ensure that the Key People are actively and substantially involved in the performance of this Agreement as set forth in each applicable Business Plan, and that Developer Lead and appropriate personnel are assigned to work on the same as needed and on call as set forth in each applicable Business Plan for the duration of this Agreement.
2.06 **Design Professionals Generally.**

(A) Developer shall retain, supervise and oversee all Design Professionals and Other Consultants needed for the completion of Developer roles and responsibilities under this Agreement, and shall do so pursuant to Design Professional or Other Consultant Agreements. Each Design Professional and each Other Consultant will be subject to County's prior written approval, will not be unreasonably withheld; provided that (i) County has heretofore approved each Design Professional or Other Consultant listed on Exhibit E attached hereto and (ii) County shall be deemed to have approved each Design Professional and each Other Consultant identified in a Pre-Development Phase Business Plan approved by County; provided that such listing shall be subject to review by County from time to time and revised if a conflict of interest with respect to such Design Professional or Other Consultant subsequently arises.

(B) Developer is solely responsible and liable for ensuring compliance with all applicable prevailing wage laws in the retention and contracting with Design Professionals and Developer’s Other Consultants, including, without limitation, surveyors. County may at any time, from time to time, without obligation to do so, audit Developer to verify whether Developer is in compliance with prevailing wage laws. Developer shall cooperate with all such audits, including making available and providing copies, during the period 9:00 a.m. to 5:00 p.m., Monday through Friday, any and all records requested by County to verify compliance promptly upon request, but not later than seventy-two hours after such request. Developer acknowledges and agrees that work performed under this Agreement may be considered a public work within the meaning of California Labor Code Section 1720 and that the requirements of Section 1771, *et seq.*, apply to such public work. Developer has included (and will include) consideration for this obligation in calculating compensation under this Agreement, if such prevailing wage requirements are applicable. Pursuant to the provisions of Section 1773 of the California Labor Code, if applicable, Developer shall comply with the general prevailing rates of per diem wages and the general prevailing rates for holiday and overtime wages in this locality for each craft, classification, or type of worker needed to perform Work under this Agreement. The rates are available from the Director of the Department of Industrial Relations at the following website: http://www.dir.ca.gov/dls/dlsr/DPreWageDetermination.htm. If applicable, Developer shall post a copy of such wage rates at the job site and shall pay the adopted prevailing wage rates. If applicable, Developer shall comply with the provisions of Sections 1775 and 1813 of the Labor Code.

(C) To the extent possible, the rates charged under each Design Professional Agreement shall be equal to or less than the lesser of the most favorable rates (i) Developer pays the Design Professionals and Developer’s Other Consultants for similar work undertaken under similar circumstances on Developer’s other projects in Santa Clara County, California, or (ii) the Design Professional or Other Consultant informs Developer, after reasonable inquiry by Developer, it charges to others for similar work in Santa Clara County, California, without any mark up by Developer. The compensation payable under the Design Professional Agreements or the Developer’s Other Consultant Agreements for any Phase shall not, in the aggregate exceed the budgeted amounts set forth in the Business Plan and Budget for such Phase for all Design Professional services under such Design Professional Agreements, and Developer may increase individual Design Professional Agreements or Developer’s Other Consultant Agreement amounts if the total amount set forth in the Business Plan and Budget for such Phase will not be
exceeded. Developer shall be responsible for reviewing Design Professional and Developer’s Other Consultant’s invoices to confirm that invoices are appropriate, reasonable, and accurate and in conformance with prevailing wage laws and the applicable Phase Budget for each Design Professional or Other Consultant’s Work.

(D) Each Design Professional Agreement and Developer’s Other Consultant Agreement shall be a private contract between Developer and the applicable Design Professional or Other Consultant, and County shall not be a party to such Design Professional Agreement and Other Consultant Agreement. Notwithstanding the foregoing, County shall be an express third party beneficiary to such Design Professional Agreement and Other Consultant Agreement and each such Design Professional Agreement and Other Consultant Agreement shall contain the provisions required of Design Professionals Agreements and Other Consultant Agreements under this Agreement, including a third party beneficiary provision.

2.07 Staffing and Administration.

(A) Developer Staffing. Developer and County have agreed that participation by certain individuals on Developer’s team is particularly important to the success of the Project: Richard G. Newman, Jr., President, as Developer Executive, and Alan Chamorro, Senior Vice President; as Developer Lead. Those individuals are designated as Key People. Developer has committed to providing the Key People for the duration of Work so long as they remain in the employment of Developer.

(1) Developer shall provide County with a minimum thirty (30) Days prior written notice of any changes in Key People, provided that Developer receives such notice. If Developer does not receive thirty (30) Days’ notice of a change in Key People, Developer shall notify County immediately when it receives notice of such change. County shall have the right to review the qualifications of any person proposed to replace any Key People.

(2) If County is not satisfied with the performance of any one or more of the Key People, in its reasonable discretion, it may advise Developer, and Developer shall replace such personnel with other persons qualified to perform the duties required for the position so filled. The County Lead is authorized to exercise the foregoing rights on behalf of County.

(B) NCF Phase Staffing and Administration.

(1) With respect to each NCF Phase, following County’s issuance of a Notice to Proceed for the applicable NCF Phase Developer shall provide staffing for the Project in accordance with the staffing plan attached to the approved Business Plan for such Phase. The staffing plan for Initial NCF Phase Pre-Development Phase A and Initial NCF Phase Pre-Development Phase B is set forth in Exhibit J attached hereto. Developer will not assign any person to the Work to whom County has delivered to Developer written notice of its reasonable objection.

(2) Developer shall procure and manage all design and construction services necessary for the completion of the applicable NCF Phase. All design services shall be performed by Design Professionals licensed and qualified to perform such work in the State of California, about whom County has been notified in writing and to whom County has not
reasonably objected by written notice. Construction services will be performed by qualified Contractors duly licensed by the State of California, Contractors State License Board, to perform the Work assigned to them, and to whom County has not reasonably objected by written notice.

(3) Developer shall comply with all Applicable Laws, in the selection of Design Professionals, and Other Consultants and Contractors. To the extent possible, contracts with Contractors shall be entered into on a Guaranteed Maximum Price basis.

(4) Developer shall require all Design Professionals, Other Consultant and Contractors to comply with Applicable Laws in the performance of their Work hereunder, and shall require each Design Professional, Other Consultant, and Contractor to certify its own compliance therewith with each payment request.

2.08 Decision Making. Developer has valuable and substantial expertise with entitling and developing real property in the City and County. As such, County is materially relying on Developer to provide advice regarding the Development, including but not limited to the Project, the Master Plan, and the other issues addressed in this Agreement. Nevertheless, final decision making authority as to all aspects of the Project Development, including but not limited to the Project Improvements, the Master Plan, and CEQA shall remain with County.

2.09 Submittals. Developer shall not submit any written applications for County land use approvals to County, City land use approvals to the City, or for approval of any other aspect of the Site or the Project Development to any other Governmental Authority without obtaining County’s prior consent for such submittal from County Lead, which consent may be withheld in County’s sole and absolute discretion.

2.10 Communications With Third Parties. Developer shall establish a calendaring system accessible on-line to County Lead and shall schedule all meetings (including, without limitation, telephone and virtual meetings) through that system. County shall have the right and opportunity to be present at all scheduled meetings (including, without limitation, telephone and virtual meetings) and shall be copied on all material correspondence (including e-mail) concerning the Site, the Development, the Entitlements or the Project, other than as set forth below (collectively, “Communications”). Developer shall provide prior notice of at least two (2) Business Days through the calendaring system of scheduled meetings concerning the Project, the Site or the Entitlements. In the event that the Project, Property or Entitlements are discussed at a meeting that was scheduled for another purpose, Developer will refrain from making decisions or commitments at that meeting, and, following its conclusion, shall promptly notify County about, and provide a summary of, discussions that occurred during such meeting. Similarly, if County authorizes Developer to engage in a Communication without County, Developer shall provide County with a copy of all such written Communications (including any responses to the same) and a summary of events for all other forms of Communications. All Communications may be made through email or by on-line posting in a manner that is accessible to County Lead. Notwithstanding the foregoing, Developer communications among its own personnel, the Design Professionals, Other Consultants, Contractors and Developer’s own counsel shall not be deemed to be Communications, nor shall Developer be required to provide prior notice or follow-up summaries for such communications.
2.11 **Media Contact; News and Information Release.** Developer agrees that, absent the written consent of County Lead (which may be provided as part of the Business Plan process through an approved marketing plan), neither Developer nor Design Professionals or Developer’s Other Consultants shall contact the media or respond, either verbally in writing or “off the record,” to any media source or outlet. Any media inquiries must be referred to County Lead. Developer agrees that neither it nor the Design Professionals or Developer’s Other Consultants will issue any news releases in connection with either the award of this Agreement or any subsequent amendment of or effort under this Agreement without first obtaining review and written approval of said news releases from County Lead. The provisions of this Section shall be specifically imposed upon all Design Professionals and Other Consultants.

2.12 **Project Meetings.**

(A) Developer shall establish a schedule (acceptable to County) for regular project status meetings (“**Status Meetings**”) as appropriate in light of the work being performed by Developer from time to time, or as requested by County Lead, with County Lead, the appropriate Design Professionals, Developer’s Other Consultants, and such other personnel whose attendance Developer or County Lead may deem appropriate, to discuss the following matters:

1. The progress of the Work and the design and construction of the Project Improvements compared to the then-current approved Phase Schedule;

2. Upcoming work that will be performed in the next thirty (30) Days;

3. Milestones which have not been met, or delays based on the then-current approved Phase Schedule, together with the reason for such delay and the best estimate when such Milestone is to be accomplished;

4. Specific Milestones scheduled for completion before the next scheduled Status Meeting;

5. Status of long lead-time items and materials;

6. Any material change in any aspect of the Project;

7. Any problems being encountered in the Work or the Project and any contingency plans being used or proposed to be used;

8. The status of any problems previously reported;

9. Any other information pertinent to the Work or the Project that has come to the attention of Developer, Contractors, Design Professionals, Developer’s Other Consultants, and/or County since the previous Status Meeting.

(B) Unless County Lead directs Developer otherwise, Developer shall prepare and distribute no later than ten (10) Business Days after each Status Meeting a written record of all material issues addressed at such Status Meeting, the date each issue arose, the party designated as responsible for taking action on each issue, the date each issue was resolved, and the agreed
resolution of each issue. Developer shall incorporate comments received from County Lead or others into these records.


(A) Included within Developer’s responsibilities hereunder are the provision of services and deliverables, without limitation, as specified here:

(1) Investigation and analysis of the Site;

(2) Scheduling and coordinating with County Lead;

(3) Cost control and scheduling, quality control management, safety, constructability, startup and commissioning, construction coordination, field engineering, contract management, materials management, and labor relations related to the Work to reasonably minimize disruption to ongoing County operations and services;

(4) Processing and obtaining Permits required for each Phase;

(5) INTENTIONALLY OMITTED;

(6) Identification, analysis and compliance with Applicable Laws;

(7) Preparation of, and compliance with, the terms of the Business Plan(s);

(8) Risk management, including cost control and insurance analysis (where applicable) for the Work;

(9) Integration of, and monitoring and facilitating design and construction of, each NCF Phase, including applicable Infrastructure, in balance with existing County buildings, services and facilities at the Site;

(10) Selection of, negotiation of contracts with, and coordination of the efforts (including scheduling) of, all Design Professionals, Contractors and other Developer Representatives, through the design, development, construction and LEED certification of each NCF Phase;

(11) Management of the Design Professionals, Contractors and other Developer Representatives (and through such contractors, and Subcontractors), monitoring of the entitlement, design and construction processes for the purpose of causing the planning, design, construction and completion of each phase of the Work to be conducted in a good, workmanlike, professional and expeditious manner, including, without limitation, ensuring that all punch list items are timely completed;

(12) Maintenance of a secure online data base of books and records, information, and reports of architects, appraisers, engineers, accountants and other professionals in any fashion relating to the Work, all of which items shall at all times be open to the inspection of County upon at least twenty-four (24) hours’ advance notice;
(13) Maintenance at Developer’s offices of books and records, information, and reports of architects, appraisers, engineers, accountants, or other professionals in any fashion relating to the Project and all other Work, all of which items shall at all times during normal business hours be open to the inspection of County or County’s authorized representatives, upon at least twenty-four (24) hours’ advance notice, and as otherwise allowed by Applicable Law;

(14) Enforcing compliance (among the Developer Representatives) with the Phase Schedules and Budgets;

(15) Keep the applicable Project Site while in Developer's possession and surrounding areas free from accumulation of waste materials and rubbish at all times;

(16) Coordinate parking facilities and activities affected by Developer's construction activities with County’s parking management;

(17) Manage the preparation, implementation, and enforcement of safety plans and procedures, including all appropriate measures to maintain safe working conditions on the applicable Project Site while in Developer's possession for the public, County, Developer, Developer Representatives and their workers, and construction personnel, traffic, visitors, pedestrians, and others; coordinate safety plans and procedures on the applicable Project Site while in Developer's possession with City and County public safety and emergency agencies, including the Santa Clara County Fire Department, and City equivalent (if applicable);

(18) Timely preparing and filing, following approval by County, of any Project Documents required for Developer or the Developer Representatives to comply with its/their/any obligations hereunder;

(19) Obtain and manage on- and/or off-site parking facilities to accommodate parking for Developer, its employees, and all Developer Representatives, Design Professionals and Contractors;

(20) Create and maintain a public information program, including a file transfer protocol (FTP) website, to advise the public of the status of the Project, changes to parking and traffic, safety and other Project issues;

(21) Implement programs to achieve compliance with the County policies described in Exhibit F;

(22) Contract for and manage the design, construction, commissioning and certification of each NCF Phase of the Project assigned to Developer to achieve the Silver level of certification of such NCF Phase pursuant to the U.S. Green Building Council’s LEED standards. Developer shall comply with and incorporate into all Work all the guidelines, policies, practices and requirements found in County’s Integrated Pesticide Management Ordinance B28, County Board of Supervisors green cleaning standards, and other County sustainability practices found in Sections 7.13, 8.3 and 8.4 of the County Board of Supervisors Policy Manual (https://www.sccgov.org/sits/bos/Legislation/BOS-Policy-Manual/Pages/default.aspx) and other green building and sustainability practices and ordinance provisions.
(23) Other services required by this Agreement, including, without limitation the proper handling, storage and Remediation (including, without limitation disposal) of Hazardous Materials pursuant to Article XIV below.

(B) Subject to County compliance with its payment obligations hereunder, Developer shall be responsible for the performance and payment of all Design Professionals, Contractors and other Developer Representatives, including all employees, managers, consultants and independent contractors retained by Developer. Developer shall be solely responsible for all compensation, care and benefits payable to its employees, and all benefits payable on behalf of such employees, including social security taxes. In no event shall any Design Professionals, Contractors or other Developer Representatives have the right to participate in any employee benefits of County.

(C) Developer shall furnish Project management and quality control/quality assurance services and contract with Developer Representatives for the design and construction of the Work so that the Work meets all requirements of the Master Plan, this Agreement (including all conditions of approval thereof), the applicable Project Documents and all Applicable Laws.

2.14 **Project Labor Agreements.** Prior to bidding out any Construction Contracts for an NCF Phase, Developer shall have entered into a project labor agreement with one or more labor organizations covering the Work to be performed in such NCF Phase (each a “Project Labor Agreement”). A single or multiple Project Labor Agreements shall cover construction of all Project Improvements. Each Project Labor Agreement will, at a minimum, comply with the Board of Supervisors Policy Manual Section 5.7.5, and all Applicable Laws, including, without limitation, the California Public Contract Code and the Uniform Public Construction Cost Accounting Act. All Construction Contracts entered into by Developer hereunder will be made expressly subject to the applicable Project Labor Agreement(s).

2.15 **Parking.** Developer shall acquire and manage appropriate parking facilities for construction workers during the Work. Such parking facilities shall be subject to County’s reasonable approval to the extent not provided for under the applicable NCF Phase Business Plan.

**ARTICLE III**

**GENERAL RESPONSIBILITIES OF COUNTY**

3.01 **County Lead.** County will designate one or more County Leads, who may be replaced from time to time at County’s sole option.

3.02 **Validation Action.**

   (A) To the extent necessary or desirable for the financing of the Project or this Agreement, the County may initiate procedures to validate this Agreement pursuant to Code of Civil Procedure Section §860 et seq..

   (B) If County files a validation action and this Agreement is invalidated by such judicial action, County shall not be obligated to issue a Notice to Proceed and may terminate this Agreement for convenience as provided in Section 12.04.
3.03 Financing.

(A) County shall pay for Third Party Cost Reimbursement, Pre-Development Phase A Fee, Pre-Development Phase B Fee and the Cost of the Work (including, without limitation, Construction Management Fee and Development Management Fee) performed by Developer under the terms of this Agreement. Any decisions on financing for this purpose will be at the sole discretion of County. Developer understands that the County customarily finances County buildings through public offerings of lease revenue bonds by the Santa Clara County Financing Authority. County reserves the right to proceed customarily or through any other means.

(B) Where allowed by Applicable Law, including, without limitation, conflict of interest provisions, and subject to County advance written approval, Developer’s scope of work under this Agreement may include financing, or consulting, advisory or placement services with respect to financing of private development on any of the revenue-generating parcels identified by the County within the 55-acre Civic Center Campus. In the event that County determines in its sole and absolute discretion to authorize Developer to provide such financing of private development on any of the revenue-generating parcels, such financing will be added to Developer’s scope of work hereunder by appropriate amendment.

3.04 Permits, Approvals, Licenses and Notices.

(A) County shall provide reasonable assistance and cooperation to Developer with respect to those items identified in the Permit List attached to each NCF Phase Business Plan as being Developer’s responsibility.

(B) County shall comply with all Applicable Laws relating to its responsibilities on the Project.

3.05 Furnishing of Services and Information.

(A) County has provided the surveys, reports and other documents pertaining to the Project listed in Exhibit D to Developer, and Developer acknowledges receipt of those materials.

(B) As needed, County will furnish, at its own cost and solely for County’s benefit, all legal, accounting and insurance counseling services as may be deemed necessary by County for the Project and Work.

(C) County shall diligently perform its duties under this Agreement, including furnishing required information and shall diligently render decisions pertaining thereto, including review and decisions on any submissions of Developer, in accordance with the applicable Phase Schedule, as adjusted from time to time, and County review periods set forth therein.

(D) Those services and information required in this Article III that are within County’s control shall be furnished at County’s expense.
ARTICLE IV
PRE-DEVELOPMENT PHASES AND CONSTRUCTION PHASES; INDIVIDUAL NCF PHASE PLANS

4.01 Pre-Development Phase A - Due Diligence and Master Planning.

(A) Initial NCF Pre-Development Phase A. The activities and schedule to be performed by Developer during Initial NCF Phase Pre-Development Phase A, in addition to the requirements set out below and elsewhere herein, are outlined in the Initial NCF Phase Pre-Development Business Plan (the “Initial NCF Phase Pre-Development Phase Business Plan”) attached hereto as Exhibit C. County’s execution of this Agreement shall constitute Notice to Proceed with Initial NCF Phase Pre-Development Phase A.

(1) Due Diligence. Following the Effective Date, for the period set forth in the Pre-Development Phase Business Plan with respect to Initial NCF Phase Pre-Development Phase A, Developer shall investigate the Site to determine its suitability for development in accordance with this Agreement. Such investigation will include, but is not limited to, (a) civil surveying, (b) title review; (c) soils investigation; (d) Hazardous Materials investigation; and (e) review of information regarding County needs and programming intended for inclusion in the Development, including the reports and materials set forth on Exhibit D attached hereto. By the deadline set forth in the Initial NCF Phase Pre-Development Phase Business Plan, Developer shall submit to County copies of all third party reports received in connection with such due diligence activities, each of which shall expressly provide for the County's right to rely thereon, together with a written report (the “Initial NCF Phase Due Diligence Summary”) (a) summarizing the results of such due diligence investigations, including any circumstances or conditions at the Site Developer discovers or identifies during its investigation that it anticipates will have a material effect on the Cost of the Work or NCF Phase Schedule for the Initial NCF Phase; (b) describing the Known Environmental Condition for the Site, and (c) identifying any subsurface conditions and physical conditions of the Site (other than Hazardous Materials conditions) which cannot be reasonably investigated because of existing improvements and/or operations on the Site (the “Excluded Areas”).

(2) Preparation of Master Plan. By the deadline set forth in the Initial NCF Phase Pre-Development Phase Business Plan, Developer shall submit to County a site plan prepared by Gensler pursuant to Exhibit H attached hereto, in sufficient detail and specificity to be used in the preparation of a "Project-level" draft CEQA compliance document with respect to the Initial NCF Phase and a "programmatic-level" draft CEQA compliance document with respect to the balance of the Site (a “Preliminary Master Plan”).

(3) Budget for Due Diligence and Preparation of Master Plan. The Initial NCF Phase Pre-Development Phase Business Plan contains (a) a list of proposed Design Professionals for due diligence and preparation of the Master Plan, including Gensler, to perform the services described on Exhibit H attached hereto; (b) the proposed scope of work and estimated budget for each other Design Professional; (c) a proposed Pre-Development Phase Schedule (the “Pre-Development Phase Schedule”); and (d) a proposed Pre-Development Phase Budget for the completion of due diligence and preparation of the Master Plan, which budget (i) covers the period extending until the completion of Initial NCF Pre-
Development Phase and (ii) includes a Developer Contingency (the “Pre-Development Phase Budget”). The Pre-Development Phase Business Plan and Pre-Development Phase Budget were mutually prepared by Developer and County. Developer will be responsible for any cost overruns for the completion of the activities set forth in the Pre-Development Phase Business Plan; subject to increase for County-approved additional services.

(B) Subsequent NCF Pre-Development Phase A. The activities and schedule to be performed by Developer during subsequent NCF Phase Pre-Development Phase A, in addition to the requirements set out below and elsewhere herein, will be outlined in the NCF Phase Pre-Development Business Plan delivered pursuant to Section 4.05 below.

(1) Due Diligence. For the period set forth in the Pre-Development Phase Business Plan with respect to any subsequent NCF Phase, Developer shall investigate the proposed Project Site for such NCF Phase to determine its suitability for development in accordance with this Agreement (to the extent not investigated in the Initial NCF Phase Pre-Development Phase A). By the deadline set forth in the applicable NCF Phase Pre-Development Phase Business Plan, Developer shall submit to County copies of all third party reports received in connection with such due diligence activities, each of which shall expressly provide for the County's right to rely thereon, together with a written report (the “Subsequent NCF Phase Due Diligence Summary”) (a) summarizing the results of such due diligence investigations, including any circumstances or conditions at the Project Site Developer discovers or identifies during its investigation that it anticipates will have a material effect on the Cost of the Work or NCF Phase Schedule for such NCF Phase; (b) summarizing the results of the Initial NCF Phase Due Diligence Summary applicable to such Project Site, and (c) describing the Known Environmental Condition for such Project Site, and (d) identifying any Excluded Areas of such Project Site.

(2) Preparation of Conceptual Site Plan. By the deadline set forth in the Initial NCF Phase Pre-Development Phase Business Plan, Developer shall submit to County a site plan for the proposed Project Site for such NCF Phase prepared by Gensler in sufficient detail and specificity to be used in the preparation of a "Project-level" CEQA compliance document (an “NCF Preliminary Conceptual Site Plan”).

(3) Budget for Due Diligence and NCF Phase Conceptual Site Plan. The NCF Phase Pre-Development Phase Business Plan will contain (a) a list of proposed Design Professionals and Developer’s Other Consultants for due diligence and preparation of the NCF Preliminary Conceptual Site Plan, including Gensler; (b) the proposed scope of work and estimated budget for each other Design Professional; (c) a proposed Pre-Development Phase Schedule; and (d) a proposed Pre-Development Phase Budget for the completion of due diligence and preparation of the NCF Preliminary Conceptual Site Plan, which budget (i) covers the period extending until the completion of the NCF Phase Pre-Development Phase and (ii) includes a Developer Contingency. The Pre-Development Phase Business Plan and Pre-Development Phase Budget shall be mutually prepared by Developer and County. Developer will be responsible for any cost overruns for the completion of the activities set forth in the Pre-Development Phase Business Plan; subject to increase for County-approved additional services.

4.02 Pre-Development Phase B - Entitlement.
(A) Initial NCF Pre-Development Phase B. The activities and schedule to be performed by Developer during each subsequent NCF Phase Pre-Development Phase B, in addition to the requirements set out below and elsewhere herein, are outlined in the Initial NCF Phase Pre-Development Business Plan attached hereto as Exhibit C. It is anticipated, as set forth in the Initial NCF Phase Pre-Development Business Plan, that Initial NCF Phase Pre-Development Phase B will commence prior to the completion of Initial NCF Phase Pre-Development Phase A.

(B) Subsequent NCF Pre-Development Phase B. The activities and schedule to be performed by Developer during each subsequent NCF Phase Pre-Development Phase B, in addition to the requirements set out below and elsewhere herein, will be outlined in the NCF Phase Pre-Development Business Plan delivered pursuant to Section 4.05 below. Such subsequent NCF Phase Pre-Development Business Plan may provide that the NCF Phase Pre-Development Phase B may commence prior to or following completion of the NCF Phase Pre-Development Phase A.

4.03 Pre-Development Phase C - Schematic Design Development.

(A) Initial NCF Pre-Development Phase C. The activities and schedule to be performed by Developer during Initial NCF Phase Pre-Development Phase C, in addition to the requirements set out below and elsewhere herein, are outlined in the Initial NCF Phase Pre-Development Business Plan. Within the time set forth in the Initial NCF Phase Pre-Development Business Plan, Developer will submit to County a proposed Project Document budget for such NCF Phase Pre-Development Phase C, setting forth a description, Pre-Development Phase C Fee, estimated Cost of the Work for the Initial NCF Phase, and an updated schedule with proposed timing for the Project Team work to prepare preliminary design and engineering and conceptual plans for the such NCF Phase, including necessary Infrastructure, in accordance with the Master Plan and anticipated Entitlements in a revised Pre-Development Phase Budget. Such proposed refined Project Document budget for Initial NCF Phase Pre-Development Phase C shall be submitted and reviewed as a NCF Business Plan Update in accordance with the procedures in Section 4.05 below. Such NCF Business Plan Update may provide that the NCF Phase Pre-Development Phase C commence prior to or following completion of the NCF Phase Pre-Development Phase A. Developer shall proceed with Initial NCF Phase Pre-Development Phase C following its receipt of a Notice to Proceed under Section 4.06 below.

(B) Subsequent NCF Pre-Development Phase C. The activities and schedule to be performed by Developer during each subsequent NCF Phase Pre-Development Phase C, in addition to the requirements set out below and elsewhere herein, will be outlined in the NCF Phase Pre-Development Business Plan for such NCF Phase delivered pursuant to Section 4.05 below. Within the time set forth in such NCF Phase Pre-Development Business Plan, Developer will submit to County a proposed Project Document budget for such NCF Phase Pre-Development Phase C, setting forth a description, Pre-Development Phase C Fee, and, estimated Cost of the Work, Third Party Cost Reimbursement, Development Management Fee, and Construction Management Fee for such NCF Phase and an updated schedule proposed timing for the Project Team work to prepare preliminary design and engineering and conceptual plans for such NCF Phase, including necessary Infrastructure, in accordance with the Master Plan and
Entitlements in a Pre-Development Phase Budget. Such subsequent NCF Phase Pre-Development Business Plan may provide that the NCF Phase Pre-Development Phase C may commence prior to or following completion of the NCF Phase Pre-Development Phase B. Such proposed refined Project Document budget for such NCF Phase Pre-Development Phase C shall be submitted and reviewed as an NCF Business Plan in accordance with the procedures in Section 4.05 below. Developer shall proceed with such NCF Phase Pre-Development Phase C following its receipt of a Notice to Proceed under Section 4.06 below.

(C) Design and Estimating.

(1) Developer shall provide architectural and engineering design and estimating services as set forth herein in accordance with each NCF Phase Schedule.

(2) The standard of care for all architectural and engineering services performed under this Agreement shall be the highest standard of care and skill ordinarily used by members of the architectural and engineering professions with expertise in the design and construction of public facilities, practicing under similar conditions in Santa Clara County and at the same time as the services performed hereunder.

(3) Developer shall prepare and submit to County project cost estimates for the Cost of the Work for each applicable Phase in order to allow for evaluation, financing and budgeting confirmation of the Phase Budget, which estimates shall take into account the relevant items raised by the applicable Due Diligence Summary. Such cost estimates shall be updated as required to account for material changes in design in order to confirm that the Work can be completed within the Phase Budget. In the event that any such cost estimate exceeds the previous estimate or the Phase Budget, Developer shall make appropriate recommendations to County for reducing the Cost of the Work.

(4) During the course of preparing the construction estimates Developer shall prepare and submit to County written Value Engineering Proposals (each, a “VEP”) for alternative systems, means, methods, finishes, equipment and the like that satisfy the general design criteria of the Work but which result in savings of time or money in constructing or operating and maintaining the Work. Each VEP shall describe the proposed change, identify all aspects of the Work directly or indirectly affected by the change, specify the cost or time savings to be achieved if the VEP is accepted, and detail any anticipated effect on the service life, economy of operation, ease of maintenance, appearance, design or safety standards of the completed Work. In addition to VEPs submitted during design phase, Developer shall solicit and submit VEPs developed during bidding and construction of such NCF Phase.

(5) As the design documents are being prepared, Developer will keep County advised of the effects of any County-proposed changes on the Phase Schedule and/or the Phase Budget. Developer shall not incorporate any proposed changes into the Project Documents unless and until it receives written direction to do so from County.

(6) Developer shall provide County with reproducible electronic copies of all design and other Project Documents prepared in connection with the design and construction of the Work in such Phase.
(D) Schematic Design.

(1) Developer shall cause to be prepared and furnished to County for review schematic design documents consistent with the Basis of Design and based upon County’s requirements for the Work in such Phase. These Project Documents may be used by County for determining whether the proposed design of the Work in such Phase is acceptable.

(2) Developer shall furnish to County for review a detailed proposed revised Phase Budget based on the schematic design documents prepared on a mutually agreeable basis. In the event that any such cost estimate exceeds the previous estimate or the Phase Budget, Developer shall make appropriate recommendations to County for reducing the Cost of the Work.

(3) County shall review and provide written comments to Developer within thirty (30) Days after receipt of a complete package of schematic design documents. If requested by County, Developer, its Design Professionals, and its Other Consultants will meet with representatives of County and/or County to discuss the schematic design documents.

(E) Design Development.

(1) Upon County’s written approval of a schematic design and written authorization from County, Developer shall proceed with the preparation of development design incorporating all of County’s comments on the schematic design documents to County’s satisfaction, and shall cause to be prepared design development documents to fix the size and character of the Work in such Phase. Developer shall highlight in the design development documents the modifications made to address County’s comments on the schematic design documents.

(2) Developer shall furnish to County for review design development documents. The design development documents are for County’s use in determining that the design development is consistent with the Basis of Design, approved schematic design documents and then current Phase Budget.

(3) Developer shall furnish to County with each submission of the Design Development documents for review a detailed proposed revised Phase Budget based on the Design Development documents prepared on a mutually agreeable basis. In the event that any such cost estimate exceeds the previous estimate or the Phase Budget, Developer shall make appropriate recommendations to County for reducing the Cost of the Work.

(4) County shall review and provide written comments to Developer within thirty (30) Days of receipt of a complete package of design development documents. If requested by County, Developer, its Design Professionals, and its Other Consultants will meet with representatives of County to discuss the design development documents.

(5) Within sixty (60) Days after receipt of any written comments, Developer shall use its best efforts to cause the preparation of revised design development documents and revised Phase Budget to County’s reasonable satisfaction.
Developer shall highlight in such revised design development documents and Phase Budget the modifications made to address County’s written comments on the previous submission. County shall review and provide either written approval pursuant to Section 4.06(B) below or written comments to Developer within thirty (30) Days of receipt of such revised package of design development documents and Phase Budget, which period shall be subject to extension up to fourteen (14) days at the request of County and with the approval of Developer, which approval shall not be unreasonably withheld. If requested by County, Developer, its Design Professionals, and its Other Consultants will meet with representatives of County to discuss the design development documents. If County issues written comments to such revised design development documents and Phase Budget, then Developer shall revise and resubmit for County review in accordance with this subsection (5).

(F) Architectural and Engineering Services.

(1) Developer shall procure and cause to be furnished all professional architectural and engineering services from Design Professionals necessary for the Work in each NCF Phase, except those that are identified to be provided by County Contractors in the Phase Business Plan.

(2) The Design Professionals shall reasonably cooperate with all County Contractors and shall coordinate their Project Documents with documents prepared by other Design Professionals, Contractor(s) and County Contractors.

(3) Prior to termination of the services of any Design Professional or Contractor, Developer shall obtain County’s written approval, which approval shall not be unreasonably withheld, shall identify to County in writing the architect or engineer proposed to take over performance of the architectural or engineering services, and secure County’s written approval to the engagement.

(4) Developer’s agreements with its Design Professionals and Contractors shall provide for assignment of those agreements to County in the event that County terminates this Agreement as provided herein. Following such termination, County shall notify in writing those Design Professionals and Contractors whose agreements will be assigned to County pursuant to Section 12.04(G) below.

(5) County may communicate with the Design Professionals or Contractors; however, any written correspondence shall be directed to Developer. Design Professionals and Contractors shall not take any direction from County unless approved in writing by Developer.

(6) Except where the assignment of a contract has been accepted by County, nothing in this Agreement shall create a contractual relationship between County and any of the Design Professionals or Contractors provided, however, that County will be made a third-party beneficiary to all contracts between Developer and Design Professionals and Contractors.

(7) If Developer believes or is advised by Design Professionals or Contractors that implementation of any instruction received from County would cause a violation of any Applicable Laws, Developer shall notify County in writing.
(8) Developer will, pursuant to the applicable NCF Phase Pre-Development Business Plan, (a) diligently examine the applicable Project Site and all reports, studies and other documents provided by County, including the documents are identified in Exhibit D, and the reports of any tests performed by or on behalf of Developer; (b) perform all reasonable investigations essential to a professional understanding of the difficulties that may be encountered in performing the Work (including but not limited to those described in the Basis of Design); (c) be familiar with the terms and conditions of the Basis of Design; and (d) will acquaint itself with the conditions under which the Work is to be performed, including without limitation, Applicable Laws, covenants, conditions and restrictions on title to such Project Site (including, without limitation, the Richey Deed Restriction), local labor conditions, local weather patterns, restriction in access to and from the Site, prior work performed by others on the Project Site (if information regarding such work is provided by County), utilities, obstructions, and other conditions relevant to the Work, Project Site, and its surroundings. With the exception of (i) Excluded Areas identified in the applicable Due Diligence Summary and (ii) Newly Discovered Environmental Conditions, Developer expressly assumes the risk with respect to completion of the construction Work in each NCF Phase E undertaken (including mitigation of the Known Environmental Condition in accordance with Environmental Laws and industry standards) of the actual conditions at the Project Site discovered in the performance of its obligations in connection with such NCF Phase E under this Agreement and not taken into account in Developer’s GMP Proposal for such NCF Phase. Developer will complete the Work in each NCF Phase for the compensation stated in this Agreement and the applicable NCF Phase Business Plan, except as provided in this Section and elsewhere in this Agreement, no claim of limitations that may exist or may arise affecting the Work or of difficulties in performing the Work will be an excuse for any failure or omission by Developer to fulfill the requirements of this Agreement. Notwithstanding the foregoing, (1) Developer shall have no responsibility arising out of or with respect to any Claims arising out of Hazardous Materials (other than a Developer Release thereon) on any portion of the Site prior to delivery thereof to Developer of such portion upon commencement of a Phase E applicable thereto; (2) Developer shall have no responsibility with respect to Remediation of any Newly Discovered Environmental Condition unless by appropriate Change Order (which, notwithstanding anything to the contrary herein, including Section 9.02(a) below shall not be funded out of Contractor’s Contingency or Developer’s Contingency unless agreed to by Developer in its sole and absolute discretion); (3) Developer shall have no responsibility arising out of or with respect to any third party Claims for on-Site and off-Site bodily injury and property damage resulting from evaporation or migration of Hazardous Materials from the Site or any portion of the Site onto or into adjacent real property, unless such evaporation or migration is the result of a Developer Release or a breach of Developer's obligations under this Agreement. County has or shall provide or procure a Pollution Legal Liability insurance policy covering the Site that (A) specifies County as a named insured. (B) names Developer as an additional insured, (C) provides that, upon direction by County, proceeds thereof can be paid directly to Developer (or to County for disbursement to Developer in accordance with the provisions hereof) for the performance of Remediation on Unknown Environmental Conditions undertaken by Developer pursuant to this Agreement, (D) has a minimum of an annual term, (E) provides coverage for on-Site clean-up of pre-existing unknown conditions on the Site, (F) covers third party Claims for on-Site and off-Site bodily injury and property damage resulting from pre-existing conditions and known Hazardous Materials, (G) provides contingent transportation coverage, (H) provides primary coverage
(collectively, the “PLL Policy”). All premiums and costs of the PLL Policy thereunder shall be borne by County, provided that deductibles thereunder shall be a Cost of Work. Following adoption of a Change Order pursuant to Article IX with respect to any Newly Discovered Environmental Condition, County’s maintenance of the PLL Policy or recovery of proceeds thereunder shall not be a condition to County’s obligation to pay Developer for Costs of the Work incurred pursuant to such Change Order in connection with such Newly Discovered Environmental Condition. County shall use its commercially reasonable efforts to procure the PLL Policy prior to the end of the Initial NCF Phase Pre-Development Phase B. The form and substance of the PLL Policy, including, without limitation, the term, coverage exclusions, liability limits and other policy terms, and the identity and credit rating of the carrier of such policy, shall be subject to Developer’s approval, and the continuing effectiveness of the PLL Policy with such Developer-approved term, coverage exclusions, liability limits and other policy terms, and the maintained credit rating of the carrier of such policy, shall be a condition precedent to County’s issuance of a Notice to Proceed with respect to any NCF Phase E. With respect to each Project Site delivered to Developer for Work, Developer shall procure, or cause its Contractor to procure, per the requirements in Exhibit F a Contractor Pollution Liability insurance policy that specifies County and Developer as additional insureds, which policy covers claims by County and other third parties with respect to Developer Release(s) with respect to such Project Site, in form agreed to by County (including its risk management/insurance staff and consultants) in its reasonable judgment (the “CPL Policy”). The incremental cost of premiums and costs of the CPL Policy including deductibles thereunder, shall be a Cost of the Work.

(9) Prior to acceptance by County of the GMP Proposal pursuant to Section 4.04(A)(12) hereof, Developer shall notify County, in writing, of any circumstances or conditions at the Project Site (a "New Condition") Developer discovers or identifies after submission of Due Diligence Summary that it expects will have a material effect on the Cost of the Work or NCF Phase Schedule promptly following becoming aware of the condition or circumstance ("New Condition Notice"). Within sixty (60) Days following delivery of the Due Diligence Summary or any such New Condition Notice, either Party may terminate this Agreement without cause upon thirty (30) Days prior written notice to the other Party setting forth its reasoning (so that the Parties may have an opportunity to meet and confer prior to a termination), if the Known Environmental Condition of the Site or any New Condition: (a) cause or are reasonably anticipated to cause material delays in the development of the Project or completion of the Work on a timely basis and as set out or contemplated in this Agreement; (b) precludes the procurement of any required insurance policies, including but not limited to the PLL Policy; or (c) would result in a total Cost of the Work for such NCF Phase in excess of the then current NCF Phase Budget. Notwithstanding the foregoing, if the New Condition could have reasonably been discovered during the NCF Phase Pre-Development Phase A for such NCF Phase, then if County terminates the Agreement for convenience, Developer shall not be entitled to receive any Deferred Compensation Fee.

4.04 Pre-Development Phase D - Construction Drawings and GMP Proposal. The activities and schedule to be performed by Developer during each subsequent NCF Phase Pre-Development Phase D, in addition to the requirements set out below and elsewhere herein, will be outlined in the NCF Phase Pre-Development Business Plan delivered pursuant to Section 4.06 below.
(A) Project Documents and GMP Proposal.

(1) Upon written approval of the design development documents and written authorization from County, Developer shall address all of County’s comments on the design development documents to County’s satisfaction and cause to be prepared construction documents to fix the size and character of that NCF Phase of the Work. Developer shall highlight in the construction documents the modifications made to address County’s comments on the design development documents. The construction documents shall address County-requested changes to County’s satisfaction.

(2) The construction documents shall consist of drawings, specifications, and other documents (including both paper and electronic data necessary to reproduce such documents) and shall be identified by the NCF Phase of the Work to which they apply (the “NCF Phase Construction Documents”). The NCF Phase Construction Documents shall be consistent with the Basis of Design for such NCF Phase and the approved design development documents provide information for the use of those in the building trades; and include all documents required for regulatory agency approvals.

(3) When the Phase Construction Documents are 75% complete, Developer shall submit to County for plan check and to County for review and shall issue them to the Contractor for pricing. Developer shall provide County with pricing information received from Contractor based on the 75% Phase Construction Documents. Developer shall obtain pricing for construction work, other than work Developer proposes to perform with its own forces, in accordance with the bidding procedures set forth in Section 5.01(B).

(4) Developer shall furnish to County for review four (4) sets of the construction documents at the 75% completion Milestone and, if at a different time, when the construction documents are issued for bidding. These documents are for County’s use in determining that the design of the Work is being carried out in a manner consistent with the Basis of Design and approved design development documents.

(5) County shall review and provide written comments to Developer within thirty (30) Days after receipt of a Phase Construction Document submittal. If requested by County, Developer, its Design Professionals, and its Other Consultants will meet with representatives of County and/or County to discuss the Phase Construction Documents.

(6) Developer will revise the Phase Construction Documents to address the issues raised by County to the satisfaction of County, and will resubmit the Phase Construction Documents to County within 10 Days after receipt of County’s comments or meeting.

(7) Developer and County will continue to review and submit the Phase Construction Documents until County approves the Phase Construction Documents in writing.

(8) When the Phase Construction Documents are approximately 90% complete, including all County plan check comments, Developer shall issue them to the Contractor for a pricing update. Developer shall then prepare and submit a Guaranteed Maximum Price Proposal (the “GMP Proposal”) for such Phase of the Work.
(9) The GMP Proposal shall include the following:

(a) Developer’s project cost spending plan Excel spreadsheet, including a detailed estimate of the Cost of the Work showing all labor, materials, equipment and services required to construct that portion of the Work included in the GMP Proposal;

(b) Contractors’ cost estimates, including a detailed estimate of the Direct Costs and Indirect Costs of work that a Contractor proposes to perform with its own forces, and a summary of the bids received for work to be performed by Subcontractors and Design Professionals that sets forth each bid received and identifies the bid used in computing the GMP Proposal;

(c) a detailed estimate of the general conditions for that portion or Phase of the Work, for the duration of that Work as shown on the then-current NCF Phase Schedule;

(d) a cash-flow projection showing how the proposed Guaranteed Maximum Price will be expended, month-by-month, during performance of the Work included in the GMP Proposal;

(e) a list of the assumptions on which the GMP Proposal is based;

(f) a list of items Developer proposes to carry as allowances, if any, the amount proposed for each allowance, and the basis on which the allowances will be expended;

(g) all contingencies included in the GMP Proposal, including a contingency for development of the construction documents, and the basis on which the contingencies may be expended;

(h) all escalation included in the GMP Proposal;

(i) a list of the exceptions, if any, to the GMP Proposal;

(j) a construction schedule, showing any proposed adjustment to the NCF Phase Schedule associated with the GMP Proposal;

(k) adequate provision for training County, including preparation of training videos, on the operation and maintenance of mechanical and other systems installed and constructed in the Project; and

(l) express warranties from Contractors, Sub-Contractors, Design Professionals and Other Contractors (including the warranties required under Section 10.02 below, to the extent available) and additional costs associated therewith.

(10) If County discovers any inconsistencies or inaccuracies in the information presented by Developer, it shall notify Developer, who shall make appropriate revisions to the GMP Proposal.
(11) Developer and County will meet to review the GMP Proposal and the supporting documents, and use good faith efforts to agree on a Guaranteed Maximum Price for that Phase of the Work. Neither Developer’s preparation and submission of nor County’s prior approval of any NCF Phase Budget shall bind either party with respect to reaching agreement on the Guaranteed Maximum Price. Notwithstanding the foregoing, if the assumptions, proposed allowances and exceptions or other terms of the GMP Proposal are inconsistent with the then effective NCF Phase Budget or design development drawings approved by County pursuant to Section 4.03(E)(5) above for such NCF Phase, County may terminate this Agreement as provided in Section 12.02, but the Deferred Compensation Fee described in Section 12.04 shall be reduced by fifty percent (50%). Notwithstanding the foregoing, if either (a) the GMP Proposal is consistent with the then effective NCF Phase Budget and design development drawings approved by County pursuant to Section 4.03(E)(5) above, or (b) is inconsistent with the then effective NCF Phase Budget and design development drawings approved by County pursuant to Section 4.03(E)(5) above solely as a result of County’s subsequent requested changes to the design development drawings approved by County pursuant to Section 4.03(E)(5) above, and County terminates this Agreement pursuant to Section 12.04, the Deferred Compensation Payment shall not be reduced.

(12) Each GMP Proposal shall include and assume that from time to time, Developer will encounter delays and difficult site conditions arising from limited access to work areas, other interference, or conditions at the Site that Developer identified in the Due Diligence Report. Developer assumes responsibility for its examination, investigation and understanding of such difficulties and the GMP Proposal shall take into account, and assume the risk of, those differing site conditions, except to the extent (a) provided in Section 4.03(F)(8) or (b) resulting from County’s willful misconduct or violation of its obligation in this Agreement.

(13) Upon acceptance by County of the GMP Proposal for an NCF Phase, the Guaranteed Maximum Price and its basis shall be set forth in a supplement to this Agreement as mutually approved by the parties. The Guaranteed Maximum Price shall be subject to additions and deductions for modifications as provided in Article IX of this Agreement and the Milestones shall be subject to adjustment as provided in Article V of this Agreement. With respect to any NCF Phase E, Developer will have the right to contract for the Work in a manner such that there are separate GMP Proposals for different portions of the Work (each such portion, a "GMP Portion"). Such circumstances may arise, by way of example only, where a GMP Proposal is submitted for demolition, excavation, remediation and other site work and a separate GMP Proposal is submitted for a GMP Portion consisting of the construction of the Improvements in such NCF Phase E. Such circumstances may also arise, by way of example only, where a separate GMP Proposal is submitted for a GMP Portion consisting of construction of a parking structure and a separate GMP Proposal is submitted for a GMP Portion consisting of the construction of County Building in such NCF Phase E. Such circumstances may also arise, by way of example only, where County’s finance plan for an NCF Phase E contemplates a GMP Portion for specific upfront Costs of the Work to be paid from County’s general funds appropriated by the Board for such Costs of the Work, with the GMP Portion covering the balance of the Work to be paid out of the proceeds of a bond issuance that has not yet been completed. In such cases, with respect to the submission of the GMP Proposal and County approval thereof leading to a Guaranteed Maximum Price, then (a) the terms "GMP Proposal", "GMP" and "Guaranteed Maximum Price" as used in this Section 4.04 shall mean and refer to
the "GMP Proposal", "GMP" and "Guaranteed Maximum Price" associated with each GMP Portion in such NCF Phase; (b) all GMP’s with regard to such Phase E shall be aggregated for all other purposes under this Agreement, including, without limitation, calculating the final Development Management Fee and final Construction Management Fee with respect to such NCF Phase E.

(14) Developer shall furnish two (2) printed sets of the final Phase Construction Documents, outline specifications and final specifications to County, along with four (4) sets of electronic copies of these materials in a CADD format acceptable to County. The CADD documents will be sealed, and all CADD functions shall be active. In addition, Developer shall establish and maintain an ftp site on the Internet on which all Project Documents will be posted. Each party shall be solely responsible for reproduction and distribution of all drawings, specifications and other documents for its own use and for the use of its separate consultants, Contractors, suppliers and others as may be applicable.

(15) Developer shall provide all plans and other documents required to apply for and obtain approval of all Governmental Authorities as may be required for the initiation, prosecution and construction of the Work.

(16) Notwithstanding the foregoing, if the process utilized by Developer in the selection of a Contractor, pursuant to Section 5.01 hereof or otherwise, for such NCF Phase E is subject to a credible threat (meaning that a point has been reached where, in the opinion of the Board of Supervisors on the advice of County Counsel based on existing facts and circumstances, there is a significant exposure to litigation against the County) of an action in a court of competent jurisdiction as being in violation of Applicable Law, then County may terminate this Agreement as provided in Section 12.02, but the Deferred Compensation Fee described in Section 12.04 shall be reduced by fifty percent (50%). For purposes of this Section, “existing facts and circumstances” shall have the meaning set forth in Government Code Sections 54956.9(e)(2), (3), (4) and/or (5).

4.05 Plans for Each NCF Phase.

(A) Business Plans for Subsequent NCF Phase. Within one hundred eighty (180) Days after County’s request specifying the amount and location of County Buildings desired by County to be constructed by Developer on a particular Project Site in a particular NCF Phase (consistent with the Entitlements, including the Master Plan, and the Infrastructure Plan), Developer shall submit to County an initial draft business plan specifying a strategy for additional due diligence, preparation of a program-level CEQA document, design, permitting and construction of such County Buildings, including related and necessary Infrastructure consistent with Infrastructure Plan (each a “Proposed NCF Phase Business Plan”). Each NCF Phase Business Plan shall contain, without limitation, (i) a list of proposed Contractors, Design Professionals, and Other Consultants (other than Contractors required to be publicly competitively bid) and qualifications for each; (iii) the proposed scope of work and estimated budget of Direct Costs and Indirect Costs for each Design Professional and Other Consultant; (iv) a detailed schedule for completing the design of the Project Improvements and production of Project Documents for the applicable NCF Phase (each a “Proposed NCF Phase Design Schedule”); (v) a detailed cost estimate for completing the design of the Project Improvements
and production of Project Documents for the applicable NCF Phase (each a “Proposed NCF Phase Design Budget”); (vi) a detailed schedule for completing the construction of the Project Improvements and production of Project Documents for the applicable NCF Phase (each a “Proposed NCF Phase Completion Schedule”); and (v) a detailed cost estimate for completing the construction of the Project Improvements and production of Project Documents for the applicable NCF Phase, which schedule shall include projected costs associated with the matters in the applicable Due Diligence Report and shall incorporate the County-response times set forth in this Article IV (each a “Proposed NCF Phase Construction Budget”), which Proposed NCF Phase Construction Budget is not intended as Developer’s guaranty that the Guaranteed Maximum Price for the applicable NCF Phase will not exceed such budget. Each Proposed NCF Phase Business Plan shall be prepared in close coordination with County, and shall be subject to County Lead approval, which shall not be unreasonably withheld or delayed. Any comments or requested changes shall be delivered by County in writing to Developer within thirty (30) Days following submission by Developer, and following receipt of comments or requested changes, Developer shall meet and confer with County regarding same, modify the Proposed NCF Phase Business Plan (including the Proposed NCF Phase Design Schedule, the Proposed NCF Phase Design Budget, the Proposed NCF Phase Schedule and the Proposed NCF Phase Construction Budget) and resubmit same to County for review and approval within thirty (30) Days following County’s delivery of comments or requested changes. Upon County Lead’s approval in writing of an applicable Proposed NCF Phase Business Plan (including the applicable Proposed NCF Phase Design Schedule, the Proposed NCF Phase Design Budget, the Proposed NCF Phase Schedule and the Proposed NCF Phase Construction Budget), then such documents shall be the “NCF Phase Business Plan”, the “NCF Phase Design Schedule” and the “NCF Phase Design Budget”, the “NCF Phase Schedule” and the “NCF Phase Budget”, respectively. Notwithstanding the foregoing, the approval of an NCF Phase Budget is not intended as Developer’s guaranty that the Guaranteed Maximum Price for such NCF Phase will not exceed such budget. County acknowledges that proposals for services from Design Professionals, Other Consultants, and Contractors included with an applicable Proposed NCF Phase Business Plan may not remain binding for longer than ninety (90) Days, and accordingly, unless otherwise agreed by Developer, if the parties have not agreed upon a Proposed NCF Phase Business Plan for such NCF Phase within ninety (90) Days after submission, then such Proposed NCF Phase Business Plan (including the Proposed NCF Phase Design Schedule, the Proposed NCF Phase Design Budget, the Proposed NCF Phase Schedule and the Proposed NCF Phase Construction Budget) will be deemed to be withdrawn.

(B) Updated to each NCF Phase Business Plan. Developer shall submit updates to each NCF Phase Business Plan (“NCF Phase Business Plan Update”), including an updated detailed NCF Phase Schedule and NCF Phase Budget, on a semi-annual basis on the first Business Day of every month following County approval of the corresponding NCF Phase Business Plan (and the applicable NCF Phase Schedule shall reflect such updating deadlines). Each NCF Phase Business Plan Update shall be subject to approval by County and the Board of Supervisors and, upon approval thereof, shall become the NCF Phase Business Plan for the corresponding NCF Phase; however, the prior NCF Phase Business Plan for such NCF Phase will remain in effect until the approval of a new NCF Phase Business Plan Update by County and the Board of Supervisors for such NCF Phase, so that at no time will there not be an NCF Phase Business Plan in effect for each NCF Phase. Each NCF Phase Business Plan Update shall be prepared in close coordination with County. Each component of each NCF Phase Business
Plan may be revised outside the NCF Phase Business Plan Update process, in writing, with the approval of County and the Board of Supervisors.

(C) Notwithstanding the foregoing and pursuant to Board of Supervisors Policy Manual Section 5.3.5.1, in the event of an approval of a new NCF Phase Business Plan Update or of a revision of an NCF Phase Business Plan outside the NCF Phase Business Plan Update process that is clerical, non-substantive or not material to the performance of this Agreement, in lieu of action by the Board of Supervisors, such approval may be jointly granted by the County Counsel and the Office of the County Executive.

4.06 Notice to Proceed. Developer shall not proceed with any Pre-Development Phase or Phase E before receiving the appropriate written Notice to Proceed from County. It shall be condition precedent to the effectiveness of any Notice to Proceed that County has first approved and delivered to Developer a financing plan to finance the Cost of the Work in such Phase and the Board has approved the appropriation of sufficient funds for the payment of the amounts set forth in the NCF Budget with respect to such Phase (or GMP Portion, as applicable).

ARTICLE V
PROJECT DEVELOPMENT AND CONSTRUCTION

5.01 Construction Management.

(A) Developer shall procure and manage all construction services reasonably necessary for Project Development. All construction services will be performed by well-qualified contractors duly licensed by the State of California, Contractors State License Board, to perform the work assigned to them, and to whom County has no reasonable objection.

(B) Developer and each of Developer’s Contractors shall enter into written Construction Contracts for construction of the Work in such Phase E based on competitive bids received from at least three licensed, qualified contractors for each portion of such Work to be performed by Subcontractors where the anticipated value of the Subcontract will exceed the greater of $50,000 or one-half of one percent of the proposed Guaranteed Maximum Price. Developer may consider relevant factors in addition to price, such as the Subcontractor’s experience and financial strength, in awarding the Subcontracts. The Contractors, Subcontractors and Design Professionals shall be duly licensed and meet the insurance requirements set forth in this Agreement.

(C) Developer’s Construction Contracts with its Contractors shall provide for assignment of those Construction Contracts to County, at County’s sole election, in the event that County terminates this Agreement. Following such termination, County shall notify in writing those Contractors whose agreements will be assigned.

(D) County shall communicate with the Contractors through Developer. Contractors shall not take any direction from County unless approved in writing by Developer, or as otherwise assigned.

(E) Except where County has approved the assignment of the contract to the County, nothing in this Agreement shall create a contractual relationship between County and any of the
Contractors, provided, however, that County will be made a third-party beneficiary to all contracts between Developer and Contractors.

(F) On a timely basis, Developer shall require Contractors to submit product samples and other materials to County to confirm that the Work will meet the requirements of the Project Documents, shall facilitate delivery or other presentation of the samples to County, maintain records of County’s approval or other response to each submittal, and require Contractors to furnish additional samples when submittals are rejected.

(G) Developer shall implement and manage a program to achieve compliance with County’s construction debris and materials recycling programs.

(H) Developer shall require all Contractors to comply with Applicable Laws, including but not limited to Santa Clara County Storm Water Prevention Plans or Programs, storm water controls, best management practices, and shall monitor Contractors’ compliance.

(I) Developer shall maintain in an online secure data room a record copy of the Project Documents, including product data, shop drawings, Change Orders and other modifications, in good order and regularly updated to record the completed construction. Samples shall be maintained at the on-Project Site,

(1) Such record copies shall be delivered to County upon completion of the Work and prior to final payment, upon earlier termination of this Agreement, or as otherwise requested by County:

(2) Record drawings shall be provided for all Work performed by Developer, Developer Representatives or Contractors shall include, without limitation, concealed pipes, drains, mains, conduit, raceways, temperature control piping or wiring, post-tensioning and all like equipment or devices. Record drawings shall include electronic files.

(J) Developer shall maintain and secure those portions of the Project Site affected by performance of the Work and regularly remove and dispose of debris, rubbish and waste materials resulting from the Work. After completing Work in an area, Developer shall clean the area and remove all debris, rubbish and waste materials, construction equipment, tools, machinery, and surplus materials. Developer shall make provisions to minimize and confine dust and debris resulting from construction activities. Developer shall not be required to clean or remove any materials, debris or waste materials left by County or County Contractors. If, within three (3) Business Days of receiving written notice that Developer has not adequately cleaned up its work, Developer has not cleaned up or commenced and diligently prosecuted such clean up, County may perform clean-up and deduct the reasonable cost in performing such clean-up from the Construction Management Fee due, or that becomes due, to Developer.

(K) Developer shall enforce all representations, warranties and guaranties given by any Contractor, Design Professional, Developer Representative or material supplier and pursue obtaining from such parties copies of all warranties, guaranties and operating manuals (including for all building systems and equipment), and a set of Record Drawings and specifications and final and unconditional mechanics and materialmen’s lien releases together with a title endorsement insuring lien-free completion of each part of the Work.
 Developer shall provide construction job cost accounting, including review and verification of Contractor payment applications.

 Developer agrees to bind every Design Professional, Contractor and Developer Representative (and require them to bind their subconsultants, subcontractors and material suppliers) to all the provisions of this Agreement as they apply to same, including but not limited to the provisions regarding indemnity, audit, dispute resolution, ownership of documents, insurance, termination for convenience, and, where or if applicable, the California Public Contract Code and Labor Code requirements.

5.02 Project Schedules.

(A) Developer acknowledges that some of the existing buildings and other facilities on the Project Site may remain occupied and in regular use during performance of the Work. Developer shall schedule and manage the Work to protect such County-occupied existing facilities, buildings and operations, and use all reasonable efforts to minimize interference with County’s day-to-day activities and operations therein.

(B) The NCF Phase Schedule will establish the anticipated overall time line for completion of such Phase E and all major activities contemplated thereunder. All of the sub-schedules described herein will conform to the then-current NCF Phase Schedule.

(C) Developer shall maintain and update such NCF Phase Schedule using software acceptable to County (County agrees that Microsoft Project is acceptable), and shall provide electronic copies to County. The Project Schedule, and all other schedules prepared by or on behalf of Developer, shall clearly identify activities on the Critical Path.

(D) The NCF Phase Schedule will identify the significant dates on which either Party is required to furnish information, review documents or render decisions and, where applicable, the period of time that a party has to provide such information, perform such review or render such decisions. The time for each party review shall commence on the Day after the other Party delivers to said party a written request for said party to provide information, review documents, or render a decision, together with any documents for review. Should the Documentation submitted be incomplete or insufficient to adequately perform the review, the reviewing party shall notify the requesting party within thirty (30) Days, in writing, of the incompleteness or insufficiency, and commencement of the time for review shall be extended until such time that submittal is complete.

(E) County shall endeavor to provide timely approval for those County required approvals not otherwise identified on such NCF Phase Schedule.

(F) As part of each GMP Proposal, Developer shall furnish a baseline schedule for construction of the Work included in the GMP Proposal (“GMP Construction Schedule”) in accordance with the then-current NCF Phase Schedule.

(G) County may notify Developer in writing of concerns about Developer’s ability to achieve the GMP Construction Schedule, but lack of such notification shall not relieve Developer of liability for failing to achieve such schedule.
(H) Regardless of the cause of the Work falling behind the then-current approved NCF Phase Schedule or GMP Construction Schedule, Developer shall undertake recovery measures. In the event that County provides written notice of concerns regarding Developer’s falling behind schedule, Developer shall within twenty-one (21) days of such notice provide a formal recovery schedule. In the event that within the designated period Developer fails to provide a realistic recovery schedule satisfactory to County, in its reasonable discretion, County reserves the right to order Developer to expedite its performance through the use of overtime, additional shifts, or additional manpower, so that the Work can be placed back on schedule and proceed in accordance with the then-current, approved NCF Phase Schedule or GMP Construction Schedule.

(I) If activities on any Critical Path fall behind the then-current approved NCF Phase Schedule or GMP Construction Schedule then, as between County and Developer, all costs of expediting which would cause the Cost of the Work to exceed the Guaranteed Maximum Price for that Phase or portion of the Work shall be borne by Developer, provided, however, that County and Developer shall each be responsible for its own overhead costs.

(J) Notwithstanding anything to the contrary herein, if activities on any Critical Path fall behind the then-current approved NCF Phase Schedule or GMP Construction Schedule solely due to Force Majeure or other Excusable Delay, then the affected Milestones shall be extended and, as between County and Developer, the Guaranteed Maximum Price will be increased in an amount equal to the Costs of the Work attributable to expediting, or County may modify the scope of the affected Work in order to remain within the applicable Guaranteed Maximum Price.

(K) Subject to the provisions of Article IX below, if activities on any Critical Path fall behind the then-current approved NCF Phase Schedule or GMP Construction Schedule on account of events for which County and Developer each bears some responsibility as provided in this Section, the actual Direct Costs and Indirect Costs of expediting the Work will be shared proportionately based upon comparative responsibility for the delay, and the Guaranteed Maximum Price will be increased to the extent such increased Direct Costs and Indirect Costs are allocated to County. County may modify the scope of the affected Work in order to remain within the applicable Guaranteed Maximum Price.

(L) County and Developer shall each be responsible for making diligent decisions and approvals in accordance with such NCF Phase Schedule and any approved GMP Construction Schedule. Developer shall be responsible for ensuring that the Work is completed and approved in accordance with such NCF Phase Schedule, any approved GMP Construction Schedule and in accordance with all terms and conditions of this Agreement.

5.03 Permits, Approvals, Licenses and Notices.

(A) Except as otherwise determined by County, Developer shall obtain and pay for (as a Cost of the Work) all permits, approvals, licenses and easements for such NCF Phase and shall pay for (as a Cost of the Work) such government charges and inspection fees identified in the Permit List included in the NCF Phase Business Plan.
(B) Except as otherwise determined by County, Developer shall give all notices and comply with all Applicable Laws relating to the Work.

**5.04 Safety and Security.**

(A) Developer shall have overall responsibility for safety precautions and programs in the performance of each Phase E, including but not limited to access control and securing those areas of the Site affected by the Work. While the provisions of this Section establish the responsibility for safety between County and Developer, they do not relieve Contractors or Developer Representatives of their responsibility for the safety of persons or property in the performance of their work, nor for compliance with the provisions of Applicable Laws.

(B) Developer shall contract, directly or indirectly, with the security services vendor presently used by County at the Site for all on-Project Site security services required in connection with the Work or as otherwise approved by County.

(C) Developer shall avoid injury, loss or damage to persons or property by taking or causing Contractor and Developer Representatives to take all steps required by Applicable Laws and good industry practice to protect:

(1) employees and other persons at the Project Site;

(2) materials and equipment stored on-site or off-site locations for use in performance of the Work; and

(3) all property located at the Project Site, and all property located elsewhere on the Site from perils arising out of Work on the Project Site.

(D) Developer shall designate one or more individuals in the employ of Developer or a Contractor who shall act as Developer’s designated safety representatives with a duty to enforce site safety and prevent accidents. Developer’s safety representatives shall coordinate all safety and emergency procedures with the appropriate public safety officials and organizations.

(E) Developer shall provide County with copies of all notices required of Developer by Applicable Laws. Developer’s safety program shall meet the requirements of governmental and quasi-governmental authorities having jurisdiction.

(F) Damage or loss not insured under any Developer insurance policy which may arise from the performance of the Work shall be promptly remedied by Developer.

(G) If County deems any part of the Project Site unsafe or inadequately secured, County shall promptly notify Developer of such conditions. In addition, County may, without assuming responsibility for Developer’s safety or security program, require Developer and Developer Representatives to stop performance of the Work until corrective measures are taken by Developer to remedy such conditions. County may, without assuming responsibility for Developer’s safety or security program, take corrective measures to remedy such conditions if Developer or any of the Developer Representatives fails or refuses to take corrective measures to remedy such conditions within such reasonable period of time under the circumstances. If
County takes such corrective measures as described in the preceding sentence, County may deduct the reasonable cost incurred by County in performing such measures from the Construction Management Fee or other payments due or that become due to Developer.

(H) Developer shall take appropriate action to repair promptly any damage to tracks, pavement, curbs, sidewalks, walls, stairs, sewage or drainage structures, mains, pipes, valves, conduits, poles, wires, transformers, trees, shrubs, adjoining work, or to any other improvement or property above or below the surface of the ground, whether private or public, arising from performance of the Work, as directed by County consistent with the applicable NCF Phase Business Plan. If, in the opinion of County, the best interest of County requires such repair to be made prior to the execution of any further Work, County will so notify Developer. If County directs Developer to delay the Work until the necessary repair has been made, the affected Milestones shall be extended and the applicable Phase E, NCF Phase Schedule and NCF Phase Budget will be adjusted where specifically allowed by this Agreement. Upon the failure of Developer to comply with any such direction in a reasonably prompt manner, or upon Developer’s failure to make immediate emergency repairs which are necessary to protect the Work, County may do such work itself as is necessary to protect life and property, in its sole discretion, and deduct the total cost of such work from the other payments due or that become due to Developer. In the case of immediate emergency repairs which are necessary to protect the Work, life and/or property, no prior notice to Developer shall be necessary for County to take this action, but County will notify Developer as soon as reasonably possible.

(I) County may but is not obligated to notify any person or persons on the Project Site at County’s invitation or County’s behest of Developer’s safety and clean-up rules. Both parties shall reasonably cooperate with each party’s safety program.

5.05 Project Meetings.

(A) Developer shall convene project Status Meetings at least twice per month, with County, the Developer Representative, the Contractor, and such other personnel whose attendance Developer and/or County may deem appropriate, to discuss the following matters:

1. The progress of development, design, and construction, compared to the then-current approved NCF Phase Schedule or GMP Construction Schedule;

2. Upcoming Work that will be performed in the next 30 Days;

3. Milestones which have not been met, or other delays in Work based on the then-current approved NCF Phase Schedule or GMP Construction Schedule, together with the reason for such delay and the best estimate when such Milestone is to be accomplished;

4. Specific Milestones scheduled for completion before the next scheduled status meeting;

5. Status of long lead-time items and materials;

6. Any material change in any aspect of such NCF Phase or of the Work;
(7) Any problems being encountered in such NCF Phase or the Work and any contingency plans being used or proposed to be used;

(8) The status of any problems previously reported;

(9) Any other information pertinent to such NCF Phase or the Work that has come to the attention of Developer, Developer Representative and/or County since the previous status meeting.

(B) Developer shall prepare and distribute no later than ten (10) Business Days after each status meeting a written record of all material issues addressed at the status meeting, the date each issue arose, the party designated as responsible for taking action on each issue, the date each issue was resolved, and the agreed resolution of each issue. Developer shall incorporate comments received from County or others into these records.

5.06 Monthly Reports. Within thirty (30) Days after the end of each calendar month, unless either (a) the information is included with a Pre-Development Phase Payment Application under Section 8.02(B) or a Construction Payment Application under Section 8.07(D)(1)(b)(ii) below, or (b) County Lead directs Developer to prepare them less frequently, Developer shall prepare and submit to County Lead a written report for the preceding month containing at least the following information:

(1) progress on such NCF Phase achieved during the preceding month;

(2) a comparison of actual progress to scheduled progress for the same period;

(3) the disbursements made during the preceding month and to date, by category of expenditure, and a comparison thereof to the Phase Budget;

(4) Developer Contingency funds theretofore committed or proposed to be committed;

(5) the estimated cost of completing the Project Improvements; and

(6) an explanation of cost overruns or construction delays encountered during the preceding month and recommendations with respect thereto, together with the Phase Budget and Phase Schedule marked to show variances, if any, from the originals, with notations of the cause of the variances, if any.

(7) any and all variations in design, specifications, materials, and miscellaneous items.

(8) any replacement or changes in Contractors, Design Professionals, Other Consultants or Key People.

Such monthly reports will be in addition to any other report required to be provided under this Agreement.
5.07 **Additional Reports.**

(A) In addition to the monthly reports required under Section 5.06 above, Developer shall prepare and submit in a timely fashion such additional reports as County may reasonably request.

(B) From time to time, Developer shall make such formal presentations regarding such NCF Phase as County may reasonably request.

5.08 **Financial Management.** Developer shall prepare and submit to County Lead for approval a set of policies and procedures (the “Financial Management Manual”) for cash handling, purchasing/account payable, invoicing, bank reconciliation, financial controls, income statements, preparation of financial reports and any other information required by the Auditor-Controller to ensure adequate financial and accounting practices are observed by Developer. At any time during the term of this Agreement, County Lead may require revisions of the policies and procedures set forth in said Financial Management Manual. Developer may also request County Lead to approve changes in said Financial Management Manual at any time during the Term hereof.

5.09 **Review of Invoices/Reports.** Following submission of any Pre-Development Phase Payment Application or any Construction Payment Application, County Lead and/or Auditor-Controller may meet with Developer at County’s office (or other mutually agreed upon location), as promptly as County deems necessary, to review and approve such Payment Application. This meeting may occur during regularly scheduled Project meetings. Pre-Development Phase Payment Applications and Construction Payment Applications shall be delivered to County Lead. In the event that County Lead determines a meeting is not necessary such monthly invoices and statements shall be delivered to County Lead by the last Business Day of that month. Any approval and payment by County of any Pre-Development Phase Payment Application or any Construction Payment Application shall not diminish or impair County’s audit rights as set forth in this Agreement, including Section 8.07(D)(8) and 15.1, which audit rights include County’s right to confirm that Developer is neither compensated in excess of the applicable Development Management Fee Cap and the Construction Management Fee Cap nor reimbursed or otherwise paid by County for Third Party Expenses or construction costs for amounts attributable to Contractors, Sub-Contractors, Design Professionals or Other Consultants in excess of the amounts actually paid or payable by Developer to such Contractors, Sub-Contractors, Design Professionals, and/or Other Contractors.

5.10 **Standard for Developer Performance.** In performing the required or needed Work under this Agreement, Developer shall comply with all Applicable Laws, permits, insurance policies, surety bonds, and all Documents. To the extent that Developer learns of any violation of any Applicable Laws or Permits, Developer shall take appropriate action to secure compliance with all Applicable Laws.

5.11 **GMP Construction Schedules.**

(A) Upon County approval of a GMP Proposal with respect to any Phase E, Developer shall prepare and present a “GMP Construction Schedule”, subject to review and
approval by County, to provide additional detail as to the sequence and duration of activities necessary for the completion of that Phase or portion of the Work.

(B) Developer will prepare each GMP Construction Schedule using the critical path method of scheduling, using project management and planning software equivalent to SureTrak or better. The GMP Construction Schedule shall not modify the Milestones or overall duration of the Work contained in the then-current NCF Phase Schedule. Developer shall submit the GMP Construction Schedules to County for review, and shall incorporate such changes as County may reasonably request.

(C) Developer shall update the GMP Construction Schedule monthly to show the actual progress of the Work and such updated schedule shall be submitted to County (in paper and electronic form) concurrently with each Construction Payment Application, along with a narrative report detailing any activities on the Critical Path that are behind schedule, the reasons for the delay in those items, and Developer’s plan for getting those items back on schedule. Notwithstanding Developer’s obligations to furnish updates to the GMP Construction Schedule provided for in this Section, Developer shall promptly notify County of any material event which is reasonably expected to result in a change in the GMP Construction Schedule.

5.12 Construction.

(A) Developer shall direct Contractors to commence construction of the Work in an NCF Phase as provided in a written Notice to Proceed issued by County. County shall issue a separate Notice to Proceed for each Phase of the Work. Developer shall not commence construction of any Phase before County has issued a Notice to Proceed for that Phase. County acknowledges that construction bids may not remain binding for longer than one hundred eighty (180) Days, and accordingly, unless otherwise agreed by Developer (which agreement may be reasonably withheld if the NCF Phase Schedule and NCF Phase Budget are not reasonably adjusted to account for actual extensions and direct cost increases required by any unreasonable delay), if County has not issued a Notice to Proceed with construction for such Phase within one hundred eighty (180) Days after County approval of final Project Documents for such Phase, then (1) such NCF Phase Business Plan (including the NCF Phase Design Schedule, the NCF Phase Design Budget, the NCF Phase Schedule and the NCF Phase Budget) will be deemed to be withdrawn.

(B) Developer shall furnish to County all such drawings and other descriptive material as are reasonably required to establish the kind and quality of materials, fixtures and equipment to be provided. The submittals will be made in accordance with the GMP Construction Schedule. Such submittals shall be done with sufficient, professional and accurate detail to adequately and correctly describe items proposed to be furnished or methods of installation to enable County to determine compliance with the Phase Construction Documents. Developer shall furnish and complete its submittals so as not to delay the Work.

(C) Developer shall furnish evidence satisfaction to County as to the kind and quality of materials provided. County may require, and Developer shall submit if required, a list designating the source of supply of designated materials, fixtures and equipment to be incorporated into the Work, and in such event, such materials, fixtures, equipment or products
shall not be delivered to the Work nor installed therein until after County has approved the specific source of supply.

(D) Developer shall pay royalties and license fees for patented or copyrighted designs, processes or products incorporated into the Work as a Cost of the Work, and further agrees to defend, indemnify and hold County and County Representatives harmless from all liabilities, penalties, costs, losses, damages, expenses, causes of action, actions, claims or judgments, including reasonable attorneys’ fees and other defense costs for infringement of any patent rights, copyrights and other intellectual property arising from or related to Developer’s or any of the Developer Representative’s alleged infringement of any such patent, copyright or other intellectual property rights.

(E) When County determines that the Work, or a designated portion thereof, is acceptable to County and complete, then Developer shall prepare and submit to County a preliminary “Punch List” which shall be comprised of items of Work that need to be completed or corrected to County’s satisfaction. The failure to include any items on such list does not alter the responsibility of Developer to complete all Work in accordance with the Project Documents. Developer shall provide County with an estimate of the cost to complete or correct each item contained therein, or, if the cost is not known, then Developer’s reasonable professional estimate of such cost to complete or correct such item, which estimate shall be substantiated to County’s satisfaction.

(F) Upon receipt of the preliminary Punch List and written notice from Developer that the Work is ready for review, County shall, within 10 Days of receipt of such notice, review the Work. Developer shall have the right to accompany County in making this review. Based upon this review and upon Developer’s preliminary Punch List, County shall compile a Punch List, which list shall be transmitted to Developer.

(G) Developer shall diligently complete and correct the items on the Punch List. When Developer believes that the Punch List is complete and the Work is ready for final inspection, Developer shall notify County and County shall determine whether such Work has been completed to County’s satisfaction.

(H) When County, on the basis of the review requested by Developer, determines that the Work or designated portion thereof has achieved completion, Developer will prepare a Certificate of Completion which shall state the date of Completion, state the responsibilities of County and Developer and fix the time within which Developer shall complete the items listed on the Punch List.

ARTICLE VI
PRIVATE DEVELOPMENT PARCELS

6.01 Private Development Parcels. If the Master Plan provides for development of Private Development Parcels, County may develop the Private Development Parcels through other developers or contractors, without involvement from Developer or any of the Developer Representatives, including but not limited to Gensler, in its sole and absolute discretion.
ARTICLE VII

TIME

7.01 **General.**

(A) County and Developer shall perform their respective obligations as expeditiously as is consistent with reasonable professional skill and care and the orderly progress of the Work.

(B) Time is of the essence in the performance of this Agreement.

(C) County and Developer each covenant and agree to use reasonable efforts to undertake the actions required of each under this Agreement in a timely manner so as not to interfere with either party’s ability to achieve their respective responsibilities under this Agreement.

7.02 **Force Majeure and Other Delays.**

(A) The parties acknowledge that the Work may be delayed for reasons beyond Developer’s control. Therefore, the parties agree that the Milestones shall be extended in the event and to the extent of the number of Days that Work on the Critical Path of the then-current GMP Construction Schedule is delayed by an Excusable Delay Event.

(B) Upon the occurrence of any event that constitutes or may constitute an Excusable Delay Event or that causes or may cause a delay in completion of one or more Milestones, Developer shall notify County as soon as possible but in any event within thirty (30) Days. Following such notification, County and Developer shall meet to discuss the nature and extent of such event and/or delay. Developer shall use its best efforts to minimize any delay in achieving the Milestone caused by such event. Notwithstanding the above, nothing in this section shall prevent Developer from immediately taking any and all necessary action to remediate or otherwise address the event causing such delay.

(C) If the Developer believes that an Excusable Delay Event has affected activities on the Critical Path such that the Project completion date or Milestones will be delayed, Developer may be entitled to an adjustment of the GMP Schedule and/or Milestones. Developer shall:

(1) Provide to County a written statement of the actions Developer contends delayed the activities on the Critical Path and the length of the claimed delay; and.

(2) Demonstrate the delay to activities on the Critical Path in the form of a time impact analysis.

(D) Actual delays in activities not on the Critical Path will not be the basis for an adjustment to the GMP Schedule or Milestones.

(E) To the extent expressly provided for in Article IX below, Developer may be compensated by an adjustment in the Guaranteed Maximum Price in an amount equal to the actual additional, unavoidable Costs of the Work incurred by the Contractors, Design
Professionals, Developer’s Other Consultants and Developer as a result of an Excusable Delay Event.

ARTICLE VIII
COMPENSATION AND PAYMENTS

8.01 **Compensation for Strategic Facilities Process Phase.** Developer shall be entitled to receive a payment of Ninety Thousand Dollars ($90,000) as its full compensation (inclusive of any fees, reimbursements and/or staffing costs) for its work, activities and deliveries within the Strategic Facilities Process Phase. Such amount will be paid without invoice within thirty (30) Days after the Effective Date.

8.02 **Compensation for Pre-Development Phase A.** As compensation for Developer’s performance of its obligations with respect to each Pre-Development Phase A, Developer will be entitled to receive, in addition to any applicable Deferred Compensation Fee pursuant to Section 12.02 or 12.04 hereof, the following:

(A) **Third-Party Cost Reimbursement.** Developer will be reimbursed in an amount equal to its actually incurred Third Party Costs not to exceed the Budgeted Third-Party Costs. Developer shall submit an invoice to County on a monthly basis containing a detailed statement of services performed and costs incurred for which payment is requested, together with copies of invoices from all third party consultants and contractors (“Third-Party Cost Reimbursement”) for each Pre-Development Phase A, as set forth in the Phase Budget and related schedule approved by County for such Pre-Development Phase A. County shall pay approved costs within thirty (30) days after receipt of Developer's Pre-Development Phase Payment Application, which shall comply with the requirements of Section 8.02(B) below. The Phase Budget for Initial NCF Phase Pre-Development Phase A which is attached hereto as part of Exhibit C has been approved by County.

(B) **Third-Party Cost Reimbursement Payment Applications.**

(1) Developer shall deliver to County, on or before the last Business Day of each full calendar month following the commencement of the applicable Phase, an itemized invoice describing the Work in the applicable Pre-Development Phase performed in the preceding month ("Pre-Development Phase Payment Application"), which Pre-Development Phase Payment Application shall constitute a representation and warranty by Developer that that Developer is entitled to payment in the amount requested and (iv) the payment requested by Developer does not exceed the amounts paid or payable by Developer to its applicable Design Professionals and Other Contractors.

(2) The Pre-Development Phase Payment Application shall include detailed backup material, including but not limited to invoices from Contractors, Design Professionals, Other Consultants, and other vendors, as County may reasonably request. The County will not process or make payment based upon incomplete Pre-Development Phase Payment Applications. In addition, with each Pre-Development Phase Payment Application, and at the request of County, Developer shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, and any other evidence required by County to demonstrate that cash
disbursements already made by Developer on account of the Cost of the Work equal or exceed payments already received by Developer. Developer shall have no rights to receive any payment under a Pre-Development Phase Payment Application until all documents required by this Section 8.02(B) have been submitted to County, and County has had at least ten (10) Business Days to review the submitted materials.

(3) Provided that a complete Third-Party Cost Reimbursement Payment Application is received by County not later than the last Day of a calendar month, payment shall be made by County not later than the last Day of the following month. If a Pre-Development Phase Payment Application is received by County after the application date fixed above, payment shall be made by County not later than thirty (30) Days after County receives the Pre-Development Phase Payment Application.

(C) Initial NCF Pre-Development Phase A Fee. Developer will be paid a maximum not to exceed fee (the “Initial NCF Pre-Development Phase A Fee”) for Initial NCF Pre-Development Phase A equal to Seven Hundred Fifty-Six Thousand Dollars ($756,000). The Initial NCF Pre-Development Phase A Fee will be paid in twelve (12) equal monthly installments of Sixty-Three Thousand Dollars ($63,000) each, payable on the first Business Day of each calendar month commencing with the first calendar month following the Effective Date.

(D) Subsequent NCF Phase Pre-Development Phase A Fee. Developer will be paid a maximum not to exceed fee (the “Pre-Development Phase A Fee”) for each subsequent NCF Phase Pre-Development Phase A equal to an amount to be determined in the Phase Business Plan proposed by Developer and agreed to by County pursuant to Section 4.05, which Pre-Development Phase A Fee shall be based upon the Budgeted Staffing Costs of Developer for Pre-Development Phase A as provided in such Phase Budget. The Pre-Development Phase A Fee will be paid in equal monthly installments during such Pre-Development Phase A, payable on the first Business Day of each calendar month commencing with the first full calendar month following issuance of a Notice to Proceed for such Phase.

8.03 Compensation for Pre-Development Phase B. As compensation for Developer’s performance of its obligations with respect to Pre-Development Phase B, Developer will be entitled to receive, and the Phase Budget for Pre-Development Phase B attached hereto as part of Exhibit C includes:

(A) Third-Party Cost Reimbursement. Developer will be reimbursed a Third-Party Cost Reimbursement for Pre-Development Phase B, equal to its actually incurred Third-Party Costs a maximum not to exceed amount included in the Phase Budget and related schedule approved by County for Pre-Development Phase B. County shall pay such approved costs within thirty (30) days after receipt of Developer’s Pre-Development Phase Payment Application, which shall comply with the requirements of Section 8.02(B) above.

(B) Initial NCF Pre-Development Phase B Fee. Developer will be paid a fee (the “Initial NCF Pre-Development Phase B Fee”) for Initial NCF Pre-Development Phase B (the scope of which is set forth on the Initial NCF Pre-Development Phase attached hereto as Exhibit C) equal to Thirty Seven Thousand Five Hundred Dollars ($37,500) per month over a maximum seven (7) month period with a maximum not to exceed a total of Two Hundred Sixty-Two
Thousand Five Hundred Dollars ($262,500), payable on the first Business Day of each calendar month commencing with the calendar month in which a Notice to Proceed is issued by County with respect to the Initial NCF Pre-Development Phase B, provided, however, that such Initial NCF Phase Pre-Development Phase B Fee shall be zero dollars with respect to any month during the Initial NCF Phase Pre-Development Phase B in which Developer is entitled to receive the Initial NCF Phase Pre-Development Phase A Fee, and the Initial NCF Phase Pre-Development Phase B Fee shall be zero with respect to any month after issuance of the Notice to Proceed for the Initial NCF Phase Pre-Development Phase C.

(C) **Subsequent NCF Phase Pre-Development Phase B Fee.** Developer will be paid a fee (the “Pre-Development Phase B Fee”) for each subsequent NCF Phase Pre-Development Phase B equal to a maximum not to exceed amount to be determined in the Phase Business Plan proposed by Developer and agreed to by County pursuant to Section 4.05, which Pre-Development Phase B Fee shall be based upon the Budgeted Staffing Costs of Developer for Pre-Development Phase B as provided in such Phase Budget. The Pre-Development Phase B Fee will be paid in equal monthly installments during such Pre-Development Phase B, payable on the first Business Day of each calendar month commencing with the first full calendar month following issuance of a Notice to Proceed for such Phase.

8.04 **Development Management Fee for Pre-Development Phases C and D.** Developer shall be paid a “Development Management Fee” (herein so called) in the applicable amount set forth in Exhibit L hereto (the “Development Management Fee Table”), provided that in no event shall the Development Management Fee exceed two percent (2%) of the actual audited Direct Costs and Offsite Costs (the “Development Management Fee Cap”) for each NCF Phase, excluding Indirect Costs. The Development Management Fee, less retainage of ten percent (10%), will be paid in equal monthly installments over the total number of months for Pre-Development Phase C and Pre-Development Phase D as specified in the Project Schedule, payable on the first Business Day of each calendar month commencing with the first full calendar month following issuance of a Notice to Proceed for such Pre-Development Phase. One-half (½) of the Retainage on Development Management Fee withheld during any Pre-Development Phase C will be released and paid to Developer upon successful completion of such Pre-Development Phase C. One-half (½) of the Retainage on Development Management Fee withheld during any Pre-Development Phase D will be released and paid to Developer upon successful completion of such Pre-Development Phase D. The balance of Retainage withheld during Phases C and D will be incorporated into and released as part of final payment provided for pursuant to Section 8.07(D)(8) below, and the Development Management Fee Cap will be trued up upon final completion based upon the final audited Cost of the Work included in such NCF Phase, and to the extent that amounts previously paid in respect of Development Management Fee exceed the final Development Management Fee Cap, County may deduct such excess from the final payment to Developer following completion.

8.05 **Cost Reimbursement for Pre-Development Phase C.** Developer will be reimbursed a Third-Party Cost Reimbursement for Pre-Development Phase C equal to its actually incurred Third-Party Costs not to exceed the amount included in the Phase Budget and related schedule to be approved by County for Pre-Development Phase C in accordance with Section 4.05. County shall pay such costs within thirty (30) days after receipt of Pre-Development Phase Payment Application, which shall comply with the requirements of Section 8.02(B) above.
8.06 **Cost Reimbursement for Pre-Development Phase D.** Developer will be reimbursed a Third-Party Cost Reimbursement equal to its actually incurred Third Party Costs not to exceed the amount set forth in the Phase Budget and related schedule to be approved by County for Pre-Development Phase D in accordance with Section 4.05. County shall pay such costs within thirty (30) days after receipt of Developer’s Pre-Development Phase Payment Application, which shall comply with the requirements of Section 8.02(B) above.

8.07 **Compensation for Each Phase E.** As compensation for Developer’s performance of its obligations with respect to each Phase E, Developer will be entitled to receive, and the Phase Budget approved by County for such Phase E and the Guaranteed Maximum Price for such Phase E will include only the following:

(A) **Third-Party Cost Reimbursement.** Developer will be reimbursed a Third-Party Cost Reimbursement for such Phase E, as set forth in the Phase Budget approved by County for such Phase E. The Third-Party Cost Reimbursement for Phase E will be invoiced and payable in accordance with Section 8.07(D) below.

(B) **(Section Reserved).**

(C) **Construction Management Fee.** Developer will be paid a “Construction Management Fee” (herein so called) in the applicable amount set forth in Exhibit L hereto (the “Construction Management Fee Table”), provided that in no event shall the Construction Management Fee exceed three percent (3%) of the Cost of the Work excluding the Development Management Fee payable to Developer (“Construction Management Fee Cap”). The Construction Management Fee with respect to any Phase E, less retainage of ten percent (10%), will be paid in equal monthly installments over the total number of months in such Phase E as specified in the GMP Schedule therefor, payable on the first Business Day of each calendar month commencing with the first full calendar month following issuance of a Notice to Proceed for such Phase E. The Construction Management Fee Cap shall be trued up upon final completion based upon the final audited Cost of the Work included in such Phase E, and to the extent that amounts previously paid in respect of Construction Management Fee exceed the final Construction Management Fee Cap, County may deduct such excess from the final payment to Developer following completion (including retainage).

(D) **Payment of Construction Costs.**

(1) **Progress Payments.**

(a) **Schedule of Values.** Simultaneously with Developer’s submission of the GMP Proposal for the applicable Phase E, Developer shall submit to County a Schedule of Values in sufficient detail to evaluate progress of the Work in such Phase E and in a form reasonably acceptable to County (the “Schedule of Values”). The Schedule of Values shall show all items included in the applicable Phase E Budget and the GMP Proposal and be done in sufficient detail and supported by such data to substantiate its accuracy as County may reasonably request. Without limiting the foregoing, the Schedule of Values shall allocate the entire Guaranteed Maximum Price among the various portions of the Work in such Phase E, and the Construction Management Fee or Development Management Fee, as appropriate, shall be
shown as single separate items. Construction costs will be broken out by subcontract; all other costs will be itemized by contract or other mutually agreeable category. This Schedule of Values, when approved by County, shall be used as a basis for Developer’s applications for payment. Progress payments will be made based upon actual progress of the Work, measured against the agreed-upon Schedule of Values.

(b) **Construction Payment Applications.**

(i) Developer shall deliver to County, on or before the last Business Day of each full calendar month following the commencement of the applicable Phase E, an itemized invoice describing the Work in the applicable Phase E performed in the preceding month (“**Construction Payment Application**”), which Construction Payment Application shall constitute a representation by Developer that (i) the Work will have progressed to the point indicated by the end of the month, (ii) that the quality of the Work covered by the Construction Payment Application is in accordance with the Project Documents, (iii) that Developer is entitled to payment in the amount requested and (iv) the payment requested by Developer does not exceed the amounts paid or payable by Developer to Contractor, Design Professionals, and/or Other Contractors. Payment Applications shall show the percentage of completion of each portion of the Work as of the end of the period covered by the Construction Payment Application. The percentage of completion shall be the percentage of that portion of the Work which has actually been completed.

(ii) The Construction Payment Application shall include detailed backup material, including but not limited to invoices from Contractors, Design Professionals, Other Consultants, and other vendors, as County may reasonably request. In addition each Construction Payment Application shall be accompanied by the following monthly reports (collectively, “**Monthly Reports**”): (i) the NCF Phase Schedule and GMP Construction Schedule (in electronic form) updated to show the actual progress of the Work and any material changes; (ii) a narrative report describing the actual progress of the Work compared to scheduled progress and explaining any deviations between actual and scheduled progress and any known events that may affect the cost or schedule for the Work; (iii) a written progress payment report stating the value of all contracts for the Work and a comparison to the approved Schedule of Values, all payments made by Developer to date, current payments requested by Contractors, Design Professionals and Other Consultants, any other pending payment requests, retainage held on each contract, and actual amounts Developer proposes to pay to each Contractor and Design Professional or Other Consultant in the current payment period; (iv) a written Modification report listing all Change Orders by number, a brief description of the Change Order work, any adjustment to the Cost of the Work or Guaranteed Maximum Price, and percent of completion of the Change Order work; (v) a written Contingency report showing those portions of the Contractor’s and Developer’s contingencies that have been expended or that Developer proposes to expend and identifying the reason for each contingency expenditure. Each of the reports identified above is a material component of a complete Construction Payment Application. The County will not process or make payment based upon incomplete payment applications. Developer shall not use contingency funds without County’s written authorization. Developer shall also furnish, with each Construction Payment Application, a current unconditional waiver of lien for itself and an unconditional waiver for each of its Contractors, Subcontractors, materialmen and suppliers for the prior Application in the applicable form required under
Applicable Laws. In addition, with each Construction Payment Application, and at the request of County, Developer shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, and any other evidence required by County to demonstrate that cash disbursements already made by Developer on account of the Cost of the Work equal or exceed progress payments already received by Developer (not including any payments of the Construction Management Fee and/or Development Management Fee). In addition, Developer shall furnish such forms as required by the title insurer or lender (if any) in order to effectuate payment from the Project financing proceeds or to insure an effective waiver or mechanics and materialmen liens in compliance with the laws of the State in which the Project is located, and as may be required in connection with any financing which County may enter into with respect to the Work on the Project. Developer shall have no rights to receive any payment under a Construction Payment Application until all documents required by this Section 8.07(D)(1)(b) have been submitted to County, and County has had at least ten (10) Business Days to review the submitted materials.

(iii) At a meeting held on or before the end of each month, County and Developer will review Developer’s proposed values and agree on the status of the Work and the amount to be paid for that month.

(iv) The established amounts will be input into a master spreadsheet by Developer, who will then prepare a Construction Payment Application for the payment period. The Construction Payment Application will include only those Offsite Costs, Direct Costs and Indirect Costs that County and Developer agree are properly due and owing based on the status of the Work.

(c) Provided that a Construction Payment Application is received by County not later than the last Day of a calendar month, payment shall be made by County not later than the last Day of the following month. If a Construction Payment Application is received by County after the application date fixed above, payment shall be made by County not later than thirty (30) Days after County receives the Construction Payment Application.

(d) Subject to other provisions of this Agreement, the amount of each progress payment shall be computed as follows:

(i) Take that portion of the Guaranteed Maximum Price properly allocable to completed Work within such Phase E. Pending final determination of costs to County of Changes in such Work, amounts not disputed by County shall be included;

(ii) In computing progress payments, Developer may include 70% of the value of materials delivered to the Site or fabricated materials stored on the Project Site or off the Project Site since the first day of the month during which Developer submits such Construction Payment Application. Payment for materials stored off the Project Site shall be contingent upon County receiving reasonably satisfactory evidence that Developer has acquired title to such material, that the materials will be utilized on the Work, and that the materials are satisfactorily stored, protected, and insured, or such other procedures satisfactory to County, to protect County’s interests. Materials stored off-site, to be considered for payment, shall, in addition to the above requirements, be stored in a bonded warehouse, fully insured, and available
to County for inspection. If requested by County, Developer shall obtain an executed security agreement and all necessary UCC-1’s before seeking payment for any materials stored other than at the Project Site. County shall have discretion as to the amount of stored material and equipment for which payment may be made on any Construction Payment Application.

(iii) Add the applicable Construction Management Fee, less retainage of ten percent (10%).

(iv) Subtract retainage of ten percent (10%) from that portion of the Work that Developer self-performs;

(v) Subtract the shortfall, if any, indicated by Developer in the documentation required by (1)(b) above to substantiate prior Construction Payment Applications, or resulting from errors subsequently discovered by County’s auditors in such documentation; and

(vi) Subtract amounts, if any, for which County disputes as provided in Section 13.04.

(e) County and Developer shall agree upon (i) a mutually acceptable procedure for review and approval of payments to Contractors and Subcontractors and (ii) the percentage of retainage held on the Construction Contract and subcontracts, which in no event shall be less than ten percent (10%) and Developer shall execute subcontracts in accordance with those agreements. Notwithstanding the foregoing, County will agree to release retainage with respect to subcontracts which have been fully performed for a period of ninety (90) Days.

(f) In taking action on the Construction Payment Applications, County shall be entitled to rely on the accuracy and completeness of the information furnished by Developer and shall not be deemed to represent that County has made a detailed examination, audit or arithmetic verification of the documentation submitted in accordance with Sections 8.07 or 8.08 or other supporting data; that County has made examinations to ascertain how or for what purposes Developer has used amounts previously paid on account hereof. Any approval and payment by County of any Construction Payment Application shall not diminish or impair County’s audit rights as set forth in this Agreement, including Section 8.07(D)(8)(c) and 15.1. Such examinations, audits and verifications, if required by County, will be performed by County’s auditors acting in the sole interest of County. No partial payment made hereunder shall (i) be or construed to be final acceptance or approval of that part of the Work to which such partial payment relates or (ii) relieve Developer of any of its obligations hereunder with respect thereto.

(g) Developer shall promptly pay all bills for labor and material performed and furnished by others in connection with the construction, furnishing and equipping of the Project Improvements and the performance of the Work in a particular NCF Phase.

(2) Phase Retainage. Progress Construction Payment Applications shall reflect retainage in the amount of five percent (5%) of the Development Management Fee and ten percent (10%) of the Offsite Costs, Direct Costs and Construction Management Fee. In addition, and notwithstanding anything to the contrary herein, County shall be entitled to
withhold 200% of the estimated cost of the completion of punch list items as retainage. Upon final payment for the improvements within an applicable NCF Phase, pursuant to Section 8.07 (D)(8) below, County shall release to Developer all amounts withheld as retainage with respect to such NCF Phase except for the 200% of the reasonably estimated value of the punch list items. The amount withheld for each individual punch list item shall be paid as such punch list item is completed within thirty (30) Days of completion of such punch list items in a good and workmanlike manner.

(3) Payment Disputes. In the event County’s opinion of the proper amount due under the Construction Payment Application differs from the amount in Developer’s Certificate of Payment, County and Developer shall meet during the fifteen (15) day period after County’s receipt of the Construction Payment Application and resolve their differences. Notwithstanding anything to the contrary in this Agreement, County shall pay all undisputed amounts due Developer as shown in the Construction Payment Application within the time set forth above.

(4) Grounds for Withholding. In addition to the amounts County may retain as provided elsewhere in this Agreement, County may withhold a sufficient amount from any payment otherwise due to Developer as in County’s good-faith determination may be necessary to protect County in the event of the following:

(a) Third-party claims filed or reasonable evidence indicating probable filing of such claims;

(b) Defective Work (unless Developer has commenced and is diligently prosecuting acceptable remedial measures, or has entered into a written agreement with County regarding the performance and schedule of acceptable remedial measures);

(c) Failure of Developer to make proper payments to any of its Design Professionals, Other Consultants, Contractors or Subcontractors or for labor, materials, or equipment;

(d) Failure of Developer to comply with any lawful or proper direction concerning the Work given by any representative of County authorized to have given such instruction;

(e) Any claim or penalty asserted against County on account of a failure of Developer, Design Professionals, Other Consultant, Contractor, or Subcontractor to comply with the provisions of Applicable Laws; or

(f) Any reason specified elsewhere in this Agreement as grounds for a retention or that otherwise would legally entitle County to a set-off or recoupment.

(5) Withholdings for Third Party Claims. Developer shall, promptly upon notice by County of withheld amounts pursuant to a third-party claim against Developer, Design Professionals, Developer’s Other Consultants, Contractor or their Subcontractors or suppliers, pursue a resolution of the third party claim by settlement, litigation or, if available, arbitration.
Developer’s obligations to defend and indemnify under Section 13.02 shall apply to such proceedings.

(6) Payment Not Acceptance. Neither progress payments nor partial or entire use or occupancy of the Project, or any potion or Phase of the Work, by County shall constitute acceptance of Work that is incomplete or that does not meet the requirements of the Project Documents or this Agreement.

(7) Payment by County. If Developer is in default of its payment obligations to any Design Professional, Contractor or material supplier under this Agreement, County may pay Design Professionals, Other Consultants or Contractors directly (which payment shall be credited against the Cost of the Work) absent Developer’s showing of good cause, or with Developer as joint payee.

(8) Final Payment.

(a) When County reasonably determines that a Phase E of the Work is complete, Developer shall submit a final Construction Payment Application for such Phase E including the items listed below. The final Construction Payment Application shall include an accounting of all contingencies, allowances and other elements of the Guaranteed Maximum Price Development Management Fee and Construction Management Fee for that Phase E or portion of the Work. Final payment, constituting the entire unpaid balance of the Cost of the Work, Construction Management Fee and Development Management Fee for the Phase E of the applicable NCF Phase, shall be made by County to Developer when Developer has fully performed the Work in such Phase E in accordance with the requirements hereof and the other Project Documents except to satisfy other requirements, if any, which extend beyond final payment, and Developer has submitted a final accounting for the Cost of the Work for the Phase E of the applicable NCF Phase and a final Construction Payment Application including the items below.

(b) Final Construction Payment Application. Developer shall submit the following items with its final Construction Payment Application:

(A) A declaration under penalty of perjury stating that all workers and persons employed, all firms supplying the materials, all Contractors, Design Professionals, Developer’s Other Consultants, and other individuals and entities that have contributed to the Work have been paid in full except for retention, and that there are no claims outstanding against the Work for either labor or materials, except certain items, if any, to be set forth in detail in the declaration;

(B) Record Drawings as described in the Basis of Design;

(C) A certificate evidencing that insurance required by the Project Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least 30 days’ prior written notice has been given to County;
(D) A written statement that Developer knows of no substantial reason that the insurance will not be renewable to cover the period required by the Project Documents;

(E) Consent of surety, if any, and if required, to final payment;

(F) Properly executed releases from Developer and all applicable Contractors and material suppliers (A) in the form of California Civil Code Section 3262(d)(1) with respect to the portion of the final payment being released; and (B) in the form of California Civil Code Section 3262(d)(2) with respect to any previous Progress Statements;

(G) A certificate, in form reasonably acceptable to County, certifying that the Work has been substantially completed in accordance with the Project Documents;

(H) A statement of any unresolved claims or disputes in connection with that Phase; and

(I) Any additional documents reasonably requested by County.

(c) County’s auditors will review and report in writing on the final accounting within thirty (30) Days after delivery of the final accounting by Developer and final payment to Developer shall be made no later than thirty (30) Days thereafter. If County’s auditors report the Cost of the Work as substantiated by the Developer’s final accounting to be less than claimed by Developer, Developer shall be entitled to request mediation of the disputed amount without seeking an initial direct discussion pursuant to Section 13.04. A request for mediation shall be made by Developer within thirty (30) Days after Developer’s receipt of County’s notice to Developer of County’s auditor’s determination. Failure to request mediation within the foregoing thirty (30)-day period shall result in the substantiated amount reported by County’s auditors becoming binding on Developer. Pending a final resolution of the disputed amount, County shall pay the Developer the amount in the final Construction Payment Application, less the amount in dispute.

(d) Based on the audited Cost of the Work, County shall calculate the final Development Management Fee Cap and the Construction Management Fee Cap. County shall notify Developer in writing of the amounts confirmed for the actual Cost of the Work, the Development Management Fee Cap, and the Construction Management Fee Cap. To the extent that amounts previously disbursed in respect of Development Management Fee exceeds the Development Management Fee Cap, or amounts previously disbursed in respect of Construction Management Fee exceeds the Construction Management Fee Cap, such excess amounts shall be deducted from the final progress payment. To the extent that amounts previously disbursed in respect of Development Management Fee is less than the Development Management Fee Cap, or amounts previously disbursed in respect of Construction Management Fee is less than the Construction Management Fee Cap, such shortfall amounts shall be included in the final progress payment.
payment. If Developer contests the amount confirmed for final payment, the Cost of the Work, the Development Management Fee Cap, or the Construction Management Fee Cap, it shall, within thirty (30) Days of receipt of notice from County of the amounts confirmed, file a protest in writing setting forth in detail all grounds on which Developer disputes the amount certified. Failure to file a timely protest shall constitute Developer’s waiver and acceptance of the County’s audit results and fee calculations for all purposes.

8.08 Passage of Title. Title to all construction, equipment and materials shall pass to County upon payment therefor, or installation or incorporation into the Work, whichever occurs first, and Developer shall prepare and execute all documents necessary to effect and perfect such transfer of title. If a lien or encumbrance is filed against the Project for reasons other than County’s failure to make proper payment to Developer, County may withhold 200% of the amount of such lien until it is discharged or County is indemnified by a surety bond or other means reasonably satisfactory to County.

8.09 Waiver of Claims. Acceptance of final payment for a Phase shall constitute a waiver of all claims by Developer in connection with that Phase except those previously made in writing and identified by Developer as unsettled at the time of the final Construction Payment Application. Neither acceptance of, nor payment for, the Work or any part thereof, nor any extension of time, nor any possession taken by County shall operate as a waiver of any of the provisions of this Agreement, nor shall a waiver of any breach of this Agreement be held to be a waiver of any other or subsequent breach. In addition, recordation of a Notice of Completion shall not be deemed an acceptance of latent defects, nor shall it constitute a waiver of any of the provisions of this Agreement.

ARTICLE IX
CHANGE PROCESS

9.01 Changes.

(A) Changes in the Work may be accomplished after the Effective Date without invalidating this Agreement by Change Order, Work Change Directive, or a Minor Change in the Work, subject to the limitations stated in this Agreement and advance written approval by County.

(B) A Change Order shall be based upon agreement between County and Developer. A Work Change Directive may be issued by County without the agreement of Developer.

9.02 Change Orders.

(A) Definition. A “Change Order” is a written instrument prepared by Developer and signed by County and Developer stating their agreement upon all of the following:

(1) the scope of the change in the Work;

(2) the amount of the adjustment, if any, in the Guaranteed Maximum Price for that Phase; provided that (a) the parties will use their reasonable good faith efforts (taking into account, among other things, the percentage of Work that has been completed, remaining
Developer’s Contingency and Contractor’s Contingency), to fund such Change Order, first, out of Contractor Contingency, second, out of Developer Contingency and third, out of savings on other Costs of the Work in such GMP Portion or from prior GMP Portions, if any, in that order, to avoid any increase in the Guaranteed Maximum Price; and (b) the amount of the adjustment shall be subject to County’s approval, in its reasonable discretion (taking into account, among other things, the percentage of Work that has been completed, remaining Developer’s Contingency and Contractor’s Contingency), unless either (i) such adjustment would result in an increase to the Guaranteed Maximum Price for that Phase greater than the amount of “owner contingency” set aside by County in connection with such NCF Phase, or (ii) if, at County’s election, such approval is submitted by County Lead for consideration to the Board, in either such case the approval may be withheld in County’s sole and absolute discretion, provided in no event shall County be entitled to require Developer to apply Developer’s Contingency or Contractor’s Contingency if such Change Order is the result of a County Work Change Directive or PLL Policy-Covered Cost;

(3) the extent of the adjustment, if any, in the Project or Construction Schedule or Milestones; and,

(4) other information or details requested by County.

(B) Procedure.

(1) If County desires to make a change to the Work, it shall submit to Developer a request that Developer prepare a written proposal.

(2) Developer may also initiate proposed changes to the Work by submitting a written proposal to County.

(3) Developer’s proposal will set forth an estimate of (i) the lump sum amount to be added to or deducted from the Guaranteed Maximum Price as a result of the proposed change, if any; (ii) the effect on the Milestones of any such change, (iii) the estimated professional fees related to the proposed change, (iv) and any other information or details requested by County. Developer shall deliver such proposal to County as soon as reasonably possible after County’s request. If County agrees with such proposal and elects to proceed with such change, County shall provide Developer with a written notification of its agreement and the Parties shall execute a Change Order or such other amendment to this Agreement as deemed appropriate by County, subject to all requisite approvals. County shall not be required to compensate Developer for proposed changes initiated by or on behalf of Developer but not approved by County.

9.03 Work Change Directive.

(A) Definition. A Work Change Directive is a written order prepared and signed by County in its sole discretion, directing a change in the Work prior to agreement on the adjustment, if any, in the Guaranteed Maximum Price, other fees or payment and/or Milestones (“Work Change Directive”).
(B) **Procedure.** County and Developer shall negotiate in good faith for appropriate adjustments to the Cost of the Work and Scheduled Completion Dates arising out of Work Change Directives and shall conclude these negotiations as expeditiously as possible.

(C) **Finalizing Changes.** When County and Developer agree upon the adjustments in the Cost of the Work and Scheduled Completion Dates, such agreement shall be effective upon preparation and execution of an appropriate Change Order by all parties, or if by Agreement amendment, then such change shall be effective upon all parties executing the amendment.

**9.04 Minor Changes in the Work.**

(A) **Minor Changes.** With a change order or Agreement amendment, Developer may propose in writing such Minor Changes in the design and construction of the Work consistent with the Project Documents that are justifiably necessary to complete the Project, provided County advance approval is obtained and provided such changes do not result in additional cost or expense to County or County Representatives or would not require a proposed adjustment to the Guaranteed Maximum Price (each, a “**Minor Change**”).

(B) **Documentation.** Developer shall record Minor Changes on the Record Documents maintained by Developer, and shall provide copies to County upon request at no cost to County.

**9.05 Limitation on Changes.** Inasmuch as Developer is responsible for the design of the Project, Developer agrees, for itself and on behalf of its Design Professionals, Contractors, and Developer's Other Consultants, that no increase in the Guaranteed Maximum Price will be made to pay for work that Developer could otherwise claim as a change order or extra work unless Developer establishes in accordance with Section 9.08 below that the additional cost is the result of one of the following: (a) an express change or addition to the Work initiated by Developer and approved in writing by County, in its sole discretion; (b) a change required by regulatory authorities (including inspections) that was not reasonably ascertainable from the codes and regulations in effect on the date of this Agreement and not reasonably inferable from local practices or circumstances; (c) Hazardous Materials, other than to the extent of Developer’s responsibility pursuant to Section 4.03(F)(9) and Article XIV hereof; or (d) subsurface conditions and physical conditions of the Site identified as Excluded Areas pursuant to Section 4.01(A)(1) above; or (e) an Excusable Delay.

**9.06 Determination of Cost.**

(A) Changes to the Work (except for Minor Changes) approved by County in writing will be priced in accordance with all the requirements and provisions of this Agreement regarding Cost of the Work, or as the Parties may otherwise agree.

(B) Developer shall maintain a documented, itemized accounting evidencing the expenses and savings of all Changes and shall provide such documentation to County at County request and without cost to County.
9.07 **Determination of Time Impact.**

(A) If Developer believes that an Excusable Delay has affected activities on the Critical Path such that the Project completion date or Milestones will be delayed, Developer may be entitled to an adjustment of the Project Schedule and/or Milestones, in which event Developer shall:

1. Provide to County a written statement of the actions or events Developer contends delayed the activities on the Critical Path and the length of the claimed delay; and

2. Demonstrate the delay to activities on the Critical Path in the form of a time impact analysis.

(B) Developer shall not be entitled to an adjustment unless it establishes the delay to activities on the Critical Path to County's reasonable satisfaction.

(C) Actual delays in activities not on the Critical Path will not be the basis for an adjustment to the Project Schedule or Milestones.

9.08 **Claims**

(A) **Time Limits on Claims.** Any claims by either party with respect to a Change Order or Work Change Directive pursuant to this Article IX (each, a “Claim”) must be made within thirty (30) Days after occurrence of the event giving rise to such Claim or within thirty (30) Days after claimant first recognized the condition giving rise to Claim, whichever is later. Claims must be made by written notice. An additional Claim made after an initial Claim has been implemented by Change Order will not be considered, unless additional information with regard to the facts underlying such Claim only become available following such Change Order. Developer's failure to notify County within the applicable 30-Day period shall be deemed a waiver and relinquishment of Claim against County with regard to the condition.

(B) **Continuing Performance.** Pending final resolution of any Claim, except as otherwise agreed in writing, Developer shall proceed diligently with performance of this Agreement and County shall continue to make payments in accordance with this Agreement. If Developer disputes whether specified Work is included in this Agreement, Developer shall immediately notify County and proceed with such Work. Developer shall keep and present to County as part of the Claim and in such form as the County may prescribe, an itemized daily accounting of labor, equipment, and materials utilized, together with appropriate supporting documentation of costs. Developer shall file a Claim as provided in this Section 9.08.

(C) **Claims for Additional Cost.** If Developer wishes to make a Claim for an increase in the Guaranteed Maximum Price, written notice as provided herein shall be given before proceeding to execute the affected Work. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 12.02.

(D) **Written Notice.** If Developer wishes to make a Claim for an adjustment of the Project Schedule or GMP Construction Schedule, or a Milestone, written notice as provided
herein shall be given. Developer's Claim shall include an estimate of the cost and of probable effect of the delay on progress of the Work. In case of a continuing delay only one Claim is necessary. Extensions of time are subject to requirements in Section 7.02 and Section 9.07.

(E) **Injury or Damage to Persons or Property.** If either party to this Agreement suffers injury or damage to person or property because of an act or omission of other party, or any other parties, employees or agents, or of others for whose acts such party is legally liable, written notice of such injury or damage, whether or not insured, shall be given to other party within a reasonable time not exceeding 7 calendar days after first observance. Notice shall provide sufficient detail to enable other party to investigate the matter. If a Claim for additional cost or time related to this Claim is to be asserted, it shall be filed as provided in this Section 9.08.

9.09 **County's Action on Claims.**

(A) County shall review Claims and, within ten calendar days of the receipt of the Claim, take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that County is unable to resolve the Claim if County lacks sufficient information to evaluate the merits of the Claim.

(B) **Special Information.** In evaluating Claims, County may, but shall not be obligated to, consult with or seek information from Developer or from persons with special knowledge or expertise who may assist County in rendering decision.

(C) **County's final action.** County will approve or reject Claims by written decision, which shall state the reasons therefor and which shall notify the Contractor of any change in the Guaranteed Maximum Price, Project Schedule, GMP Construction Schedule or Milestones. Any approved changes will be incorporated into a Change Order as provided in this Article IX.

9.10 **Claims for Adjustment of the Guaranteed Maximum Price for Excusable Delays.** Developer shall be entitled to an adjustment in the Guaranteed Maximum Price in an amount equal to the actual additional, unavoidable Costs of the Work incurred by the Contractors, Design Professionals, Subcontractors and Developer's Other Contractors as a result of an Excusable Delay. To be entitled to an adjustment in the Guaranteed Maximum Price for an Excusable Delay, the Developer shall comply with the provisions of Section 9.08. Except as provided herein, the Developer shall have no claim for damage or compensation for any delay, interruption, hindrance, or disruption, other than for payment of Cost of the Work and its fees hereunder applicable thereto.

9.11 **Claims for Extension of Schedules or Milestones for Delays.** The Developer may make a claim for an extension of the Project Schedule, GMP Construction Schedules or Milestones, for an Excusable Delay, in accordance with applicable provision of Section 9.07, subject to the following:

(A) If a delay which not an Excusable Delay occurs concurrently with an Excusable Delay, the maximum extension of the shall be the number of Days, if any, by which the Excusable Delay exceeds the Inexcusable Delay.
The determination of whether a delay is an Excusable Delay shall not be affected by the fact that any earlier delay occurred, regardless of fault or causation.

An adjustment of the Project Schedule, GMP Construction Schedule or Milestones will be made only for Excusable Delays that affect Work activities on the Critical Path of the then-current GMP Construction Schedule.

**ARTICLE X**
**CORRECTION OF WORK AND WARRANTY**

10.01 **Warranty.** With regard to any Project Improvement caused to be constructed by Developer in an NCF Phase, if, within one (1) year after the later of (a) County's acceptance or occupancy of such Project Improvement or (b) the date of final completion of such Project Improvement, or any additional period required by terms of an applicable special warranty required by the Project Documents applicable to such Project Improvement (such one (1) year-period or, if applicable, such other period being referred to herein as the “Warranty Fix It Period”), any of the materials, equipment or workmanship in such Project Improvement was not designed, manufactured or installed as required by the Project Documents for such Project Improvement, or is otherwise defective, Developer shall cause Contractor to identify the problem and correct it, or begin to correct it and pursue such correction diligently until full completion, not later than ten (10) Business Days after receipt of a written notice from County to do so. Additionally, if after the expiration of the Warranty Fix It Period with respect to such Project Improvement, it is determined that any of the materials, equipment or workmanship in such Project Improvement was not installed, designed, manufactured or installed as required by the Project Documents for such Project Improvement, or is otherwise defective, Developer shall use commercially reasonable good faith efforts to enforce warranties against the Contractor (including, if applicable, its vendors, manufacturers and other subcontractors), with regard thereto, not later than ten (10) Business Days after receipt of a written notice from County to do so; provided, however, such covenant with respect to enforcement of warranties shall expire with respect to any such warranty upon the earlier to occur of (i) expiration of such warranty or (ii) the expiration of the statutory limitation period with regard to contractual claims hereunder in accordance with such NCF Phase. The foregoing warranty obligations of Developer with respect to any Project Improvement are in addition to any other rights or warranties County may have at law or under this Agreement with respect to the design and construction of such Project Improvement, provided, however, that any statute of limitations or statute of repose with regard to a particular Project Improvement shall not be extended or tolled as a result of the continuation of this Agreement for the Term or beyond with respect to the construction of additional Project Improvements. Developer’s obligations under this Section shall survive the expiration or earlier termination of this Agreement.

10.02 **Certain Contractor Warranties.** Developer shall use its reasonable good faith efforts to cause to be included in the Construction Contract and/or applicable Subcontracts with respect to each Project Improvement the following warranties:

(A) **Minimum One (1) Year Contractor Warranty Period.** All warranties shall cover a period of one (1) year from County's acceptance or occupancy of such Project Improvement (the
“Substantial Completion Date”) or for a longer period where expressly stipulated in the Contract Documents or so provided by a distributor, manufacturer or subcontractor.

(B) Building Systems. In the case of all building systems (electrical, plumbing, heating, air conditioning, and all other major systems, as the case may be) and the façade of each building, warranties shall cover a period of two (2) years from the Substantial Completion Date.

(C) Structural. In the case of all structural elements of the Project Improvements, warranties shall cover a period of six (6) years from the Substantial Completion Date. Notwithstanding foregoing, (a) if the Contractor’s surety under the bonds required to be delivered by Contractor under Section 13.03 assumes the responsibilities under the Construction Contract due to a default thereunder by Contractor, Contractor’s warranty for structural elements of the Project Improvements shall automatically reduce to a period of two (2) years from the Substantial Completion Date, or (b) if at any time during the applicable warranty period on structural elements it is determined by County, or at Developer’s or Contractor’s request an engineer mutually selected by both parties, that the cause of an problem with a structural element of the Project Improvements is the result of an earthquake or other shift in subsurface conditions and is not the result of Contractor error, such warranty shall not apply.

(D) Roof. In the case of the roof any building included in such Project Improvements, warranties shall be obtained from the manufacturer of all roofing materials and from the Contractor or Subcontractor performing the construction and installation thereof warranties that shall cover a period of twenty (20) years from the Substantial Completion Date of such building.

(E) General Contractor. Contractor shall assume for a period of three (3) years all responsibility for each warranty and guaranty that may be required concerning installation, operation or performance of equipment, materials, and systems as provided by a distributor, manufacturer, Contractor or subcontractor for the full period of such warranty and/or guaranty.

10.03 Testing and Correction of Work. Prior to Completion and during the applicable Warranty Fix It Period, Developer shall promptly correct Work reasonably rejected by County or known by Developer to be defective or failing to conform to the requirements of the Phase Documents, whether observed before or after Completion and whether or not fabricated, installed or completed. As between County and Developer, Developer shall bear all costs of correcting such rejected or nonconforming Work, and all costs of any warranty item, including additional testing and inspection, that causes the Cost of the Work to exceed the Guaranteed Maximum Price for the Work.

10.04 Correction or Completion by County. If Developer defaults or does not have Contractor correct any rejected, defective or nonconforming Work, including any warranty item, for which it has responsibility under Sections 10.01 and/or 10.03 and fails within ten (10) Business Days after receipt of written notice from County to commence and continue correction of such default or neglect with diligence and promptness, County may:

(A) Give a second written notice to Developer and, three (3) Days following receipt by Developer of that second written notice and without prejudice to other remedies County may
correct such deficiencies and deduct all costs of the corrective work from amounts due or to become due to Developer; or

(B) By written order signed by County, order Developer to stop the Work, or any portion thereof, until the cause for such order has been eliminated; provided, however, County’s right to stop the Work shall not give rise to a duty on the part of County to exercise the right for benefit of Developer or other persons or entities; and/or,

(C) County may pursue any or all other legal or contractual remedies County may have, without limitation, provided, however, that any statute of limitations or statute of repose with regard to a particular Project Improvement shall not be extended or tolled as a result of the continuation of this Agreement for the Term or beyond with respect to the construction of other Project Improvements.

10.05 Assignment of Warranties and Guarantees. Developer shall assign all guarantees and warranties from Contractors, Design Professionals, and Other Consultants, as applicable, to County.

ARTICLE XI
OWNERSHIP AND USE OF DOCUMENTS

11.01 Ownership and License. At all times throughout the Project, County shall be deemed the owner of all property rights, including full and complete ownership of all Documents, an irrevocable, perpetual, world-wide, irrevocable, fully-paid-up, royalty-free, assignable and transferable license to use, modify, hypothecate and transfer any and all copyrights and all other intellectual property, whether or not the Project is completed. Developer, Developer Representatives, Design Professionals, Contractors and Subcontractors shall deliver all Documents (electronic, formatted as directed by County) to County no later than (a) when requested by County, (b) the date on which the Work is complete and accepted by County, or (c) the date this Agreement is terminated for any reason prior to completion of the Work, whichever occurs first. In addition, Developer, Developer Representatives, Design Professionals, Contractors and Subcontractors shall deliver copies of all Documents to County at any time, upon ten (10) Days written notice. If this Agreement is terminated for any reason before the Work is complete, County and its agents, employees, representatives, and/or assigns may use the Documents, in whole or in part, or in modified form, for all purposes, at County’s sole discretion and without further employment of, or payment of compensation to, Developer, Developer Representatives, Design Professionals, Contractor and its Subcontractors. County may use, reproduce and make derivative works from the Documents and other rights transferred or granted herein to County for completion, as well as subsequent construction, repair, maintenance, operation, renovation and remodeling of the Work or related facilities or property.

11.02 County’s Use. County’s use of the Documents without the involvement of Developer, Developer Representatives, Design Professionals, Contractors or Subcontractors or on other projects is at County’s sole risk, except to the extent that County has paid Developer or any of the Developer Representatives for the preparation or creation of such Documents in which case any and all representations and warranties attaching to such Documents shall continue and
remain in full force and effect, including but not limited to such representations and warranties contained in this Agreement or found elsewhere, regardless of location.

11.03 **Copyrights and Intellectual Property Rights.** Except as otherwise stated in this Agreement, Developer, its Contractors, Subcontractors, Design Professionals and other Developer Representatives retain their respective copyright in and to the intellectual property depicted in the Documents subject to County’s rights and licenses set forth in this Agreement. In addition to any other rights granted herein, County’s ownership interest in the Documents includes the following single, exclusive license from Developer, its Contractors, Subcontractors, Design Professionals and other Developer Representatives for themselves, their employees, heirs, successors and assigns, hereby grants (and if any subsequent grant is necessary, agrees to grant) to County an irrevocable, perpetual, royalty-free, fully paid-up, sole and exclusive license and right to use and exercise any and all of the copyrights or other intellectual property rights that Developer, its Contractors, Subcontractors, Design Professionals and other Developer Representatives may author or create, alone or jointly with others, in or with respect to the Documents, including without limitation all drawings, designs and graphic representations. County’s license shall include the right to sublicense, shall be for all purposes with respect to each right of copyright, and shall be without restriction.

11.04 **Developer to Obtain Rights.** Developer shall obtain from its Contractors, Subcontractors, Design Professionals and other Developer Representatives all property rights and rights of use that correspond to the rights given by Developer to County in this Article.

**ARTICLE XII**

**TERM, SUSPENSION AND TERMINATION**

12.01 **Term.** The “Term” of this Agreement shall be for a period equal to the Initial Term, together with any extension(s) agreed upon by both parties. The Term shall be automatically extended if, prior to the end of the Term, County has delivered a Notice to Proceed with respect to a Phase, the approved Phase Schedule for which extends beyond the end of the existing Initial Term.

12.02 **County’s Right To Suspend Work.**

(A) County may, with or without cause, order Developer in writing to suspend, delay or interrupt the performance of all or a portion of the Work for such period of time as County may determine, subject to the provisions of this Article XII.

(B) If County suspends the Work for reasons unrelated to performance by Developer or any of the Developer Representatives or any failure of Developer or any of the Developer Representatives to fulfill any of their obligations or responsibilities under this Agreement or for reasons not otherwise allowed under this Agreement, and the Work or portion of the Work is suspended for less than one hundred and eighty (180) Days, Developer may give County written notice of why such delay(s) is materially and substantially interfering in Developer’s ability to timely perform specific duties or responsibilities or to meet certain Project deadlines without incurring additional material and substantial cost or expense. Upon receipt of such notice, County will have three (3) Business Days to remove the suspension, at County’s election,
whereupon the GMP Budget and the GMP Schedule shall be equitably adjusted for actual changes to the Cost of the Work and time to the extent attributable to such suspension, including additional costs resulting from demobilization and mobilization of the Project Site, subject to arbitration, and a corresponding increase in the Construction Management Fee.

(C) If County suspends the Work for reasons unrelated to performance by Developer or any of the Developer Representatives or any failure of Developer or any of the Developer Representatives to fulfill any of their obligations or responsibilities under this Agreement or for reasons not otherwise allowed under this Agreement, and the Work or portion of the Work is suspended for more than one hundred and eighty (180) Days, Developer may give County written notice of why such delay(s) is materially and substantially interfering in Developer’s ability to timely perform specific duties or responsibilities or to meet certain Project deadlines without incurring additional material and substantial cost or expense. Upon receipt of such notice, County will have three (3) Business Days to remove the suspension, at County’s election, whereupon the Phase Budget and, if applicable, the GMP Budget and the Phase Schedule and if applicable the GMP Schedule shall be equitably adjusted for actual changes to the Cost of the Work and time to the extent attributable to such suspension, including additional costs resulting from demobilization and mobilization of the Project Site and a corresponding increase in the Pre-Development Phase Fee or if applicable, the Construction Management Fee. Alternatively, Developer may elect to terminate this Agreement, in which case Developer shall provide County with three (3) Business Days advance written notice and County shall be deemed to have terminated this Agreement for convenience and the Parties shall proceed as provided in Section 12.04 below. If Work is to be resumed under this Section 12.02(C), then the parties will collaborate on the requisite actions needed to set priorities, Milestones, schedules and other fees, costs and expenses moving forward, including, if needed, the rebidding of the Work.

(D) Nothing stated in this Section 12.02 will act as a condition or precondition to the exercise of, or preclude either Party from exercising, any other right, including any right to terminate for cause or convenience, found elsewhere in this Agreement.

12.03 Termination by County for Default.

(A) **Events of Default.** If Developer, or any of the Design Professionals or the Contractors (which for purpose of this Section excludes any subcontractors whose Construction Contract covers less than thirty percent (30%) of the GMP Price for the applicable NCF Phase E):

1. Is insolvent or has made a general assignment for the benefit of creditors, or a receiver has been appointed on account of the insolvency;

2. Fails or refuses to diligently prosecute the Work in accordance with the then-current Phase Schedule, as properly modified with County approval for time extensions;

3. Fails or refuses to make prompt payment to Contractors for material or for labor for reason other than County's failure to comply timely with its payment obligations hereunder;
(4) Disregards or fails to comply with a law, ordinance, or the instruction of County made in accordance with this Agreement or the applicable Business Plan;

(5) Fails or refuses to correct, repair, replace or remedy errors, omissions, defects, materials, supplies or Work as required by this Agreement;

(6) Fails to provide and keep in full force and effect all insurance required by this Agreement or fails to cause all applicable Developer Representatives to do so; or,

(7) violates any material term or condition of this Agreement or any of the provisions of the Documents or Exhibits to this Agreement including, without limitation, the representations and warranties referred to in Section 8.02(B)(1) hereof;

then County may, without prejudice to any other right or remedy, give written notice to Developer and (if the default involves performance of physical construction of the Work) the Surety, if any, that it intends to suspend or terminate this Agreement unless the problem cited is cured within thirty (30) Days of Developer’s receipt of the notice (or if such problem cannot be reasonably cured within such thirty (30)-Day period, otherwise make reasonably satisfactory arrangements for a correction thereof. If Developer fails to cure the problem (or otherwise make satisfactory arrangements for a correction thereof), County may then terminate this Agreement by providing written notice to Developer. Upon providing such written notice of termination, County shall have the right to proceed in accordance with Section 12.02(B) below and Developer shall not have a right to further payment, reimbursement, fee or other entitlements authorized or provided in this Agreement, other than payment to Developer (which payment may be made in the form of joint checks) for all Work performed prior to the effective date of termination by Developer in accordance with this Agreement, all Design Professionals in accordance with the requirements hereof and their respective Design Professional Contracts and all Contractors in accordance with the requirements hereof and their respective Construction Contracts.

(B) County’s Rights Following Termination for Default. In the event of County’s exercise of any termination rights provided in Section 12.03(A) above, County may:

(1) take possession of the Project Site, and of all materials, and, if the default involves performance of physical construction of the Work, equipment, tools and construction equipment and machinery thereon owned by Developer and Contractors involved in the events giving rise to the default;

(2) provide written notice to Developer of those Design Professional Agreements and Construction Contracts that County intends to accept assignment pursuant to Section or 12.04(E) hereof;

(3) finish the Work by whatever reasonable method County may deem appropriate;

(4) offset the actual costs and expenses incurred by County in finishing the Work against the unpaid balance owed or otherwise allowed under this Agreement to Developer or its Contractors or Design Professionals; and
obtain actual damages and all other remedies at law and equity with respect to Developer's default, provided that in no event shall Developer be liable, for consequential, special or punitive damages.

(C) **Developer’s Obligations Following Termination for Default.** In the event of a termination for default, Developer shall provide prompt written assignments of all contracts and agreements County requests, along with all related Project Documentation, including documents for County’s assumption and administration of those contracts and agreements.

(D) **Effect of Bankruptcy.** If Developer files a petition under the United States Bankruptcy Code, this Agreement shall automatically terminate without further obligation from County.

(E) **No Savings.** Upon Completion of the NCF Project following termination by the County for cause, in the event the actual costs and expenses incurred by County in finishing the Work at any Phase exceed the unpaid balance of the Guaranteed Maximum Price for the Project, Developer or Surety shall pay the difference to County within 30 Days after County’s written demand. Upon the request of Developer, County shall provide a detailed accounting of the costs incurred by County in completing the Work.

12.04 **Termination by County for Convenience.**

(A) **Termination Process.** In addition to any other rights of County to suspend or terminate the Work, the Project or this Agreement, in whole or in part, found elsewhere in this Agreement or as allowed by Applicable Law, County may also terminate this Agreement (in whole or in part) at any time with or without cause, for any or no reason, upon thirty (30) Days written notice to Developer. Upon receipt of written notice from County terminating this Agreement (in whole or in part), Developer shall:

1. immediately stop all Work and cause all Developer Representatives to immediately stop all Work, and place no further orders, purchase orders, deliveries, shipments, contracts or subcontracts for materials, services, equipment or supplies or for any aspect of the Work or the Project;
2. terminate all contracts with all Developer Representatives, and cause such parties to terminate shipments, contracts, subcontracts, deliveries, orders, purchase orders and services to the extent that they relate to the terminated portion of the Work;
3. take actions necessary, or as directed by County, to preserve and protect Work completed and in progress and to protect materials, supplies, plants and equipment at the Project Site, stored off-site or in transit,

(B) **Deferred Compensation Payment for Without Cause Termination.** If County terminates this Agreement without cause pursuant to Section 12.02 or this Section 12.04, Developer shall be paid a payment (“Deferred Compensation Payment”) equal to the sum of (i) the actual Cost of the Work already incurred by Developer in the Phase in which such termination occurs, up to and including the effective date of termination, including without limitation, all Pre-Development Phase Fees, Development Management Fee (including all
retention thereon), and Construction Management Fee (including all retention thereon) through such date, and all demobilization costs and other similar costs due in accordance with the Design Professional Agreements, other Consulting Agreements and Construction Contracts, (ii) the Deposit, and (iii) an additional amount (as applicable, the “Deferred Compensation Fee”) comprised of and calculated as follows:

(1) If during any Pre-Development Phase County terminates this Agreement pursuant to Section 12.02 hereof or this Section 12.04, the Deferred Compensation Fee shall be the product of the monthly fee then in effect pursuant to Article VIII hereof (either the Pre-Development Phase Fee, the monthly Development Management Fee payment, or the Construction Management Fee as applicable) as of the date of such termination multiplied by a factor of four (4), provided, however, that if termination occurs prior to the issuance of the Notice to Proceed for Initial NCF Phase Pre-Development Phase C, the monthly fee then in effect shall be deemed to be $63,000.

(2) If County terminates this Agreement pursuant to Section 12.02 or this Section 12.04 at any time after Developer’s completion of construction of the Minimum Developer County Buildings, then the amount of Deferred Compensation Fee payable under Section 12.04(B)(1) through (5) shall be zero.

(3) Notwithstanding anything to the contrary contained herein, in no event shall the Deferred Compensation Fee payable under Section 12.04(B)(1) as a result of a termination by County of this Agreement pursuant to Section 12.02 or this Section 12.04 exceed One Million Dollars ($1,000,000) (the “Maximum Deferred Compensation Fee”).

(C) Delay Compensation Fee Payment if County Fails to Proceed with Phase D.
If for reasons unrelated to performance by Developer or any of the Developer Representatives or any failure of Developer or any of the Developer Representatives to fulfill any of their obligations or responsibilities under this Agreement or for reasons not otherwise allowed under this Agreement, County does not terminate this Agreement pursuant to Section 12.04 hereof and either (i) County fails to deliver a Notice to Proceed for Phase D within one (1) year following Developer’s completion of Initial NCF Pre-Development Phase C or (ii) County fails to issue a Notice to Proceed for the Initial NCF Phase E within four (4) years after Final Approval of the Master Plan, County shall pay to Developer as a “Delay Compensation Fee” (herein so called) an amount equal to the monthly Development Management Fee most recently paid to Developer multiplied by four (4).

(D) Application of Delay Compensation Fees to Subsequent Construction Management Fee and/or Deferred Compensation Fee.
(1) If, following any Delay Compensation Fee payments to Developer in accordance with the foregoing, County delivers to Developer a Notice to Proceed with construction for the Initial NCF Phase E, then such Delay Compensation Payments shall be applied to the first payments that would otherwise be payable to Developer in respect of Construction Management Fee pursuant to Section 8.07 (D)(1)(d)(iii) above in such Initial NCF Phase E.
(2) If, following any Delay Compensation Fee payment to Developer in accordance with the foregoing, County terminates this Agreement pursuant to Section 12.04(A) hereof, any amounts actually paid to Developer as a Delay Compensation Fee shall be credited to any Deferred Compensation Fee otherwise owing to Developer pursuant to Section 12.04(B).

(E) **Evidence of Cost.** Developer shall provide such documentation of the Cost of the Work as County may reasonably request to substantiate the Deferred Compensation Fee, consistent with the materials required under Section 8.07(D).

(F) **Settlement Payment.** Developer agrees to accept the Deferred Compensation Payment, together with its reasonable attorneys' fees and costs of collection thereof, described above in full settlement of all of County obligations and responsibilities under this Agreement, including but not limited to all fees, payments and other amounts that are or may be owed now or in the future.

(G) **Assignment or Termination of Subcontracts, Other.** All contracts (including Construction Contracts, Design Professional Agreements, and Other Consultant Agreements), purchase orders, and rental agreements entered into by Developer or by its Contractors or Design Professionals or Other Consultants shall contain provisions permitting assignment to County, as described above, and providing for termination pursuant to the terms of this Agreement. If County elects not to accept the assignment of any subcontract, purchase order, or rental agreement which would have constituted a Cost of the Work had this Agreement not been terminated, Developer shall terminate such subcontract, purchase order, or rental agreement at no additional cost or obligation to County.

(H) **Timing of Payment.** Any undisputed amount due to Developer pursuant to this Section 12.04 shall be paid within 45 Days after County’s receipt of a Construction Payment Application for such amount, together with the accompanying reasonably supporting documentation.

### 12.05 Developer’s Right To Suspend Work

If County fails to pay undisputed amounts due to Developer under this Agreement above within 45 Days after County’s receipt of a valid request for payment per the Agreement terms, Developer may serve upon County a “45-day stop work order” that states that unless all undisputed amounts then due Developer are paid within 45 Days from the date notice is received by County under this Section 12.04, Developer will stop work on the Project. Developer’s right to stop work pursuant to this Section is in addition to any and all other rights Developer may have under this Agreement. Developer shall resume Work or begin to remobilize no later than five (5) Days after County pays any undisputed amounts due and agrees upon an appropriate adjustment to the GMP to add the delay costs and remobilization costs arising out of such delay.

### 12.06 Savings Clause

If County terminates Developer for cause, and if it is judicially determined (after exhaustion of all appeals) that the termination was wrongful, such default termination shall automatically be converted to and treated as a termination for convenience under Section 12.04, above. In such event, Developer shall be entitled to receive only the Termination Payment payable under 12.04, together with its reasonable attorneys' fees and costs of collection thereof, and Developer, Contractors, Design Professionals, Subcontractors and
other Developer Representatives specifically waive any claims for any other amounts or damages, including, but not limited to, any claims for consequential damages or lost profits, in connection with the termination of this Agreement.

12.07 Remedies are Exclusive.

UNLESS THIS AGREEMENT EXPRESSLY STATES THAT A SPECIFIC REMEDY IS NOT EXCLUSIVE, THE AMOUNT OF THE DEFERRED COMPENSATION PAYMENT (INCLUDING THE AMOUNT OF THE DEFERRED COMPENSATION FEE PAYMENT) SET FORTH IN SECTION 12.04 SHALL SERVE AS LIQUIDATED DAMAGES TO DEVELOPER AND NO OTHER RIGHTS OR REMEDIES AGAINST COUNTY OR ANY OF THE COUNTY REPRESENTATIVES ARE OR SHALL BE AVAILABLE. DEVELOPER’S DAMAGES FOR EVENTS LEADING TO PAYMENT OF SUCH LIQUIDATED DAMAGES WILL BE EXTREMELY DIFFICULT AND IMPractical TO ASCERTAIN FOR ONE OR MORE OF THE FOLLOWING REASONS: (1) THE DAMAGES TO WHICH DEVELOPER WOULD BE ENTITLED IN A COURT OF LAW WILL BE BASED IN PART ON THE ACTUAL VALUE OF THE SERVICES PERFORMED OR THE ACTUAL VALUE OF THE SITE AT A PARTICULAR MOMENT IN TIME; (2) PROOF OF THE AMOUNT OF SUCH DAMAGES WILL BE BASED ON OPINIONS OF VALUE OF THE SITE AND/OR THE SERVICES RENDERED, WHICH CAN VARY IN SIGNIFICANT AMOUNTS; AND (3) IT IS IMPOSSIBLE TO PREDICT AS OF THE DATE ON WHICH THIS AGREEMENT IS MADE OR THE APPLICABLE PROJECT PHASE IS OR ARE APPROVED WHETHER THE VALUE OF THE SITE OR SERVICES WILL INCREASE OR DECREASE AS OF THE DATE OF PAYMENT PURSUANT TO THIS AGREEMENT. THE PARTIES DESIRE TO LIMIT THE AMOUNT OF DAMAGES FOR WHICH COUNTY OR THE COUNTY REPRESENTATIVES MIGHT BE LIABLE SHOULD COUNTY OR A COUNTY REPRESENTATIVE MATERIALLY BREACH THIS AGREEMENT AND TO AVOID THE COSTS AND LENGTHY DELAYS WHICH WOULD RESULT IF DEVELOPER FILED A LAWSUIT TO COLLECT ITS DAMAGES FOR A MATERIAL BREACH OF THIS AGREEMENT. THEREFORE, IF DEVELOPER BECOMES ENTITLED TO PAYMENT OF LIQUIDATED DAMAGES, SUCH SUMS SHALL BE DEEMED TO CONSTITUTE A REASONABLE ESTIMATE OF DAMAGES UNDER THE PROVISIONS OF SECTION 1671 OF THE CALIFORNIA CIVIL CODE, DEVELOPER’S SOLE AND EXCLUSIVE REMEDY IN SUCH EVENT SHALL BE LIMITED TO SUCH AMOUNT AND DEVELOPER SHALL HAVE NO RIGHT TO RECOVER ANY ADDITIONAL DAMAGES OR TO PURSUE ACTION FOR SPECIFIC PERFORMANCE OF ANY PROVISIONS OF THIS AGREEMENT. IN CONSIDERATION OF THE PAYMENT OF LIQUIDATED DAMAGES, DEVELOPER WILL BE DEEMED TO HAVE WAIVED ALL OTHER CLAIMS FOR DAMAGES OR RELIEF AT LAW OR IN EQUITY INCLUDING ANY RIGHTS DEVELOPER MAY HAVE PURSUANT TO SECTION 1680 OR SECTION 3389 OF THE CALIFORNIA CIVIL CODE RELATING TO COUNTY’S DEFAULT. BY INITIALING THIS PROVISION IN THE SPACES BELOW, DEVELOPER AND COUNTY EACH SPECIFICALLY AFFIRM THEIR RESPECTIVE AGREEMENTS CONTAINED IN THIS AGREEMENT AND AGREE THAT SUCH SUM IS A REASONABLE SUM CONSIDERING THE CIRCUMSTANCES AS THEY EXIST ON THE DATE OF THIS AGREEMENT.
12.08 **Developer Release.** Effective upon termination of this Agreement, Developer shall have no further liability or responsibility with respect to (a) any reports, plans, specifications, or other materials delivered by or on behalf of Developer prior to such termination, other than pursuant to Article X of this Agreement with respect to County Buildings completed by Developer prior to such termination, or (b) any failure to complete due diligence with respect to any portion of the Site other than Project Site upon which Developer has completed construction of County Buildings prior to such termination.

**ARTICLE XIII**

**INSURANCE, INDEMNIFICATION AND DISPUTE RESOLUTION**

13.01 **Insurance.** Developer shall obtain and maintain the insurance coverages as set forth in and comply with all other insurance requirements set forth in Exhibit F attached hereto. Developer's cost of maintaining all coverages required to be maintained by its Contractors, Design Professionals and Other Consultants pursuant to Construction Contracts, Design Professional Agreements and Other Consultant’s Agreements, as applicable, including premiums and deductibles thereunder, except as otherwise provided in this Agreement, shall not be a Third Party Reimbursement or a Cost of the Work.

13.02 **Developer’s Indemnification of County.**

  (A) To the fullest extent allowed by law, Developer shall defend with counsel reasonably approved in writing by County, indemnify and hold harmless, County, and the County Indemnitees, from, for and against all claims, liabilities, penalties, costs, losses, injury, damages, expenses, causes of action, actions, or judgments, including reasonable attorneys’ fees and other defense costs resulting from injury, suffering, illness or death sustained, suffered or incurred by any person, or damage to property of any kind, in connection with or related to or arising out of (a) breach by Developer of its obligations hereunder (including the breach by any Design Professional under its Design Professional Agreement or Contractor under its Construction Contract), or (b) Developer’s or any of the Developer Representative's fault or negligence, except that said indemnity shall not be applicable to injury, death, suffering, illness or damage to property to the extent caused by the sole negligence or willful misconduct of County or any of the County Indemnitees. These indemnification obligations shall also extend and apply to claims asserted after termination of this Agreement for whatever reason.

  (B) Developer shall require and cause all its Contractors, Subcontractors and Design Professionals to defend, indemnify and hold harmless the County Indemnitees in accordance with this Article XIII.

13.03 **Performance and Payment Bonds.** Developer shall cause each Contractor to furnish to Developer a corporate surety bond to guaranty the faithful performance and completion of the Work under its Construction Contract and a separate bond to secure payment of all claims of laborers, employees, contractors, subcontractors, mechanics, and material suppliers in the performance of such Work. The Developer shall ensure that County is named as a dual obligee on each performance and payment bond issued in accordance with this Agreement and filed with
the County. The bonds shall be substantially in the forms attached to this Agreement as Exhibit G. The performance bonds and payment bonds shall each be in an amount equal to one hundred percent (100%) of the total amount of the Construction Contract(s) for each NCF Phase E. The bonds shall contain all provisions required by law to be included in such bond forms, including the requirements of Civil Code Sections 3247-3252. All bonds shall be issued by a corporate Surety admitted in the State of California.

13.04 Dispute Resolution.

(A) If a dispute between the Parties arises out of or relates to this Agreement or its material breach, the Parties shall endeavor to resolve the dispute first through direct discussions.

(B) If the dispute cannot be resolved through direct discussions, the Parties shall endeavor to resolve the dispute by non-binding mediation before a mutually agreeable mediator. The Parties agree to exchange such documents as may be reasonably required for a thorough analysis of the dispute at least 30 Days prior to the mediation.

1. The costs for all mediation, including the administrative fees and mediator compensation, shall be shared equally by all Parties. The expenses of witnesses for any party shall be paid by the party producing such witnesses.

2. A single mediator, acceptable to both parties, shall be used to mediate the dispute. The mediator will be knowledgeable in construction law or, as needed, in the laws pertaining to the nature of the dispute. The initial mediation session shall commence within 90 Days of the request for mediation, unless otherwise mutually agreed by the parties.

3. All mediation sessions shall be conducted after the Work is complete unless a claim exceeds $250,000 and the Phase E has more than four months remaining until final completion, or unless all parties agree to immediate mediation. Mediation hearings will be conducted in an informal manner and discovery will not be allowed unless agreed to by all parties, provided, however, that the parties agree to exchange such documents as may be reasonably required for a thorough analysis of the dispute at least 30 Days prior to the mediation.

4. Any resultant agreements from non-binding mediation shall be documented in writing, as agreed upon during the non-binding mediation. All mediation results and documentation shall be non-binding and inadmissible for any purpose in any legal proceeding, unless such admission is otherwise agreed in writing by all parties.

5. If the parties do not resolve their dispute through non-binding mediation, they will have recourse to all remedies available to them under this Agreement.

ARTICLE XIV
HAZARDOUS MATERIALS

14.01 General.

(A) The obligations of Developer and County to each other with respect to Hazardous Materials shall be as set forth in this Article XIV and Section 4.03(F)(8) above. The terms of
this Article XIV shall survive the completion of the Work under this Agreement and/or any termination of this Agreement.

(B) Material Safety Data Sheets or Safety Data Sheets ("SDS") as required by law and pertaining to Hazardous Materials, materials, waste or substances used or consumed in the performance of the Work, whether obtained by Developer, Developer Representatives, Contractors or County, shall be maintained at the Project Site by Developer and made available to County, County Representatives, Contractors and Subcontractors, and their respective agents, employees and representatives.

(C) During performance of the Work, Developer shall be responsible for the proper handling, storage, Remediation (including disposal) if applicable, of all Hazardous Materials brought to the Project Site by Developer, Contractors, or other Developer Representatives, in relation to or for the Work. All Hazardous Material shall be brought onto the Project Site only in compliance with Applicable Laws and shall be handled, stored, released, disposed of, transported and used in compliance with all Applicable Laws and shall be kept segregated from Hazardous Materials included in the Known Environmental Condition.

(D) Developer shall perform and shall be responsible for the Remediation (including disposal) and other Work related to (a) the Known Environmental Condition with respect to each NCF Phase E in accordance with Applicable Laws and as part of the Cost of the Work; (b) Newly Discovered Environmental Condition as a Cost of the Work to the extent authorized by a Change Order approved by County and Developer pursuant to Section 9.02(A) above; and (c) Developer Releases at Developer's sole cost and not as a Cost of the Work or funded by Developer Contingency.

(E) Developer shall sign all manifests for the removal and transport of asbestos and other Hazardous Materials Remediated from the Project Site. County shall sign all manifests for the disposal of asbestos and other Hazardous Materials Remediated from the Project Site, other than any manifest for the disposal of Hazardous Materials from a Developer Release, which shall be signed by Developer.

14.02 Known Environmental Condition; Outline of Remediation Responsibility.
Developer acknowledges that conditions involving asbestos and other Hazardous Materials have been identified at the Site as described in the documents listed in Exhibit D or may be identified in the course of Developer’s Project Site investigation pursuant to the Pre-Development Phase Business Plan and that such Hazardous Materials constitute the Known Environmental Condition of such Project Site. Developer shall perform all Remediation and other Work related to the Known Environmental Condition with respect to each NCF Phase E in accordance with Applicable Laws and as part of the Cost of the Work.

14.03 Richey Field. Developer acknowledges receipt of the disclosures, restrictions and obligations established by and identified in that certain Quitclaim Deed executed by Director of Real Estate, Headquarters, United States Army Corps of Engineers dated March 27, 2013 and accepted by County on March 20, 2013, which deed recorded in the Official Records of Santa Clara County, California on May 30, 2013, as document number 2241834 (the “Richey Deed Restriction”). Developer acknowledges that such conditions involving Hazardous Materials in,
on, under and around Richey Field as have been identified in the Richey Deed Restriction and any other documents listed in Exhibit D or may be identified in the course of Developer’s investigation of the Richey Parcel (or portion thereof) pursuant to the Pre-Development Phase Business Plan (collectively, the “Richey Environmental Condition”) shall be part of the Known Environmental Condition with respect to any NCF Phase the Project Site for which is the Richey Parcel (or such portion). Developer acknowledges that all activities with regard to Remediation, removal, transportation and storage of the Hazardous Materials constituting the Richey Environmental Condition are subject to compliance with, and Developer shall in the performance of all of its obligations hereunder also comply with, the Richey Deed Restriction.

14.04 Hazardous Materials Discovered on Site.

(A) If, after the commencement of the Work in any Phase E, Hazardous Material other than the Known Environmental Condition is discovered at the Project Site (“Newly Discovered Environmental Condition”), Developer shall be entitled to immediately stop Work in the affected area. Developer shall immediately report the Newly Discovered Environmental Condition to County and, if required, any Governmental Authority(s) with jurisdiction.

(B) Other than Remediation of the Known Environmental Condition pursuant to the approved Project Documents for such Phase E or Hazardous Materials resulting from or related to the Work in accordance with Section 14.01(C), Developer shall not be authorized to perform any Work relating to or in the area of the Project Site in which a Newly Discovered Environmental Condition is located without an appropriate Change Order and other Project Documentation for the Remediation of the Newly Discovered Environmental Condition agreed to by the Parties.

(C) With respect to Newly Discovered Hazardous Materials only, Developer shall retain an independent testing laboratory to determine the nature of the material encountered and whether it is a Newly Discovered Environmental Condition requiring Remediation. Unless such Newly Discovered Environmental Condition is a result of a Developer Release, then the costs of such testing shall be a Cost of the Work. If such Newly Discovered Environmental Condition is a result of a Developer Release, then the costs of such testing shall not be a Cost of the Work and shall be borne solely by Developer.

(D) Following such testing, and in coordination with County and the carrier of the PLL Policy, Developer shall cause to be prepared the appropriate Change Order and other Project Documentation for the Remediation of the Newly Discovered Environmental Condition (which Change Order, notwithstanding anything to the contrary herein, including Section 9.02(a) above shall not be funded out of Contractor’s Contingency or Developer’s Contingency unless agreed to by Developer in its sole and absolute discretion). Pursuant to such Change Order the Phase Schedule and Phase Budget for such NCF Phase E shall be equitably adjusted to reflect the additional Work required to effectuate such abatement, remediation and/or removal. Any cost associated therewith shall be a Cost of the Work.

(A) **Prohibition; Environmental Laws.** Developer shall not generate, manufacture, store, handle, transport to or from, use, dispose of, or ship to or from, any Hazardous Material on, in, under or about any portion of the Project Site or the surrounding property, including, without limitation, Remediation of the Known Environmental Condition or any Newly Discovered Environmental Condition (any such activity being referred to herein as “**HazMat Use**”) without, in each instance, obtaining all prior written consents thereto from all applicable Governmental Authorities with jurisdiction, and complying with all Environmental Laws, including but not limited to all training, testing, containment, safety practices and protocols, labeling, recordkeeping, storage, handling, transportation and permitting requirements and best practices. If there is any HazMat Use at the Project Site, then Developer and the Developer Representatives may only engage in such HazMat Use, and only in such permitted quantities, (a) that are necessary for Completion of the Project Improvements in such Phase E, (b) expressly disclosed to (itemized and quantified) and approved by County in writing (which approval shall become part of the Project Documentation), and (c) only to the extent that such HazMat Use fully and completely complies with all Environmental Laws and other such Applicable Laws at all times, and Developer shall be solely responsible and liable for such compliance. Any changes to the HazMat Use from previously-approved Project Documentation may be implemented only with the prior written consent of County. County shall have the right (but not the obligation) at all times during the performance of any Phase E to (a) inspect the applicable Project Site (provided such tests and investigations do not interfere with Developer's or any Contractor's or Subcontractor's performance of the Work), (b) conduct tests and investigations to determine whether Developer or any of the Developer Representatives are in compliance with this Section or to determine if Hazardous Materials may be present in, on or about the Premises (provided such tests and investigations do not interfere with Developer's or any Contractor's or Subcontractor's performance of the Work), and (c) request lists of all HazMat Use in, on, under or about any portion of the Project Site. The cost of all such inspections, tests and investigations (collectively, “**Inspections**”) shall be borne solely by County, unless the HazMat Use revealed by any such Inspection is in violation of Developer's obligations under this Agreement (a "**Non-Conforming HazMat Use**"), in which case Developer shall reimburse County for all costs third party incurred by County for Inspections relating to such Non-Conforming HazMat Use (or such reimbursement amounts may be deducted from the next payments due to Developer hereunder). The aforementioned rights granted herein to County and its representatives shall not create (1) a duty on County’s part to perform Inspections, monitor or otherwise observe the Site or any Project Site, monitor or observe Developer or any of the Developer Representatives or their respective activities or HazMat Use, including without limitation, Developer’s operation or any remediation related thereto, or (2) liability on the part of County and County Representatives for any Hazardous Materials, HazMat Use or any Release (as defined below).

(B) **Notice of Release.** Developer shall give to County prompt verbal and follow-up written notice of any Release, provided that Developer or any of the Developer Representatives knows or reasonably should know of such Release.

(C) **Remediation of Developer Releases.** Developer, at its sole cost and expense, and not as a Cost of the Work shall or shall cause the Developer Representatives, to promptly investigate and Remediate any Developer Release such that the affected portions of the Site and any adjacent property are returned to the condition existing prior to the Developer Release. Any such Remediation shall only be performed after Developer has obtained County’s prior written
consent, which consent may not be unreasonably withheld so long as such actions would not potentially have a material adverse long-term or short-term effect on any portion of the Premises. Notwithstanding the foregoing, Developer shall be entitled to respond immediately to an emergency at its sole cost, expense and liability, without first obtaining County’s prior written consent. Developer, at its sole cost and expense, shall conduct and perform, or cause to be conducted and performed, all Remediation of such Developer Release as required by any Environmental Laws or any Governmental Authorities having jurisdiction. If Developer fails to so promptly complete the Remediation of any Developer Release, County may, but without obligation to do so, take any and all steps necessary to rectify the same and Developer shall reimburse County, within thirty (30) Days after written demand, for all costs and expenses incurred by County in the performance of the Remediation of such Developer Release. All such Remediation of Developer Releases shall be performed in such a manner so as to enable County to make full economic use of the Site and the other portions of the Site after the satisfactory completion of such Remediation.

(D) **Monitoring.** Developer shall implement, as a Cost of the Work, commercially reasonable monitoring, safekeeping and security measures for each Project Site in order to prevent other parties from causing or contributing to any Release or HazMat Use not allowed herein.

(E) **Environmental Indemnity - Developer.** Developer shall protect, indemnify, defend (with legal counsel reasonably acceptable to County) and hold County and the other County Indemnitees harmless from, for and against any and all liabilities, penalties, costs (including, without limitation, diminution in value of any portion of the Site and damages for the loss of or restriction on the use of rentable or usable space within the Site), losses, damages, expenses, causes of action, actions, claims or judgments, including reasonable attorneys’ fees and other defense costs arising at any time resulting from or related to, directly or indirectly, (i) Developer’s breach of its obligations hereunder with respect to Hazardous Materials on each Project, including the Remediation thereof; (ii) Developer’s failure to fund costs of Remediation which are its responsibility under Section 14.01(D) ; and/or (iii) any Developer Release, excepting to the extent that Claims are caused by the negligence or willful misconduct of County or the County Indemnitees. Neither the written consent of County to any use of the Site, HazMat, HazMat Use, other use, Release or Remediation, in whole or in part, nor the strict compliance by Developer with any or all Environmental Laws shall excuse Developer from its obligations of indemnification pursuant hereto. Developer shall not be relieved of its indemnification obligations under the provisions of this Agreement due to County’s status as either an “owner” or “operator” under any Environmental Laws.

(F) **Environmental Notices.** Developer shall deliver promptly to County complete copies of all written notices, demands, or other written communications from any Governmental Authority, or any insurance company or board of fire underwriters or like or similar entities, regarding any Release, Remediation, HazMat Use or Hazardous Materials on, about, upon, under, at, in, or from the Site. Developer shall promptly, upon receiving notice thereof, inform County in writing (and orally in the event of a Release or other emergency) of (a) any and all enforcement or Remediation, or other governmental, regulatory, or judicial acts or orders instituted, contemplated, or threatened pursuant to any Environmental Laws affecting Hazardous Materials in, on, upon, over or under the Site; and (b) all claims made or threatened by any third
party relating to damage, contribution, cost recovery, compensation, loss or injury resulting from any actual, proposed, or threatened use, Remediation, or Release on, in, upon, at, under, from, to, or about the Site.

(G) **Environmental Indemnity - County.** County shall protect, indemnify, defend (with legal counsel reasonably acceptable to Developer) and hold Developer and Developer Representatives harmless from, for and against any and all losses, damages, expenses, causes of action, actions, claims or judgments, including reasonable attorneys’ fees and other defense costs arising at any time in connection with, to the extent resulting from or related to, directly or indirectly, Hazardous Materials on the Site or remediated and removed from the Site other than matters for which Developer is expressly responsible hereunder, including but not limited to Developer’s failure to faithfully perform its obligations under Section 14.05(C) above.

**ARTICLE XV**

**OTHER MISCELLANEOUS PROVISIONS**

15.01 **Records and Audits.**

(A) Developer and the Developer Representatives shall keep full and detailed accounts, maintain records, and exercise such controls as may be necessary for proper financial management under this Agreement; the accounting and control systems shall be satisfactory to County. Developer’s accounting systems shall conform to generally accepted accounting principles and all records shall provide a breakdown of total costs charged under this Agreement, including properly executed payrolls, time records, utility bills, invoices and vouchers. County, its representatives and accountants shall be afforded prompt access upon reasonable notice to these records, books, and Developer and the Developer Representatives shall preserve such project records with respect to each NCF Phase for a period of three (3) years after final payment for such NCF Phase, or for such longer period as may be required by law.

(B) Developer and the Developer Representatives shall deliver to County a copy of all books of account, computer files and other records including, but not limited to, records relating to the costs of construction and construction advances upon completion of each Phase E, the termination of this Agreement for any reason, or at such other time as County may request, within thirty (30) Days after a written request from County.

(C) Developer and the Developer Representatives shall, upon reasonable notice, permit County and its authorized representatives to inspect, examine and copy their books, records, accounts, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to such Phase, and any and all data relevant to this Agreement at any reasonable time for the purpose of auditing and verifying Construction Payment Applications, and any other reports, statements, invoices, or payment applications submitted by Developer pursuant to this Agreement and shall provide such assistance as may be reasonably required in the course of such inspection. Developer and the Developer Representatives shall also allow County access to their project record keeping and accounting personnel. County further reserves the right to examine and re-examine said books, records, accounts, and data during the three (3) years period following the termination of this Agreement; and Developer and the Developer Representatives shall in no event dispose of, destroy, alter, or
mutilate said books, records, accounts, and data in any manner whatever for three (3) years after the termination of this Agreement.

(D) Pursuant to California Government Code Section 10527, the Parties to this Agreement, as well as the Developer Representatives shall be subject to the examination and audit of representative of the Auditor General of the State of California. The examination and audit shall be confined to those matters connected with the performance of this Agreement including, but not limited to, the cost of administering the Agreement.

15.02 Additional Notifications. Should any significant problem, emergency, strike, injury, work stoppage or legal problem be anticipated, or any unanticipated event occur which might adversely affect Developer’s ability to perform its obligations hereunder, Developer shall promptly prepare a written report detailing all available information and steps being taken to correct such problem or event and deliver the report to County as soon as practicable.

15.03 Attorney Fees. In any action between the parties to interpret, enforce, reform, modify, rescind or otherwise in connection with any of the terms or provisions of this Agreement, the prevailing party in the action or other proceeding shall be entitled, in addition to damages, injunctive relief or any other relief to which it might be entitled, reasonable costs and expenses including, without limitation, litigation costs, expert witness fees and reasonable attorneys’ fees and costs. As used in this Agreement, the terms “attorneys’ fees” or “attorneys’ fees and costs” means the reasonable fees and expenses of counsel to the parties hereto (including, without limitation, in-house or other counsel employed by the County or Developer) which may include printing, duplicating and other expenses, air freight charges, and fees billed for law clerks, paralegals and others not admitted to the bar but performing services under the supervision of an attorney. The terms “attorneys’ fees” or “attorneys’ fees and costs” shall also include, without limitation, all such fees and expenses incurred with respect to enforcement of judgments, appeals, arbitrations and bankruptcy proceedings, and whether or not any action or proceeding is brought with respect to the matter for which said fees and expenses were incurred.

15.04 Protection Of Developer Intellectual Property And Confidential Information.

(A) Developer Property does not include County Property or County Confidential Information. Developer confidential information shall not include: (1) information which is or becomes publicly available (other than by, through or as a result of County’s breach of any of the Agreement terms or conditions); (2) information independently developed by County, County Representatives, County Contractors or any third parties not under contract with Developer to maintain its confidentiality, and without the advance benefit, knowledge or use of any of Developer Confidential Information; or (3) information received from a third party not under a confidentiality obligation to Developer.

(B) County will insure, prior to disposing of any media, that any known Developer confidential information contained in such media shall be erased or otherwise destroyed.

(C) County agrees that it will take appropriate action by instruction, agreement or otherwise with its employees or other County Contractors permitted access to licensed software
and other proprietary data to satisfy its obligations under this Agreement with respect to use, copying, modification, protection and security of proprietary software and other proprietary data.

(D) Developer Intellectual Property. All right, title and interest in and to any of the Intellectual Property Rights of Developer shall remain and belong to Developer solely. Under no circumstances shall the Intellectual Property Rights of Developer be construed to contain or include any of the Intellectual Property Rights of County. Under no circumstances shall the Intellectual Property Rights of County be construed to contain or include the Intellectual Property Rights of Developer.

15.05 Protection Of County Property, Security And Ownership. County retains and reserves all right, title and interest (including all related Intellectual Property Rights) in and to all County Property and County Confidential Information. No rights are granted to Developer or any of Design Professionals or Developer Representatives in County Property and County Confidential Information.

(A) “County Property” as used in this Agreement, means, collectively and singularly, all of the following County property: information, data or materials provided to Developer or to any of Design Professionals or Developer Representatives by County or on behalf of County; personally identifiable information ("PII") and County Customer Data (as defined below); the Work (excluding any specific deliverables otherwise excluded from County ownership as expressly stated elsewhere in this Agreement); County documents, materials, specifications, lists, maps, outlines, emails, electronic communications; County information collected or relating to any of County Customers except as otherwise stated in this Agreement; County programming, object code, website, publication, source code, technology, internet profiles, internet websites, software, metadata, data, device, or other asset of any kind; and, the Intellectual Property Rights of County, including but not limited to all copyrights, trade names, trade dress, domain names, patents, logos, symbols, trade secrets, moral rights, termination rights, ownership rights, licenses, authorship and other proprietary rights of County including, without limitation, all goodwill, all information and materials provided by or on behalf of County and all derivative work thereto; and, all County rights necessary for any and all local, national, or worldwide development, manufacture, modification, enhancement, sale, licensing, use, reproduction, publication or display.

(B) “County Confidential Information“ means and includes all County confidential or proprietary information and documentation that County deems confidential regardless of where found and regardless of how marked, including but not limited to all County Property and any and all other information pertaining to or about County Customers. “County Customers” are (and “Customer Data” includes any information or documentation in any form resulting or generating from) any person or persons and/or entities receiving County services, accessing County links or websites, or participating in any County held or sponsored events on County property or elsewhere, regardless of whether County provided these links, websites, services, contests or games directly. All Customer Data is exclusively and solely County Property, provided, however, that PII contained in Customer Data is not County Property unless County Customer has authorized such use or granted such rights to County or County Contractors. All Customer Data is always County Confidential Information, except as otherwise determined solely by County in writing. Notwithstanding anything to the contrary above, County Property
shall also be deemed County Confidential Information, unless otherwise determined by County in writing.

(C) County Confidential Information shall not include: (1) information which is or becomes publicly available (other than by, through or as a result of Developer’s or any Developer Representatives’ breach of any of the Agreement terms or conditions); (2) information independently developed by Developer or any Developer Representatives without the benefit, knowledge or use of any of County Confidential Information; or (3) information received from a third party not under a confidentiality obligation to County.

(D) Except as otherwise authorized under this Agreement, Developer and each Developer Representative shall at all times maintain any and all County Confidential Information in its or their possession as confidential and secure information; shall not use, copy, sell, transfer, publish, disclose or display any County Confidential Information; and, shall not otherwise make any of County Confidential Information available to any third party, without the prior written consent of County. All County Confidential Information shall be maintained and secured by Developer using a reasonable standard of care acceptable within the security industry and will use security devices or procedures designed to prevent unauthorized access to such confidential information. Developer shall instruct each Developer Representative of its confidentiality obligations hereunder and not to attempt to circumvent any such security procedures and devices. Developer represents and warrants that any and all County Confidential Information shall only be distributed to persons having a need to know such information to perform their duties under or as allowed by this Agreement. Developer may disclose County Confidential Information only if required to do so by subpoena, court or regulatory order, or other legal process, provided Developer first immediately notifies County of its receipt of any such process, and reasonably cooperates, at County’s expense, with efforts to prevent or limit disclosure in response to such process.

(E) “Use of County Property or Confidential Information”. Developer warrants and represents that it has not prior to the date hereof, and agrees that it will not after the effective date hereof grant or give permission or license to use County Confidential Information or County Property, nor allow others to do so, for advertising or for any purpose without the prior written consent of an authorized representative of County. Developer acknowledges and agrees that (1) County is and shall remain the sole and exclusive owner of all right, title and interest in and to County Property and County Confidential Information, including the right to grant permission to use County Property and County Confidential Information; (2) Developer’s use of County Property and County Confidential Information, and all goodwill and derivative work associated with or derived from County Property or County Confidential Information shall inure to the sole and exclusive benefit of County; and, (3) nothing in this Agreement or any related agreement, instrument or document shall be construed to give Developer or any of its Developer Representatives any legal or beneficial ownership interest in or title to County Property or to County Confidential Information. Notwithstanding the foregoing, in the event that Developer is deemed to own any such rights, Developer hereby permanently and unconditionally assigns all such rights to County. Developer represents, warrants and agrees for itself and for each of its Developer Representatives that it has not and that it shall not change or modify County Property or County Confidential Information except as otherwise allowed or required in order to perform Developer obligations under this Agreement as determined by County.
(1) Should County Confidential Information be divulged to unauthorized third parties, Developer shall comply with all applicable federal and state laws and regulations, including but not limited to California Civil Code Sections 1798.29 and 1798.82 at Developer’s sole expense (if applicable). Developer shall not charge County for any expenses associated with Developer’s compliance with the obligations set forth in this Section.

(2) Developer agrees for itself and each Developer Representative, and Contractor that it shall establish and maintain an information security program that is designed to:

(a) Ensure the security and confidentiality of County Confidential Information;

(b) Protect against any anticipated threats or hazards to the security or integrity of County Confidential Information;

(c) Protect against unauthorized access to or use of County Confidential Information that could result in harm or inconvenience to County or any end users, patients, employees or customers;

(d) Ensure the secure and proper disposal of County Confidential Information in its custody or control;

(e) Take all appropriate action to address any incident of unauthorized access to County Confidential Information, including addressing and/or remediing the issue that resulted in such unauthorized access;

(f) Notify County immediately of any incident or threat of unauthorized access to County Confidential Information or any other breach in its security; and,

(g) Be responsible for ensuring compliance by all Developer Representatives with the confidentiality provisions of this Agreement.

15.06 Relationship Of Parties.

(A) Developer shall supply all Work pursuant to this Agreement as an independent contractor and not as an officer, borrower, financier, lender, tenant, landlord, attorney-in-fact, representative, agent, servant, or employee of County. Developer shall be solely responsible for the acts and omissions of the Developer Representatives, including but not limited to the Design Professionals, the Contractors and the Subcontractors. Nothing herein shall be considered as creating a partnership or joint venture between County and Developer or between County and any of the Developer Representatives. None of Developer Representatives shall be considered, nor are they, an officer, agent, representative, servant, or employee of County, nor shall any such person be entitled to any benefits available or granted to employees, officers, agents, contractors or representatives of County.

(B) Developer agrees to indemnify, defend and hold County harmless of and from any and all losses, damages, expenses, causes of action, claims or judgment, including reasonable
attorneys’ fees, and other defense costs, arising from or relating to any determination (whether judicially or administratively) that some relationship, other than that of independent contractor, exists between County and Developer or between County and any Developer Representative.

15.07 Developer’s Employee Wages and Related Expenses.

(A) Personnel Compensation. Developer shall prepare, process and pay the payroll for its staff and employees and shall pay all applicable federal and state employment taxes and payroll insurance, including but not limited to any income, social security and unemployment taxes and worker compensation costs. Developer shall indemnify, defend, and hold County harmless from and against any losses, damages, expenses, causes of action, claims or judgment, including reasonable attorneys’ fees, and other defense costs, with respect thereto.

(1) Developer’s Employee Wages and Related Expenses. Developer shall pay all employee wages and related expenses related to the performance by Developer of the terms and conditions of this Agreement. County shall not be liable to reimburse Developer for any such expenses (except the extent expressly provided in this Agreement). Developer shall timely (and without delay) hire, pay and supervise, as employees of Developer, all persons necessary to carry out Developer’s responsibilities and duties hereunder. Developer shall have the sole responsibility for all matters relating to such employees and shall fully comply with Applicable Laws and regulations affecting such employees, including, without limitation, laws and regulations regarding prevailing wage, payroll withholding, worker’s compensation, Social Security, unemployment insurance, hours of labor, wages and working conditions, and shall maintain worker’s compensation insurance in the amount of any statutory requirements.

(a) Developer shall cause its employees performing work under this Agreement to be paid unconditionally and not less often than once a month without deduction or rebate on any account except only such payroll deductions as are mandatory by law or permitted by the applicable regulations issued by the Secretary of Labor pursuant to the “Anti-Kickback Act” of June 13, 1934 (48 Stat 948; 62 Stat 740; 63 Stat 108; title 18 U.S.C.A., Section 874; and Title 40 U.S.C.A., Section 276c). Developer shall comply with all applicable “Anti-Kickback” regulations and shall insert appropriate provisions in all subcontracts covering provision of services and deliverables under this Agreement including to insure compliance with such regulations, and shall be responsible for the submission of required affidavits except as the Secretary of Labor may specifically provide for variations of or exemptions from the requirements.

(2) Living Wage (If Applicable). Unless otherwise exempted or prohibited by law or County policy, where applicable, contractors that contract with County to provide Direct services developed pursuant to a formal process, per County of Santa Clara Ordinance Code Division B36 (“Division B36”) and Board Policy Section 5.5.5.5 (“Living Wage Policy”), and their subcontractors, where the contract value is $100,000 or more (“Direct Services Contract”), must comply with Division B36 and the Living Wage Policy and compensate their employees in accordance with Division B36 and the Living Wage Policy. Compliance and compensation for purposes of this provision includes, but is not limited to, components relating to fair compensation, earned sick leave, paid jury duty, fair workweek, worker retention, fair chance hiring, targeted hiring, local hiring, protection from retaliation, and labor peace. If
Developer and/or a Contractor violates this provision, the Board of Supervisors or its designee may, at its sole discretion, take responsive actions including, but not limited to, the following:

(a) Suspend, modify, or terminate this Agreement (subject to the provisions of Article XII above).

(b) Require Developer and/or Contractor to comply with an appropriate remediation plan developed by the County.

(c) Waive all or part of Division B36 or the Living Wage Policy.

This provision shall not be construed to limit an employee’s rights to bring any legal action for violation of the employee’s rights under Division B36 or any other Applicable Law. Further, this provision does not confer any rights upon any person or entity other than the Board of Supervisors or its designee to bring any action seeking the cancellation or suspension of a County contract. By entering into this Agreement, Developer certifies that it is currently complying with Division B36 and the Living Wage Policy with respect to this Agreement and other applicable contracts, and warrants that it will continue to comply with Division B36 and the Living Wage Policy with respect to this Agreement and other applicable contracts.

(3) Wage Theft Prevention.

(a) Compliance with Wage and Hour Laws. Developer, and each Contractor, Subcontractor, Developer Representative, and Design Professional must comply with all applicable federal, state, and local wage and hour laws. Applicable Laws may include, but are not limited to, the Federal Fair Labor Standards Act, the California Labor Code, and any local Minimum Wage Ordinance or Living Wage Ordinance.

(b) Final Judgments, Decisions, and Orders. For purposes of this Section, a “final judgment, decision, or order” refers to one for which all appeals have been exhausted. Relevant investigatory government agencies include: the federal Department of Labor, the California Division of Labor Standards Enforcement, a local enforcement agency, or any other government entity tasked with the investigation and enforcement of wage and hour laws.

(c) Prior Judgments against Developer and/or its Contractors. BY SIGNING THIS AGREEMENT, DEVELOPER AFFIRMS THAT IT HAS DISCLOSED ANY FINAL JUDGMENTS, DECISIONS, OR ORDERS FROM A COURT OR INVESTIGATORY GOVERNMENT AGENCY FINDING—IN THE FIVE YEARS PRIOR TO EXECUTING THIS AGREEMENT—THAT DEVELOPER HAS VIOLATED ANY APPLICABLE WAGE AND HOUR LAWS.

DEVELOPER FURTHER AFFIRMS THAT IT HAVE SATISFIED AND COMPLIED WITH—OR HAS REACHED AGREEMENT WITH THE COUNTY REGARDING THE MANNER IN WHICH IT WILL SATISFY—ANY SUCH JUDGMENTS, DECISIONS, OR ORDERS.
(d) **Judgments During Term of Agreement.** If at any time during the term of this Agreement, a court or investigatory government agency issues a final judgment, decision, or order finding that Developer or any Contractor has violated any applicable wage and hour law, or Developer learns of such a judgment, decision, or order that was not previously disclosed, Developer must inform the Office of the County Executive-Office of Countywide Contracting Management (OCCM), no more than 15 Days after the judgment, decision, or order becomes final or of learning of the final judgment, decision, or order. Developer and its Contractors shall promptly satisfy and comply with any such judgment, decision, or order, and shall provide the Office of the County Executive-OCCM with documentary evidence of compliance with the final judgment, decision, or order within 5 Days of satisfying the final judgment, decision, or order. The County reserves the right to require Developer to enter into an agreement with the County regarding the manner in which any such final judgment, decision, or order will be satisfied.

(e) **County’s Right to Withhold Payment.** Where Developer or any Contractor has been found in violation of any applicable wage and hour law by a final judgment, decision, or order of a court or government agency, the County reserves the right to withhold payment to Developer until such judgment, decision, or order has been satisfied in full.

(f) **Material Breach.** Failure to comply with any part of this Section constitutes a material breach of this Agreement. Such breach, following applicable notice and opportunity to cure as provided in Section 12.02, may serve as a basis for termination of this Agreement and/or any other remedies available under this Agreement and/or law.

(g) **Notice to County Related to Wage Theft Prevention.** Notice provided to the Office of the County Executive as required under this Section shall be addressed to: Office of the County Executive—OCCM; 70 West Hedding Street; East Wing, 11th Floor; San José, CA 95110. The Notice provisions of this Section are separate from any other notice provisions in this Agreement and, accordingly, only notice provided to the above address satisfies the notice requirements in this Section.

(4) **Prevailing Wage.** Developer acknowledges and agrees that Work performed under this Agreement may be considered a public work within the meaning of California Labor Code Section 1720 and that the requirements of Section 1771, *et seq.* apply to such public work. Developer has included (and will include) consideration for this obligation in calculating compensation under this Agreement, if such prevailing wage requirements are applicable. Without limiting the provisions of Sections 2.06(B) above, Developer is solely responsible and liable for ensuring compliance with all applicable prevailing wage laws. County may at any time, without obligation to do so, audit Developer to verify whether Developer and Developer Representatives are in compliance with prevailing wage laws. Developer and Developer Representatives shall cooperate with all such audits, including making available and providing copies, during the period 9:00 a.m. to 5:00 p.m., Monday through Friday, any and all records requested by County to verify compliance promptly upon request, but not later than seventy-two hours after such request.

15.08 **Notices.** All notices, demands or other communications required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly delivered: (a)
upon personal delivery; (b) as of the third Business Day after mailing by United States mail, certified, return receipt requested, postage prepaid, addressed to the proper party at the appropriate address set forth below; (c) as of 12:00 p.m. on the Business Day immediately after the Day it is deposited with and accepted by Federal Express, or a similar overnight courier service, addressed to the proper party at the appropriate address set forth below and marked for next Business Day morning delivery; or (d) two hours after email or facsimile transmission between the hours of 8:00 a.m. and 3:00 p.m. (prevailing local time at the address of the recipient) on any Business Day to the proper party at the appropriate fax number set forth below, provided that receipt of such email or facsimile is confirmed by the recipient.

County: County of Santa Clara
Facilities and Fleet Department, Capital Programs Division
23120 North First Street, 2nd Floor, Suite 200
San Jose, California 95131-1011
Attn: David Barry, Senior Facilities Architect
Email: david.barry@faf.sccgov.org

with copies to: County of Santa Clara
Office Of The County Counsel
70 W. Hedding, East Wing, 9th Floor
San Jose, California 95110
Attn: Orry Korb,
County Counsel

and: County of Santa Clara
Office Of The County Executive
70 W. Hedding, East Wing, 11th Floor
San Jose, California 95110
Attn: Bruce J.M. Knopf
Asset and Economic Development Director
Email: bruce.knopf@ceo.sccgov.org

with copies to: Sheppard, Mullin, Richter & Hampton LLP
Four Embarcadero Center, 17th Floor
San Francisco, CA 94111-4109
Attn: Robert A. Thompson

Lowe: Lowe Enterprises Real Estate Group
595 Market Street, Suite 2550
San Francisco, California 94105
Attn: Mr. Alan Chamorro
Senior Vice President

and: Lowe Enterprises Real Estate Group
11777 San Vicente Boulevard, Suite 900
Los Angeles, California 90049
Attn: John DeMarco, Esq.  
General Counsel

with copies to: Liner LLP  
1100 Glendon Avenue, 14th Floor  
Los Angeles, California 90024  
Attn: Michael J. Kiely

Each party may designate a different person and address by sending written notice to the other party, to be effective no sooner than ten (10) calendar days after the date of the notice.

15.09 **Representation By Counsel.** The Parties to this Agreement were represented by their respective counsel in the negotiation and execution of this Agreement. The Parties are aware of the provisions set forth in California Civil Code §1717 and intend this Section 15.07 to meet said statutory requirements.

15.10 **No Assignment, Delegation or Subcontracting Without Prior Written Consent.**

(A) Except as expressly stated herein, Developer shall not assign any of its rights, delegate any of its duties or subcontract any portion of the Work under this Agreement without the prior written consent of County. No assignment, delegation or subcontracting will release Developer from any of its obligations or alter any of its obligations to be performed under the Agreement. Any attempted assignment, delegation or subcontracting in violation of this provision is voidable at the option of County and constitutes material breach by Developer. Developer is responsible for payment to the Developer Representatives and must monitor, evaluate, and account for the contracted services and operations.

(B) As used in this provision, “assignment” and “delegation” means any sale, gift, pledge, hypothecation, encumbrance, or other transfer of all or any portion of the rights, obligations, or liabilities in or arising from this Agreement to any person or entity, whether by operation of law or otherwise, and regardless of the legal form of the transaction in which the attempted transfer occurs.

(C) County consent shall not be required for a change in management or control of Developer such that Developer’s proposed successor is a wholly-owned subsidiary of Lowe Enterprises, and at least 51% of the ownership interests of Developer are held directly or indirectly by Robert J. Lowe and/or his estate, his spouse or his lineal descendants; (b) either Michael Lowe and/or Robert J. Lowe, Jr. remain as the chief executive officer of Lowe Enterprises, and (c) the Developer Executive remains unchanged.

(D) This Agreement will inure to the benefit of and be binding upon the parties and their respective successors and permitted assigns. The terms of this Agreement will survive an acquisition, merger, divestiture or other transfer of rights or assignment involving Developer (subject to clause (C) above), unless County elects to terminate this Agreement because of such transfer or assignment, which decision shall be solely and exclusively County’s and without liability, cost or obligation to County. In the event of an acquisition, merger, divestiture or other transfer of rights, Developer shall ensure that the acquiring entity or the new entity agrees to be bound by the terms of this Agreement and act in the place of Developer with respect to all of its...
obligations, duties and responsibilities as set forth herein, and no additional fees, charges, costs, payments, license or maintenance fees will apply or be charged to County as a result thereof.

(E) Developer shall provide thirty (30) Days written notice to County following the closing of an acquisition, merger, divestiture or other transfer of right involving Developer.

(F) Developer shall provide all reasonable assistance to County during the transition period.

15.11 Non-Discrimination. Developer shall, and shall ensure that all Developer Representatives, comply with all applicable federal, state, and local laws and regulations, including County’s policies, concerning nondiscrimination and equal opportunity in contracting. Such laws include, but are not limited to, the following: Title VII of the Civil Rights Act of 1964 as amended; Americans with Disabilities Act of 1990; The Rehabilitation Act of 1973 (§§ 503 and 504); California Fair Employment and Housing Act (Government Code §§ 12900 et seq.); and California Labor Code §§ 1101 and 1102. Developer shall, and shall ensure that all Developer Representatives, not discriminate against any employee, contractor, consultant, subcontractor or applicant for employment because of age, race, color, national origin, ancestry, religion, sex/gender, sexual orientation, mental disability, physical disability, medical condition, political beliefs, organizational affiliations, or marital status in the recruitment, selection for training including apprenticeship, hiring, employment, utilization, promotion, layoff, rates of pay or other forms of compensation. Nor shall Developer or any of the Developer Representatives discriminate in provision of services provided under this Agreement because of age, race, color, national origin, ancestry, religion, sex/gender, sexual orientation, mental disability, physical disability, medical condition, political beliefs, organizational affiliations, or marital status. Developer’s or any Developer Representative’s violation of this provision shall be deemed a material default by Developer giving County a right to terminate the Agreement for cause.

15.12 Other Representations And Warranties. Developer represents and warrants as of the effective date of this Agreement as follows and covenants that the following will remain true and correct at all times during the Term:

(A) Developer is a duly organized, incorporated and in good standing under the laws of California, and is authorized to carry on its business in California as such business is now conducted and to perform its obligations under this Agreement.

(B) Developer has the full right, power and lawful authority to enter into this Agreement and its execution and delivery of this Agreement has been fully authorized by all requisite actions.

(C) The person executing this Agreement on behalf of and for Developer is an authorized agent who has actual authority to bind Developer to each and every term, condition and obligation of this Agreement and, all requirements of Developer, if any, have been fulfilled to provide such actual authority. Developer has provided County with true and correct copies of documentation reasonably acceptable requested by acceptable to County designating the parties authorized to execute this Agreement on its behalf.
(D) Developer’s execution, delivery and performance of its obligations under this Agreement will not violate any Applicable Laws nor to its knowledge after due inquiry, constitute a material breach or material default under any contract, agreement, or instrument to which it is a party, or any judicial or regulatory decree or order to which it is a party or by which it is bound.

(E) Developer has not made an assignment for the benefit of creditors, filed a petition in bankruptcy, been adjudicated insolvent or bankrupt, petitioned a court for the appointment of any receiver of or trustee for it or any substantial part of its property, or commenced any proceeding relating it under any reorganization, arrangement, readjustment of debt, dissolution, or liquidation law or statute of any jurisdiction, whether now or later in effect. There has not been commenced nor is there pending against it any proceeding of the nature described in the first sentence of this subsection. No order for relief has been entered with respect to it under the Federal Bankruptcy Code.

(F) All documents, instruments, and other information delivered by Developer to County pursuant to this Agreement are true, accurate, correct and complete to Developer’s knowledge unless otherwise indicated in writing delivered concurrently with such delivery. County shall be entitled to rely upon the accuracy and completeness of the information, surveys, and reports provided by Developer or any of Developer’s employees or Design Professionals or Developer’s Representatives or Developer’s Contractors.

(G) This Agreement, when executed by Developer and delivered, shall constitute its legal, valid and binding obligation. No consent, approval, or authorization of any third person to its execution, delivery, and performance of this Agreement is required, other than consents, approvals, and authorizations which have already been unconditionally given.

(H) Developers not acting, and shall not act, directly or indirectly, for or on behalf of any person, group, entity, or nation named by any Executive Order or the United States Treasury Department as a terrorist, “Specially Designated National and Blocked Person,” or other banned or blocked person, entity, nation, or transaction pursuant to any law, order, rule or regulation enforced or administered by the federal Office of Foreign Assets Control; and (ii) Developer is not engaged in the Project or entering into this Agreement, directly or indirectly, on behalf of, or instigating or facilitating this transaction, directly or indirectly, on behalf of any such person, group, entity, or nation.

(I) Upon its receipt of knowledge that any fact or condition which would cause any warranty or representation made by it pursuant to this Section is not true, promptly give written notice of such fact or conditions to County. Each of the foregoing items (A) to (H), inclusive shall be deemed to be ongoing representations and warranties and shall survive termination, expiration or cancellation of this Agreement.

15.13 Compliance with Safety Regulations.

(A) Developer shall plan for, and ensure, that all Developer Representatives performing the Work comply with all provisions of OSHA Safety and Health Standards (29 CFR 1910) and General Construction Standards (29 CFR 1926) as such federal regulations or the
California state law equivalent, whichever is more stringent. The responsibility for the implementation and enforcement of health and safety requirements lies solely with Developer and Developer Representatives, and not County or any County Representative. Developer shall use and provide on-site Material Safety Data Sheets or Safety Data Sheets in compliance with OSHA Hazard Communication Standards. Developer shall take all necessary and desirable precautions for the safety of, and provide the necessary protection to prevent damage, injury, or loss to:

1. all persons at the work site;
2. all materials or equipment to be provided, incorporated in, or utilized in connection with, the Work at the work site;
3. other property located at the work site; and,
4. County’s property and facilities.

15.14 Debarment. Developer represents and warrants that Developer and Developer Representatives are not suspended, debarred, excluded, or ineligible for participation in Medicare, Medi-Cal or any other federal or state funded health care program, or from receiving federal funds as listed in the List of Parties Excluded from Federal Procurement or Non-procurement Programs issued by the Federal General Services Administration. Developer must within thirty (30) calendar days advise County if, during the term of this Agreement, Developer or any of the Developer Representatives become suspended, debarred, excluded or ineligible for participation in Medicare, Medi-Cal or any other federal or state funded health care program, as defined by 42 U.S.C. § 1320a-7b(f), or from receiving federal funds as listed in the List of Parties Excluded from Federal Procurement or Non-procurement Programs issued by the Federal General Services Administration. Developer shall defend, indemnify, and hold County harmless for any loss or damage resulting from the conviction, debarment, exclusion or ineligibility of Developer or any of the Developer Representatives.

15.15 Further Assurances. Developer covenants, warrants, represents and agrees that it will execute such other and further instruments and documents as are or may become necessary or convenient to effectuate and carry out this Agreement.

15.16 No Third Party Rights. The Parties do not intend to create rights in, or to grant remedies to, any third party as a beneficiary of this Agreement or of any duty, covenant, obligation, or undertaking established herein. This Agreement shall not be construed as nor deemed to be an agreement for the benefit of any third party or parties, and no third party or parties shall have any right of action herein for any cause whatsoever. There are no third party beneficiaries to this Agreement.

15.17 Governing Law, Jurisdiction And Venue. This Agreement, and all the rights and duties of the parties arising from or relating in any way to the subject matter of this Agreement or the transaction(s) contemplated by it, shall be governed by, construed and enforced in accordance with the law of the State of California (excluding any conflict of laws provisions that would refer to and apply the substantive laws of another jurisdiction). Any suit or proceeding relating to this Agreement, including arbitration proceedings, shall be brought only in Santa
Clara County, California. EACH OF THE PARTIES CONSENT TO THE EXCLUSIVE PERSONAL JURISDICTION AND VENUE OF THE COURTS, STATE AND FEDERAL, LOCATED IN SANTA CLARA COUNTY, CALIFORNIA.

15.18 No Smoking and No Alcohol; Nutrition.

(A) Tobacco and Alcohol. Sale, offering for sale or consumption, distribution, promotion, advertising or use of any type of alcohol or tobacco product on, in or about County property is strictly prohibited. Developer shall enforce and shall ensure that all Developer Representatives enforce and comply with the requirements of this provision at all times.

(1) Developer and its employees, agents and subcontractors, shall comply with County’s No-Smoking Policy, as set forth in the Board of Supervisors Policy Manual section 3.47 (as amended from time to time), which prohibits smoking: (1) at the Santa Clara Valley Medical Center Campus and all County-owned and operated health facilities, (2) within 30 feet surrounding County-owned buildings and leased buildings where the County is the sole occupant, and (3) in all County vehicles.

(B) Nutrition. The Work contemplated and authorized under this Agreement does not include the right to sell, offer for sale or distribute (even if free of charge) any food or beverage of any kind, including coupons, discounts or other reference materials in relation to food, food services or beverages. Developer and Developer Representatives must comply at all times with County’s nutrition standards applicable to food and beverages, where applicable. The County’s nutrition standards are set forth as follows:

(1) Except in the event of an emergency or medical necessity, the following nutritional standards shall apply to any foods and/or beverages purchased by Developer with County funds for County-sponsored meetings or events.

(2) If food is to be provided, healthier food options shall be offered. “Healthier food options” include (1) fruits, vegetables, whole grains, and low fat and low calorie foods; (2) minimally processed foods without added sugar and with low sodium; (3) foods prepared using healthy cooking techniques; and (4) foods with less than 0.5 grams of trans fat per serving. Whenever possible, Developer shall (1) offer seasonal and local produce; (2) serve fruit instead of sugary, high calorie desserts; (3) attempt to accommodate special, dietary and cultural needs; and (4) post nutritional information and/or a list of ingredients for items served. If meals are to be provided, a vegetarian option shall be provided, and the Developer should consider providing a vegan option. If pre-packaged snack foods are provided, the items shall contain: (1) no more than 35% of calories from fat, unless the snack food items consist solely of nuts or seeds; (2) no more than 10% of calories from saturated fat; (3) zero trans-fat; (4) no more than 35% of total weight from sugar and caloric sweeteners, except for fruits and vegetables with no added sweeteners or fats; and (5) no more than 360 mg of sodium per serving.

(3) If beverages are to be provided, beverages that meet the County’s nutritional criteria are (1) water with no caloric sweeteners; (2) unsweetened coffee or tea, provided that sugar and sugar substitutes may be provided as condiments; (3) unsweetened, unflavored, reduced fat (either nonfat or 1% low fat) dairy milk; (4) plant-derived milk (e.g., soy
milk, rice milk, and almond milk) with no more than 130 calories per 8 ounce serving; (5) 100% fruit or vegetable juice (limited to a maximum of 8 ounces per container); and (6) other low-calorie beverages (including tea and/or diet soda) that do not exceed 40 calories per 8 ounce serving. Sugar-sweetened beverages shall not be provided.

15.19 County As Regulator. County does not waive its right(s) to act and is not precluded from acting in its Governmental Capacity, including but not limited to is ability, obligation or right (discretionary or otherwise) to seek enforcement of, or take any other action pertaining to, any Applicable Laws in relation to any party to this Agreement or any third parties, or respective successors or assigns. Nothing in this Agreement, including any indemnification provision herein, is intended to (a) create any Claim or other contractual remedy for the benefit of Developer for any circumstances arising out of any action or omission of the County taken or omitted to be taken in the County’s Governmental Capacity; or (b) impair or diminish any remedy at law or in equity (other than any Claim or other contractual remedy hereunder) with respect to any circumstances arising out of any action or omission of the County taken or omitted to be taken in the County’s Governmental Capacity.

15.20 Assignment Of Clayton Act, Cartwright Act Claims. Developer hereby assigns to County all rights, title, and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. § 15) or under the Cartwright Act (Chapter 2 (commencing with Section 16720) of Part 2 of Division 7 of the Business and Professions Code), arising from purchases of goods, materials, or services by Developer for sale to County pursuant to this Agreement.

15.21 California Public Records Act. All documents and records provided to or made available to County under this Agreement become of County, which is a public agency subject to the disclosure requirements of the California Public Records Act (“CPRA”). If proprietary information is contained in documents submitted by Developer to County, and Developer expressly claims that such information falls within one or more CPRA exemptions, Developer must clearly mark such information “CONFIDENTIAL OR PROPRIETARY,” and identify the specific lines containing the confidential information. In the event of a request for such information, County will make reasonable efforts to provide notice to Developer prior to such disclosure. If Developer contends that any documents are exempt from the CPRA and wishes to prevent disclosure, it is required at its own cost, liability and expense to obtain a protective order, injunctive relief or other appropriate remedy from a court of law in Santa Clara County at least two (2) Days before County deadline to respond to the CPRA request. If Developer fails to obtain such a remedy before County responds to the CPRA request, County will disclose the requested information and shall not be liable or responsible for such disclosure.

Developer agrees that it shall defend, indemnify and hold County harmless for, from and against each and every loss, damage (whether general, punitive or otherwise), liability, action, administrative proceedings, claim, demand, lawsuit, cause of action, judgment, settlement amount, mediation cost, attorneys’ fees, court cost, , litigation, injury, allegation and penalties (the “CPRA Claims”) that may or do result from denial by County of a CPRA request for any information arising from any representation, or any action (or inaction), by Developer, Design Professionals, Developer’s Representatives, Contractors or their respective employees, agents or representatives.
15.22 Savings. This Agreement does not provide any opportunity for Developer or any Developer Party to share in any savings if the audited Cost of the Work upon completion of any Phase E is less than the Guaranteed Maximum Price for such Phase. Notwithstanding the foregoing:

(A) FPPC Opinion Regarding Savings. Developer and the County may, by mutual agreement, within 12 months from the Effective Date, jointly seek a formal written opinion of the Fair Political Practices Committee (“FPPC”) pursuant to Cal. Gov. Code section 1097.1, subdivision (c) and 83114(b) with regard to the compliance of subdivisions (B) of this Section 15.22 (collectively, the “Savings Provision”) with the provisions of both Cal. Gov. Code §1090 and the Political Reform Act. In the event that, prior to issuance of a Notice to Proceed for the Initial NCF Phase Pre-Development Phase D, FPPC issues a formal written opinion to the satisfaction of both the County and Developer finding that the Savings Provision, in the context of this Agreement and any potential financial interest of Developer or its employees and agents in the Savings, complies with Cal. Gov. Code §1090 and the Political Reform Act (the “FPPC Condition”), then this Agreement shall be deemed to have been modified such that the provisions of subdivisions (B) through (E) of this Section 15.22 shall apply, and in the event of any conflict between any provisions of this Section 15.22 and any other provision of this Agreement, the provisions of this Section 15.22 shall prevail.

(B) Developer’s Contingency Following Satisfaction of the FPPC Condition. Following satisfaction of the FPPC Condition. Following satisfaction of the FPPC Condition, Section 1.02(X) above shall be replaced with the following:

(X) “Developer Contingency” means with respect to any NCF Phase an amount equal to 5% of the Cost of the Work (excluding fees paid to Developer), which shall be included in each GMP and may be used by Developer in its discretion to pay for Costs of the Work (which shall not include any Developer NDEC Costs (as defined below) or other Excluded Costs), subject to County’s approval, which shall not be withheld unreasonably, including (a) costs of Remediation of any Newly Discovered Environmental Conditions (other than any Developer Release) in excess of PLL-Policy Covered Costs and or (b) resulting from Change Orders to the extent same do not result in an increase in the GMP and are not covered by Contractor Contingency. Any unexpended portion of the Developer Contingency that is not paid to Contractor pursuant to its Construction Contract shall not be included in calculation of the Savings.

(C) Savings Following Satisfaction of the FPPC Condition. Following satisfaction of the FPPC Condition:

(1) The following shall be added to Section 8.07(D)(8) as subsections (e) and (f):

(e) If, upon final completion of a Phase E of the Work, the County determines that the audited Cost of the Work for that Phase E is less than the Guaranteed Maximum Price for that Phase, the difference shall be
considered “Savings” (herein so called).” If, after auditing the Cost of the Work, County determines that there have been Savings, the Savings shall be divided sixty five percent (65%) to County and thirty-five percent (35%) to Developer, except as provided in Section 8.07(D)(8)(f), below. Savings shall be reduced by any rebate Developer or Contractor receives on items that are included in the Cost of the Work, regardless of when it is received. Any unexpended portion of the Contractor Contingency that is not paid to Contractor pursuant to its Construction Contract shall be included in calculation of the Savings.

(f) The Savings paid to Developer for any NCF Phase shall not exceed thirty five percent (35%) of the Construction Management Fee for such NCF Phase.

(2) The following shall be added to Section 12.03(E):

Upon Completion of the NCF Project following termination by the County for cause, in the event the actual costs and expenses incurred by County in finishing the Work at any Phase are less than the Guaranteed Maximum Price, County shall retain the entire amount of the Savings for the Project.

(D) Newly Discovered Environmental Conditions Following Satisfaction of the FPPC Condition. Following satisfaction of the FPPC Condition:

(1) The second sentence of Section 4.03(F)(8) above shall be deleted and replaced with the following:

With the exception of Excluded Areas identified in the applicable Due Diligence Summary, Developer expressly assumes the risk with respect to completion of the construction Work in each NCF Phase E undertaken (including mitigation of Hazardous Materials in accordance with Environmental Laws and industry standards) of the actual conditions at the Project Site discovered in the performance of its obligations in connection with such NCF Phase E under this Agreement and (i) not taken into account in Developer’s GMP Proposal for such NCF Phase, or (ii) PLL Policy-Covered Costs. As used herein, the term “PLL Policy-Covered Costs” means the first Ten Million Dollars ($10,000,000) of Costs of the Work incurred in the Remediation of Newly Discovered Environmental Conditions in an NCF Phase, which costs are intended to be covered by the PLL Policy, whether or not (a) the PLL Policy is in effect as of the date of the discovery of any such Newly Discovered Environmental Condition or (b) the proceeds of the PLL Policy are available for such costs.

(2) Clause (2) of the fourth sentence of Section 4.03(F)(8) above shall be deleted.
(3) The sixth sentence of Section 4.03(F)(8) above shall be deleted and replaced with the following:

Any Cost of the Work or Remediation of Newly Discovered Environmental Conditions in an NCF Phase in excess of PLL Covered Costs shall be first paid out of Developer Contingency.

(4) The following shall be added to seventh sentence of Section 4.03(F)(8) above: “and Developer’s obligations to perform Remediation with respect to Newly Discovered Environmental Conditions in such NCF Phase E.”

(5) Clause (b) of Section 14.01(D) above shall be deleted and replaced with the following:

(b) Newly Discovered Environmental Condition pursuant to Section 14.04(B) below as a Cost of the Work, except to the extent the costs of such Remediation (collectively, “Developer NDEC Costs”) are (a) in excess of PLL Policy-Covered Costs and (b) would result in the total Cost of the Work in such NCF Phase exceeding the Guaranteed Maximum Price (including any increase thereof to cover PLL Policy Covered Costs) for such NCF Phase, which Developer NDEC Costs shall be Excluded Costs and shall be Developer's sole responsibility;

(6) Section 14.04(D) above shall be deleted and replaced with the following:

(D) Following such testing, and in coordination with County and the carrier of the PLL Policy, Developer shall cause to be prepared the appropriate Change Order and other Project Documentation for the Remediation of the Newly Discovered Environmental Condition. Pursuant to such Change Order the Phase Schedule and Phase Budget for such NCF Phase E shall be equitably adjusted to reflect the additional Work required to effectuate such abatement, remediation and/or removal. Any cost associated therewith, to the extent (i) a PLL Policy-Covered Cost and/or which would not result in any increase in the GMP (including any increase thereof to cover PLL-Policy Covered Costs) shall be a Cost of the Work, and (ii) a Developer NDEC Cost shall be an Excluded Cost and shall be Developer's sole responsibility.

(7) Section 14.05(E) above shall be amended by adding the clause (ii) thereof the following: “and Section 14.04(D) with respect to any Newly Discovered Environmental Condition”.

15.23 Conflict Of Interest.

(A) Developer represents and warrants that it and its Developer Representatives presently have no and will not have any interest, direct or indirect, and covenants that while this Agreement remains in effect it shall not acquire, any interest, direct or indirect, that would conflict in any manner or degree with the performance of Work under this Agreement.
(B) Developer shall comply, and require its Developer Representatives to comply, with all applicable (i) professional canons and requirements governing avoidance of impermissible client conflicts applicable to Developer and such Developer Representatives; and (ii) federal, state and local conflict of interest laws and regulations applicable to Developer, such Developer Representatives and the services, including, without limitation, to the extent applicable, California Government Code Section 1090 et seq., the California Political Reform Act (California Government Code Section 87100 et seq.) and the regulations of the Fair Political Practices Commission concerning disclosure and disqualification (2 California Code of Regulations Section 18700 et seq.). Failure to do so constitutes a material breach of this Agreement.

(C) Within thirty (30) Days after County’s written request, Developer shall provide County with the names, description of individual duties to be performed and email addresses of all persons who will be engaged in performance of the Agreement, including without limitation colleagues, employees, agents and subcontractors with the exception of those working solely ministerial, secretarial, manual, or clerical capacity. Developer shall immediately notify County of the names of individuals working in such a capacity who, during the course of the Agreement, end their service.

(D) Developer shall ensure that all individuals identified pursuant to this Section understand that they are subject to the Political Reform Act (“PRA”) and shall conform to all requirements of the PRA and other laws and regulations, including, as required, filing of Statements of Economic Interests (Form 700) within thirty (30) calendar days of commencing service pursuant to this Agreement, annually by April 1, and within thirty (30) calendar days of their termination of service pursuant to this Agreement. Form 700 is available on the website of the Fair Political Practices Commission.

15.24 Severability. Should any part of the Agreement between County and Developer or any individual statement of work, amendment or Exhibit to this Agreement be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect the validity of the remainder of the Agreement or any individual statement of work, amendment or Exhibit which shall continue in full force and effect, provided that such remainder can, absent the excised portion, be reasonably interpreted to give the effect to the intentions of the parties.

15.25 Non-Waiver. No waiver of a breach, failure of any condition, or any right or remedy contained in or granted by the provisions of this Agreement will be effective unless it is in writing and signed by County. No waiver of any breach, failure, right, or remedy will be deemed a waiver of any other breach, failure, right, or remedy, whether or not similar, nor will any waiver constitute a continuing waiver unless the writing signed by County so specifies.

15.26 Use Of County’s Name For Commercial Purposes. Developer may not use the name of County or reference any endorsement from County in any fashion for any purpose, without the prior express written consent of County Board of Supervisors of Supervisors, or authorized designee. County hereby authorizes Developer to state on its corporate website that it has been retained pursuant to this Agreement for the purposes set forth herein.
15.27 **Headings And Titles.** The titles and headings in this Agreement are included principally for convenience and do not by themselves affect the construction or interpretation of any provision in this Agreement, nor affect any of the rights or obligations of the parties to this Agreement.

15.28 **Handwritten Or Typed Words.** Handwritten or typed words have no greater weight than printed words in the interpretation or construction of this Agreement.

15.29 **Ambiguities.** Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in interpreting this Agreement. Should any ambiguities or conflicts between contract terms and conditions contained in this Agreement and its exhibits exist, the terms and conditions in this Agreement shall control over its exhibits.

15.30 **Entire Agreement.** This Agreement and its Exhibits constitute the final, complete and exclusive statement of the terms of the agreement between the parties. It incorporates and supersedes all the agreements, covenants and understandings between the parties concerning the subject matter hereof, and all such agreements, covenants and understandings have been merged into this Agreement. No prior or contemporaneous agreement or understanding, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

15.31 **Execution and Counterparts.** This Agreement may be executed in one or more counterparts, each of which will be considered an original, but all of which together will constitute one and the same instrument. The parties agree that this Agreement, its amendments, and ancillary agreements to be entered into in connection with this Agreement will be considered signed when such signed original agreement is delivered by facsimile transmission or electronic mail in a portable document format (the “electronic copy”). The parties each agree that such electronic copy of a signed agreement shall have the same force and effect as the original signed agreement provided that Developer delivers to County the original signed Agreement within 7 Business Days after sending an electronic copy of same to County.

15.32 **Acceptance.** Unless otherwise agreed to in writing by County or as otherwise set forth in this Agreement: (1) acceptance of the Project, services performed or other deliverables, as set forth herein, shall not be deemed complete unless in writing and until the respective services performed, the other deliverables or the Project has actually been completed to the satisfaction of County, and (2) payment shall be made as set forth in this Agreement.

15.33 **Consent To Breach Not Waiver.** No term or provision of this Agreement shall be deemed waived and no breach excused, unless such waiver or consent shall be in writing and signed by the Party claimed to have waived or consented. Any consent by any Party to, or waiver of, a breach by the other, whether express or implied, shall not constitute consent to waiver of, or excuse for any other different or subsequent breach.

15.34 **Precedence.** This Agreement consists of this Agreement including Exhibits attached hereto. In the event of a conflict between this main body of this Agreement and such Exhibits, the order of precedence shall be the provisions of the main body of this Agreement (i.e., those provisions set forth in the Recitals and Sections of this Agreement), and then the Exhibits.
15.35 **Use Of Property.** County shall have free use and control over the portion of the Site it owns or controls and all revenue generated by and from the same. Such use or revenue generating activities may include, without limitation, research and training activities and conveyances not otherwise violative of the express terms of this Agreement. Subject thereto, with notice to County Lead, the Developer and the Developer Representatives shall have access over the portion of the Project Site County owns or controls during the term of this Agreement for all purposes reasonably related to the performance of their respective obligations under this Agreement.

15.36 **County Employees.** Developer agrees that it will neither negotiate, offer, nor give employment to any full-time, regular employee of County in professional classifications of the same skills required for the performance of this Agreement who is involved in this Project in a participatory status during the life of this Agreement regardless of the assignments said employee may be given or the days or hours employee may work with Developer.

15.37 **Survival.** All representations, warranties, indemnities, and covenants contained in this Agreement, or in any instrument, certificate, exhibit, or other writing intended by the Parties to be a part of their Agreement, will survive the termination of this Agreement.

15.38 **County Contracting Principles.** Developer shall comply with the County’s Contracting Principles set forth in the Board Policy Manual section 5.5.5.4. The Contracting Principles require, among other things, that Developer be a fiscally responsible entity and treat its employees fairly. Developer shall (1) comply with all Applicable Laws; (2) maintain financial records, and make those records available to County in accordance with the provisions of this Agreement relating to such matters, including Sections 2.06(B); 2.13(A)(12); 2.13(A)(13); 5.09; 8.02(A); 8.03(A); 8.04; 8.05; 8.06; 8.07(D)(1); and 8.08; (3) provide to the County copies of any financial audits that have been completed during the term of this Agreement, as required by Section 15.01; and (4) upon the County's request, provide the County reasonable access, through Developer’s Representatives, to facilities (in accordance with the provisions of this Agreement relating to such matters, including Sections 2.16), financial and employee records that are related to the purpose of the contract (in accordance with the provisions of this Agreement relating to such matters, including Sections 2.06(B); 2.13(A)(12); 2.13(A)(13); 2.13(B); 5.09; 8.02(A); 8.03(A); 8.04; 8.05; 8.06; 8.07(D)(1); 8.08; and 15.07, except where prohibited by Applicable Law.

15.39 **Availability of Funding.** Unless otherwise provided for pursuant to a financing plan adopted by County pursuant to Section 3.03 above, County's obligation for payment of any contract beyond the current fiscal year end is contingent upon the availability of funding and upon appropriation for payment to the Developer. No legal liability on the part of County shall arise for payment beyond June 30 of the calendar year; provided, however, that the foregoing shall not be deemed to impair or diminish any right of Developer to receive either (a) payment as provided herein for any Work performed pursuant to a Notice to Proceed issued by County; (b) the Termination Payment or any portion thereof, including the Deferred Compensation Fee, or (c) the Delayed Compensation Fee.

15.40 **Budget Contingency.** Performance and/or payment by County pursuant to this Agreement or any contract release purchase order is contingent upon the appropriation of
sufficient funds by County for goods and/or services covered by this Agreement or any contract release purchase order, and Developer shall not be obligated to perform under this Agreement. If funding is reduced or deleted by County for goods and/or services covered by this Agreement or any contract release purchase order, County may, at its option and without penalty or liability, terminate this Agreement or offer an amendment to this Agreement indicating the reduced amount; provided, however, that the foregoing shall not be deemed to impair or diminish any right of Developer to receive either (a) payment as provided herein for any Work performed pursuant to a Notice to Proceed issued by County; (b) the Termination Payment or any portion thereof, including the Deferred Compensation Fee, or (c) the Delayed Compensation Fee.

[Signature Blocks On The Following Page]
IN WITNESS WHEREOF, the undersigned have executed this Agreement effective as of the date last signed by all of the parties below ("Effective Date").

COUNTY:

COUNTY OF SANTA CLARA, CALIFORNIA

By: __________________________
    Dave Cortese, President,
    Board of Supervisors

Date: ________________, 2016

ATTEST:

_________________________________
Megan Doyle, Clerk of the Board of Supervisors

Date: ________________

APPROVED AS TO FORM AND LEGALITY:

_________________________________
Shirley R. Edwards,
Deputy County Counsel

_________________________________
Robert A. Thompson,
Sheppard, Mullin, Richter & Hampton LLP
Counsel to County

LOWE:

LOWE ENTERPRISES REAL ESTATE GROUP, a California corporation

By: __________________________

Name: _________________________

Title: __________________________

Date: April 21, 2016

APPROVED AS TO FORM AND LEGALITY:

_________________________________
Michael J. Kiely,
Liner LLP
Counsel to Developer
IN WITNESS WHEREOF, the undersigned have executed this Agreement effective as of the date last signed by all of the parties below ("Effective Date").

COUNTY:
COUNTY OF SANTA CLARA,
CALIFORNIA

By: ________________________________
    Dave Cortese, President,
    Board of Supervisors

Date: ________________, 2016

ATTEST:

Megan Doyle, Clerk of the Board of
Supervisors

Date: __________________________

APPROVED AS TO FORM AND
LEGALITY:

[Signature]
Shirley R. Edwards,
Deputy County Counsel

LOWE:

LOWE ENTERPRISES REAL ESTATE
GROUP, a California corporation

By: ________________________________

Name: ________________________________

Title: ________________________________

Date: April 21, 2016

APPROVED AS TO FORM AND
LEGALITY:

[Signature]
Michael J. Kiely,
Liner LLP
Counsel to Developer

Robert A. Thompson,
Sheppard, Mullin, Richter & Hampton LLP
Counsel to County
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COUNTY:
COUNTY OF SANTA CLARA, CALIFORNIA

By: __________________________
    Dave Cortese, President,
    Board of Supervisors

Date: ________________, 2016

ATTEST:

Megan Doyle, Clerk of the Board of Supervisors

Date: _________________________

APPROVED AS TO FORM AND LEGALITY:

Shirley R. Edwards,
Deputy County Counsel

Robert A. Thompson,
Sheppard, Mullin, Richter & Hampton LLP
Counsel to County

LOWE:
LOWE ENTERPRISES REAL ESTATE GROUP, a California corporation

By: __________________________

Name: _________________________

Title: __________________________

Date: April 21, 2016

APPROVED AS TO FORM AND LEGALITY:

Michael J. Kiely,
Liner LLP
Counsel to Developer
IN WITNESS WHEREOF, the undersigned have executed this Agreement effective as of the date last signed by all of the parties below ("Effective Date").

COUNTY:
COUNTY OF SANTA CLARA, CALIFORNIA

By: ____________________________
    Dave Cortese, President,
    Board of Supervisors

Date: ________________________, 2016

ATTEST:

______________________________
Megan Doyle, Clerk of the Board of
Supervisors

Date: _______________________

APPROVED AS TO FORM AND LEGALITY:

______________________________
Shirley R. Edwards,
Deputy County Counsel

______________________________
Robert A. Thompson,
Sheppard, Mullin, Richter & Hampton LLP
Counsel to County

LOWE:

LOWE ENTERPRISES REAL ESTATE GROUP, a California corporation

By: ____________________________
    Name: _______________________
    Title: SR. VICE PRESIDENT

Date: April 21, 2016

APPROVED AS TO FORM AND LEGALITY:

______________________________
Michael J. Kiely,
Liner LLP
Counsel to Developer
IN WITNESS WHEREOF, the undersigned have executed this Agreement effective as of the date last signed by all of the parties below ("Effective Date").

COUNTY:

COUNTY OF SANTA CLARA,
CALIFORNIA

By: ____________________________
    Dave Cortese, President,
    Board of Supervisors

Date: ________________, 2016

ATTEST:

______________________________
Megan Doyle, Clerk of the Board of Supervisors

Date: ________________

APPROVED AS TO FORM AND LEGALITY:

______________________________
Shirley R. Edwards,
Deputy County Counsel

______________________________
Robert A. Thompson,
Sheppard, Mullin, Richter & Hampton LLP
Counsel to County

APPROVED AS TO FORM AND LEGALITY:

______________________________
Michael J. Kiely,
Liner LLP
Counsel to Developer
The following is a graphical representation of the Site for context. The colored overlays, particularly their exact boundaries, are subject to refinement and change.
MASTER DEVELOPMENT AGREEMENT
SANTA CLARA COUNTY CIVIC CENTER

EXHIBIT B
GUIDING PRINCIPLES

- Formulate a modernization and consolidation plan for County facilities
- Prepare a financially responsible plan demonstrating:
  - Operational cost savings from existing facilities
  - Consolidation savings
  - Creation of ongoing, long-term County revenue stream(s) from surplus assets
  - Provide a flexible framework with discrete phases to allow for long-term implementation
- Promote economic growth and high-value job creation
- Be consistent with County policies. (For example, incorporate sustainable development principles consistent with the County's Climate Action Plan and Sustainability Policy promoting energy conservation and long-term savings to the County's operating budget)

Also:
- Enhance the Civic Center as a community asset for the neighborhood and First Street corridor
- Respect the history of former City Hall without comprising the future needs of the County and the marketplace
- Obtain entitlement approvals from, and consistent with, City of San Jose land use policies
- Utilize an open and transparent process
- Provide multiple, competitive opportunities for private sector development entities to have a role in new construction

HOW DO WE MEASURE SUCCESS?

- Develop an appropriate and viable use or replacement strategy for outdated existing buildings
- Plan sufficient flexibility to meet current and future County space needs at the Civic Center
- Generate long-term revenue streams
- Support the creation of quality jobs
- Align and consolidate law and justice uses
- Encourage an alignment of County Civic Center assets with the needs of the community
  - San Jose Urban Village concept
  - Transit stop densification
  - Quality, neighborhood-serving retail
  - Adequate off-street parking
- Support workplace improvements (day-lighting, natural ventilation, healthy and safe work environment)
- Provide improved public access, intelligent transit alignment, and enhanced public spaces
- Consistency with County policies

Exhibit B
-1-
MASTER DEVELOPMENT AGREEMENT
SANTA CLARA COUNTY CIVIC CENTER

EXHIBIT C
INITIAL NCF PHASE PRE-DEVELOPMENT PHASE BUSINESS PLAN

[attached]
Summary Scope of Work - Pre-Development Phases

- **Pre-Development Phase A - Master Plan and Due Diligence:**
  - **Site Investigation / Due Diligence:** Site investigation of existing conditions. Investigations will include a review and documentation of as-built conditions and existing site constraints. The preliminary investigative work is intended to inform the development team about project costs and risks. Additional, detailed investigation work may be required as the project advances. Information obtained during this phase will be used by the consultant teams over the course of design as project drawings, budgets and timelines are prepared.
  - **Site Master Planning:** The site will be master planned to a more detailed, “Project-level” for Site A (Richey), and to a less detailed, “Programmatic-level” for the remainder of the site. The Master Plan(s) will be used to create high-level conceptual designs, development timelines, and budgets. The Project and Programmatic level Master Plans will be sufficiently detailed for preliminary project budgeting and to start the pre-EIR reports.

- **Pre-Development Phase B - CEQA/EIR and Other Approvals:**
  - **Pre-EIR Investigations / NOP:** Working with County planners, land use, and Environmental Impact Report (EIR) consultants; selected pre-EIR investigations will be prepared in an effort to advance the California Environmental Quality Act (CEQA) process to the point of the County’s issuance of a Notice of Preparation (NOP) for a single EIR.
  - **Draft and Final Environmental Impact Reports (DEIR and FEIRs):** After issuance of the NOP, prepare the DEIR and FEIR based on the County selected Master Plan. This is a County responsibility.
  - **Other Approvals:** A major approval process with the City of San Jose is not anticipated; however, certain City and other non-County approvals may be required. Under this Phase, County will identify and obtain all approvals required to construct the Initial NCF Phase (Richey site). Building permits for the Initial NCF Phase (Richey Site) are part of Phase D, below.

- **Pre-Development Phase C – Initial NCF Phase (Richey Site) – Preliminary Design & Engineering (Excluded):**
  The exact scope and responsibilities for this Phase will be determined at a later date. Costs are excluded from the budget.
  - **Preliminary Design and Engineering Documents:** Based on the selected Master Plan, prepare preliminary design and engineering documents for the Initial NCF Phase (Richey site). These documents include initial drawings and specifications for Conceptual Design (CD), Schematic Design (SD), and Design Development (DD), but not for Construction Documents (CDs).
  - **Contractor Pre-Procurement:** Develop and mutually agree upon procurement strategies for General Contractor(s).
• Pre-Development Phase D – Initial NCF Phase (Richey Site) - Preconstruction (Excluded):
  The exact scope and responsibilities for this Phase will be determined at a later date. Costs are excluded from the budget.
  o Preconstruction (Including Construction Documents): Develop coordinated Construction Documents based on the Design Development documents created in Phase C. Manage the City plan check and permit processes. Provide preconstruction services related to contractor negotiations, to contracting, and to implementation of a project insurance program.

Figure 1 - Preferred Site Strategy with Outlines of Sites (approx.)

3/30/16- Santa Clara County Civic Center Campus Master Plan (SC5_MPC)
**Major Goals**

Pre-Development Phases A+B focus on achieving the following goals immediately following execution of the Master Development Agreement (MDA). Except as may be specifically noted in the MDA, these goals are targets only and not contractual commitments. Specifically, the timing of the Phases C+D’s goals are shown for reference only and may be refined. The initial goals are shown graphically on Exhibit C - Attachment 2- Pre-Development Phases A+B Business Plan Schedule:

**Pre-dev Phase A - Master Plan and Due Diligence**

<table>
<thead>
<tr>
<th>Goal</th>
<th>Target</th>
<th>Summary</th>
</tr>
</thead>
</table>
| Process Planning Program Sufficiently Complete by County (ABA) to Start the Master Plan Options. | End of Month 2  | • Determine the primary/major program, requirements, and adjacencies for all County Departments sufficient to start Master Plan options for all four sites and to finish a CEQA Constraints Analysis. County responsibility.  
• Commence site investigation and due diligence work. |
| Select Base Master Plan Scheme and One Alternate Scheme. | End of Month 5  | • Complete 3-5 Master Plan options. County selects the Base Scheme and potentially one Alternate Scheme. |
| Due Diligence and Master Plan(s) Completed.           | End of Month 9  | • Complete site investigations and due diligence. 
• Complete refinement of Master Plan(s).                |

**Pre-dev Phase B - CEQA/EIR and Other Approvals**

<table>
<thead>
<tr>
<th>Goal</th>
<th>Target</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>County Issue NOP</td>
<td>End of Month 3</td>
<td>• Develop the project description for an NOP for a single EIR. The EIR is planned to be program-level for the entire campus and project-level for the Initial NCF Phase (Richey Site).</td>
</tr>
<tr>
<td>Sufficient Info to Advance Pre-EIR Documents</td>
<td>End of Month 5</td>
<td>• Determine sufficient parameters to prepare the pre-EIR documents, specifically including determining building locations/sizes to start the Federal Aviation Administration’s applications for Determinations of No Hazard.</td>
</tr>
<tr>
<td>Final EIR Certified</td>
<td>End of Month 17</td>
<td>• Certify the Final EIR approximately twelve months after sufficient information is available to prepare the pre-EIR documents.</td>
</tr>
</tbody>
</table>
### Pre-dev Phase C – Initial NCF Phase (Richey) Design & Engineer (Excluded)

<table>
<thead>
<tr>
<th>Goal</th>
<th>Target</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Start Design Documents</td>
<td>TBD</td>
<td>• County selects either the Base Scheme or the Alternate Scheme.</td>
</tr>
<tr>
<td>Ready to Request County’s Approval</td>
<td>TBD</td>
<td>• Finish the Initial NCF Phase (Richey Site) Business Plan including an update budget and schedule based on Design Development level design and engineering documents.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Approximately one month following the FEIR certification, complete all other approvals (excluding building permits) for construction of the Initial NCF Phase (Richey Site).</td>
</tr>
</tbody>
</table>

### Pre-dev Phase D – Initial NCF Phase (Richey) Preconstruction (Excluded)

<table>
<thead>
<tr>
<th>Goal</th>
<th>Target</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>County’s Approval to Proceed with Initial NCF Phase (Richey Site)</td>
<td>TBD</td>
<td>• Obtain County’s approval to proceed with final Construction Documents (CDs).</td>
</tr>
<tr>
<td>Complete Construction Documents</td>
<td>TBD</td>
<td>• Complete Construction Documents for the Initial NCF Phase (Richey Site). Advance plan check and permit process to the point that initial permits are ready to be secured.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Complete bidding and negotiating with Contractor(s) and execute construction contract(s).</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Develop insurance strategy.</td>
</tr>
<tr>
<td>All Approvals to Mobilize</td>
<td>TBD</td>
<td>• Incorporate Construction Documents scope into General Contractor(s) contract(s).</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Obtain County approval to start the Initial NCF Phase (Richey Site) construction.</td>
</tr>
</tbody>
</table>
## Exhibit C: Attachment 1 - Budget by Pre-Development Phase (Initial NCF Phase - Richey)

### Pre-Dev Phase A: Master Plan, Due Diligence, Site Investigation
### Pre-Dev Phase B: CEQA/UIR and Other approvals ("Project level" on Richey and "Programmatic level" on the rest)
### Pre-Dev Phase C: Design and Engineering through Design Development (Excluded/TBD)
### Pre-Dev Phase D: Preconstruction, including Construction Documents (Excluded/TBD)

<table>
<thead>
<tr>
<th>Consultant Category</th>
<th>Phase A</th>
<th>Phase B</th>
<th>Phase C</th>
<th>Phase D</th>
<th>Phase A-B Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>EEEOB Architecture &amp; Master Plan</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
</tr>
<tr>
<td>Interior Architecture (Including Program)</td>
<td>Gender</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
</tr>
<tr>
<td>BDS Chambers Stand Alone (Excl Program)</td>
<td>Gender</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
</tr>
<tr>
<td>Parking Garage(s)</td>
<td>Excludes Gender design (not reg’d)</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
</tr>
<tr>
<td>Main Site Consultants (upper Gender)</td>
<td>Struct, MEP, Landsc, LEED, Elev, + Code</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
</tr>
<tr>
<td>Civil</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
</tr>
<tr>
<td><strong>Subtotal - Primary Consultants</strong></td>
<td><strong>$1,191,500</strong></td>
<td><strong>$65,000</strong></td>
<td>TBD</td>
<td>TBD</td>
<td><strong>$1,256,500</strong></td>
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<table>
<thead>
<tr>
<th>Other Consultants</th>
<th>Phase A</th>
<th>Phase B</th>
<th>Phase C</th>
<th>Phase D</th>
<th>Phase A-B Total</th>
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<td>Acoustical</td>
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<td>TBD</td>
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<tr>
<td>Archeologist</td>
<td>TBD</td>
<td>TBD</td>
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<td>TBD</td>
<td>TBD</td>
</tr>
<tr>
<td>Arborist</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
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<tr>
<td>Biologist</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
</tr>
<tr>
<td>Certified Industrial Hygienist (CIH)</td>
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<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
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<tr>
<td>Commissioning</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
</tr>
<tr>
<td>Cost Estimating / Logistics</td>
<td>for planning &amp; pre-B/&amp;E Reports</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
</tr>
<tr>
<td>Energy + Microclimate</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
</tr>
<tr>
<td>Environmental Phase I ESA</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
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<tr>
<td>Environmental Phase II ESA</td>
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<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
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<tr>
<td>Façade Access (Window Washing)</td>
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<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
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<tr>
<td>Federal Aviation Administration (FAA)</td>
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<td>Furnishings, Fixtures, and Equipment (FF&amp;E)</td>
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<td>Fire/Life Safety System</td>
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<td>Food Service</td>
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<td>TBD</td>
<td>TBD</td>
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<td>TBD</td>
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<td>Geotechnical Engineering and Inspections</td>
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<td>TBD</td>
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<td>Historic</td>
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<td>Leasing</td>
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<td>TBD</td>
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<td>TBD</td>
</tr>
<tr>
<td>Legal Contracts/Agreements</td>
<td>Excludes Land Use by County</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
<td>TBD</td>
</tr>
</tbody>
</table>

Page 1 of 3

16200.002-2865417
### Exhibit C - Attachment 1: Budget by Pre-Development Phase (Initial NCF Phase - Richey)

#### Lighting
- Low Voltage (AV, Sec, & Tele/Data) TBD
- Market Studies TBD
- Miscellaneous Consultants / TBD
- Parking Controls and Management TBD
- Public Art TBD
- Property Condition Reports TBD
- Roofing/Waterproofing TBD
- Shading TBD
- Signage (Monument / Exterior) TBD
- Skin (Conceptual / Schematic) TBD
- Testing and Inspection TBD
- Title / Escrow TBD
- Title 24 Envelope Calculations TBD
- Transportation Consultant TBD
- Waste Management TBD
- Water Features TBD
- Wind TBD

Subtotal: Other Consultants $855,000 $70,000 TBD TBD TBD $875,000

#### Other

<table>
<thead>
<tr>
<th>Description</th>
<th>Phase A</th>
<th>Phase B</th>
<th>Phase C</th>
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<td>City-Plan Check, Permit, and Fee Fees</td>
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<td>Insurance (Builder's Risk, Const Lien, etc.)</td>
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Subtotal: Other $981,000 $915,000 TBD TBD TBD $1,896,000

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Page 3 of 3
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<th>Consultants by Category</th>
<th>Phase A</th>
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<td>Legal-Land Use Attorney</td>
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<td>Programming</td>
<td>Anderson Brule Architects (ABA)</td>
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<td>by County</td>
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<td>Subtotal Consultations by County</td>
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<td>$ -</td>
<td>$ -</td>
<td>$ -</td>
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**TOTAL**

|                | $ 2,970,500 | $ 626,500 | TBD | TBD | $ 3,597,000 |

3/30/2015

Page 3 of 3
MASTER DEVELOPMENT AGREEMENT
SANTA CLARA COUNTY CIVIC CENTER

EXHIBIT D

OWNER-PROVIDED STUDIES, SURVEYS AND INFORMATION CURRENTLY AVAILABLE AS OF EFFECTIVE DATE

Specific Documents:

- AllWest Environmental Inc.’s Property Condition Assessment- 70 West Hedding Street dated February 6, 2015 (268 pages);
- BFGC-IBI Group’s Evaluation of the Former San Jose City Hall dated July 31, 2012;
- Gensler’s Facilities Needs Assessment FINAL dated September 9, 2014 (37 pages);
- IBI Group’s Santa Clara County Civic Center Master Plan dated August 8, 2012 (32 pages);
- IBI Group’s Santa Clara County Civic Center Master Plan dated September 28, 2012 (36 pages);
- U.S. Army Corps of Engineers’ Environmental Condition of Property Report for 155 W. Hedding St. dated March 2007 (64 pages);

Lists of Other Record Documents:

- **Facility No 0100**: County Government Center Connector East/West – 70 W Hedding St- digital files on the Monday, December 29, 2014 list (4 pages);
- **Facility No 0101**: CCOB-East Wing – 70 W Hedding St- digital files on the Friday, March 27, 2015 list (23 pages);
- **Facility No 0102**: CCOB West Wing – 70 W Hedding St- digital files on the Friday, August 15, 2014 list (16 pages);
- **Facility No 0103**: *Transferred* Hall of Justice-East Wing- 190 W Hedding St- digital files on the Wednesday, September 03, 2014 list (7 pages);
- **Facility No 0104**: Main Jail South - DOC- 180 W Hedding St- digital files on the Friday, May 15, 2015 list (14 pages);
- **Facility No 0105**: *Transferred* Hall of Justice-West Wing- 200 W Hedding St- digital files on the Wednesday, September 03, 2014 list (6 pages);
- **Facility No 0109**: Crime Laboratory- 250 W Hedding St- digital files on the Friday, February 28, 2014 list (16 pages);
- **Facility No 0114**: Main Jail North - DOC- 150 W Hedding St- digital files on the Friday, May 15, 2015 list (15 pages);
• Facility No 0116- **Vacant** Social Services Modular- 300 W Hedding St- digital files on the Monday, July 20, 2009 list (1 page);

• Facility No 0121- Civic Center Visitor Paid Parking Garage- 171 W Hedding St- digital files on the Wednesday, January 14, 2015 list (5 pages);

• Facility No 0127- Army Reserve Center – Armory- 155 W Hedding St- digital files on the Tuesday, June 04, 2013 list (3 pages);

• Facility No 0128- Army Reserve Center – Storage Bldg 101- 155 W Hedding St- digital files on the Tuesday, February 19, 2013 list (2 pages);

• Facility No 0129- Army Reserve Center – Storage Bldg 102- 155 W Hedding St- digital files on the Tuesday, February 19, 2013 list (2 pages);

• Facility No 0181- Old City Hall- 801 N 1st St- digital files on the Friday, April 13, 2012 list (6 pages);

• Facility No 0182- Old City Hall- Annex- 801 N 1st St- digital files on the Thursday, April 12, 2012 list (2 pages);

• Facility No 0183- Old City Hall – Re-Entry Resource Center- 151 W Mission St- digital files on the Tuesday, March 03, 2015 list (3 pages);

• Facility No 0404- Sheriff Department- 55 W Younger Ave- digital files on the Monday, March 30, 2015 list (10 pages);

• Facility No 0411- San Jose National Guard Armory- 251 W Hedding St- digital files on the Monday, July 20, 2009 list (1 page);

• Facility No 7201- East Wing/Supv Parking Alley- 70 W Hedding St- digital files on the Wednesday, September 01, 2010 list (1 page);

• Facility No 7204- HOJ Parking Lot/Juvenile Alleyway- 190 W Hedding St- digital files on the Tuesday, November 10, 2009 list (2 pages);

• Facility No 7225- Civic Center Main Parking Lot –N 1st St & Hedding St- digital files on the Friday, February 28, 2014 list (2 pages);

• Facility No 7226- Sheriff Office Parking Lot- 55 W Younger Ave- digital files on the Friday, February 28, 2014 list (3 pages);

• Facility No 7228- Municipal Court/Juvenile Hall Parking Lot- 200 W Hedding St- digital files on the Tuesday, July 21, 2009 list (1 page);

• Facility No 7235- National Guard Parking Lot- 251 W Hedding St- digital files on the Monday, November 02, 2009 list (1 page);

• Facility No 7258- U.S. Army Reserve Parking Lot- San Pedro St/Younger Ave- digital files on the Wednesday, March 10, 2010 list (1 page); and,

• Facility No 7262- West Wing Parking Lot- 70 W Hedding St- digital files on the Friday, May 15, 2015 list (1 page).
### Exhibit E

**County Approved Design Professional and Other Developer Consultants**

<table>
<thead>
<tr>
<th>Consultant Category</th>
<th>Pre-Approved</th>
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</thead>
<tbody>
<tr>
<td>1. Certified Industrial Hygienist (CIH)</td>
<td>Millennium Consulting, RGA Environmental, and/or URS</td>
</tr>
<tr>
<td>2. Civil/Surveying &amp; Joint Trench</td>
<td>BKF, Arup, Kier + Wright, Giacalone, RGA Design, and/or AECOM/URS</td>
</tr>
<tr>
<td>3. Cost Estimating / Logistics</td>
<td>Cumming Corporation</td>
</tr>
<tr>
<td>4. Elevators</td>
<td>Edgett Williams Consulting Group</td>
</tr>
<tr>
<td>5. Energy &amp; Microclimate</td>
<td>Arup, WSP Group, and/or Glumac</td>
</tr>
<tr>
<td>6. Environmental Site Assessment (ESA)</td>
<td>Cornerstone, Langan (Treadwell + Rollo), Millennium Consulting, and/or TRC</td>
</tr>
<tr>
<td>7. Geotechnical</td>
<td>Cornerstone, Langan (Treadwell + Rollo), and/or TRC</td>
</tr>
<tr>
<td>8. Historic</td>
<td>Architectural Resources Group and/or Page &amp; Turnbull</td>
</tr>
<tr>
<td>9. Landscape Architect</td>
<td>CMG, SWA, and/or The Guzzardo Partnership</td>
</tr>
<tr>
<td>10. Legal</td>
<td>Liner LLP, Rogers Joseph O'Donnell, and/or Manatt, Phelps &amp; Phillips</td>
</tr>
<tr>
<td>11. Market Research</td>
<td>Seifel Consulting</td>
</tr>
<tr>
<td>12. Master Planning Architect</td>
<td>Gensler</td>
</tr>
<tr>
<td>13. Mechanical, Electrical, and Plumbing</td>
<td>Arup, WSP Group, Glumac, Buro Happold, PAE Consulting Engineers, and/or Integral Engineers</td>
</tr>
<tr>
<td>14. Other</td>
<td>TTG</td>
</tr>
<tr>
<td>15. Parking and/or Parking Garage(s)</td>
<td>International Parking Design (IPD), Walker Parking Consultants, and/or Watry Design</td>
</tr>
<tr>
<td>16. Property Condition Assessment(s)</td>
<td>Allwest Environmental, Marx Okubo, and/or IVI Assessment Services (a CBRE Co.)</td>
</tr>
<tr>
<td>17. Public Art Consultant</td>
<td>Barbara Goldstein and/or City of San Jose Office of Cultural Affairs</td>
</tr>
<tr>
<td>18. Structural Engineer</td>
<td>Arup, Holmes Culley, Nabih Youssef, Louie International, Rutherford + Chekene, and/or Murphy Burr Curry</td>
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<td>19. Sustainability</td>
<td>Arup, Sherwood Design Engineers, Buro Happold, Integral Engineers, PAE Consulting Engineers, KEMA, and/or DNV GL</td>
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<tr>
<td>20. Title/Easements</td>
<td>Commonwealth and/or First American</td>
</tr>
<tr>
<td>21. Transportation/Circulation</td>
<td>Arup, Hexagon, Fehr + Peers, and/or Nelson Nygaard</td>
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EXHIBIT F

INSURANCE REQUIREMENTS

MASTER DEVELOPMENT AGREEMENT

SANTA CLARA COUNTY CIVIC CENTER

1.1.1 Covenant to Maintain Insurance. Without limiting the indemnification obligations of Developer under the Agreement, Developer shall procure and keep in effect, or cause to be procured and kept in effect, as appropriate, the insurance specified in this Section F.

1.1.1 Insurance Coverage Requirements.

(a) Commercial General Liability (CGL) Insurance. At all times during the Term, Developer shall procure and keep in force commercial general liability insurance as specified below.

   (i) Coverage shall be at least as broad as the broadest available version of Insurance Services Office form CG 00 01.

   (ii) The policy shall insure against the legal liability of the insureds named in Section 2.(a)(x) below, relating to claims by third parties for accidental death, bodily injury or illness, property damage, personal injury and advertising injury, non-owned automobile liability, unless covered by the automobile liability policy pursuant to Section 2.(b) below, and liability assumed under an insured contract (including the tort liability of another assumed in a business contract).

   (iii) The commercial general liability coverage shall, collectively, have limits of not less than $10,000,000 per occurrence and in the aggregate per policy period. Developer shall have the right to satisfy the requisite insurance coverage amounts for liability insurance through a combination of primary policies and umbrella or excess policies. Umbrella and excess policies shall comply with all insurance requirements, terms and provisions set forth in this Exhibit for the applicable type of coverage (“follow form”).

   (iv) County Indemnitees shall each be added to the primary policy as an insured using Insurance Services Office forms CG 20 10 10 01 and CG 20 37 10 01 or, in County’s reasonable discretion, forms providing the same scope of coverage. Excess liability policies shall include as insureds all those insured under the primary policy. The policy shall provide for separation of insureds. The policy shall contain no insured vs. insured exclusion.

   (v) Each primary coverage policy may provide for a deductible up to $500,000 per occurrence but only if the policies obligate the insurers to pay on behalf of an insured on a first dollar basis and to later be reimbursed by the first named insured.
(vi) During any time when construction contractors are engaged for construction of projects as approved by the County, Developer shall cause general contractors to provide commercial general liability insurance subject to the same requirements of subparagraphs (i) through (v) above, but with per occurrence and general aggregate limits of no less than $25,000,000, with a designated separate aggregate limit for the project using ISO form CG 25 03 05 09. The completed operations portion of commercial general liability insurance for construction projects shall remain in place for no less than (a) for a project-specific placement the later of (A) ten (10) years after substantial completion of such NCF Phase and (B) expiration of the State’s applicable statute of repose, or (b) for all other placements, expiration of the State’s applicable statute of repose, through continuous renewal of coverage that includes the completed operations hazard. If coverage is maintained by continuous renewal, each subsequent general liability insurance policy shall be endorsed with form CG 20 37 10 01, or the equivalent, with County Indemnitees scheduled as additional insureds.

(vii) For all Developer Representatives other than general contractors, Developer shall cause each such Developer Representative to provide insurance that complies with requirements for insurance set forth in this Section 2.(a), other than coverage limits. Developer shall have sole responsibility for determining the limits of coverage required to be obtained by such Developer Representatives, which determination shall be made in accordance with reasonable and prudent business practices. Developer shall cause each such Developer Representatives to include County and County Indemnitees as additional insureds under such Developer Representatives’ general liability and excess liability insurance policies. If requested by County, Developer shall promptly provide certificates of insurance evidencing coverage for each Developer Representative. County shall have the right to contact the Developer Representatives directly in order to verify the above coverage.

(b) Automobile Liability Insurance. At all times during the Term, Developer shall procure and keep in force and shall cause to be procured and kept in force by all Developer Representatives, commercial automobile liability insurance covering all owned, non-owned and hired automobiles used in the performance of this Agreement, as specified below:

(i) Each policy shall cover accidental death, bodily injury and property damage liability arising from the ownership, maintenance or use of all owned, non-owned and hired vehicles connected with performance of the Work, including loading and unloading. The policy shall contain extensions of coverage that are typical for a project of the nature of the Project, and shall contain only those exclusions that are typical for a project of the nature of the Project. Coverage shall be at least as broad coverage provided in Insurance Services Office form CA 00 01. Policies shall cover “any auto” (symbol “1”).

(ii) Policies shall have limits not less than $3,000,000 for each accident or shall be scheduled under an umbrella or excess liability insurance policy to achieve the minimum required limits.

(iii) If Developer’s or any Developer Representative’s activities involve transportation of materials (including Hazardous Materials) that require endorsement MCS 90 (as described below), the automobile liability Insurance Policy for Developer or such Contractor shall be endorsed to include for private, non-commercial vehicles Motor Carrier Act of 1980 Form MCS-90.
Endorsement-Hazardous Materials Clean up (MCS-90) and shall be endorsed to provide coverage for liability arising from release of pollutants (CA 99 48 – Pollution Liability – Broadened Coverage for Covered Autos – Business Auto, Motor Carrier and Truckers Coverage Form).

(c) Workers’ Compensation and Employer’s Liability Insurance.

(i) At all times when work is being performed by any employee of Developer, or Developer Representatives, Developer shall procure and keep in force, or cause to be procured and kept in force, a policy of workers’ compensation and employer’s liability insurance in conformance with Applicable Law. Developer and/or Developer Representatives, whichever is the applicable employer, shall be the named insured on these policies. The workers’ compensation Insurance Policy shall contain the following endorsements:

(1) A voluntary compensation endorsement;
(2) An alternative employer endorsement; and
(3) An endorsement extending coverage to all states operations on an “if any” basis.
(4) U.S. Longshore and Harbor Workers’, Jones Act, and Federal Employer’s Liabilities Act coverage on an “if any” basis.

(ii) Employer’s liability insurance for Developer, and Developer Representatives shall be as specified below.

(1) The policy/ies shall insure against liability for death, bodily injury, illness or disease for all employees of Developer and Developer Representatives working on or about any Project or otherwise engaged in the Work.
(2) Employer’s liability shall have a limit of not less than $1,000,000 per accident, and shall be scheduled under umbrella or excess policies. Umbrella and excess policies shall comply with all insurance requirements, terms and provisions set forth in the Agreement for the applicable type of coverage.

(d) Professional Liability/Errors and Omissions Liability Insurance. For Developer, Design Professionals, or Contractors performing any type of professional services including but not limited to design-build construction, construction management, engineering and architecture.

(i) At all times that professional services are rendered respecting design and construction of any Project (which services are conclusively presumed to start on the Effective Date) until the first to occur of (1) three years after the professional services have concluded for the Project or (2) expiration of all applicable statutes of limitation and repose applicable to professional services performed for the Project, Developer shall cause any design-build Contractor, architect, engineering firm (in the case of design work) and each
Contractor that is under direct contract with Developer and provides professional services to Developer respecting such design and construction (in the case of any other design or engineering work) to procure and keep in force professional liability insurance as specified herein.

(ii) Each policy shall provide coverage of liability of the party performing the professional services arising out of any negligent act, error or omission in the performance of professional services or activities for the Project.

(iii) Developer shall ensure that for any Design Professional or Developer Representatives providing professional services, including design-build contractors, professional liability insurance policies shall have a limit of not less than $2,000,000 per claim and in the aggregate, which limit shall not be considered as any limitation of liability. A minimum of 50% of any aggregate limit must remain available at all times; if over 50% of any such aggregate limit has been paid or reserved by the insurer under such policy, County will require additional coverage to be purchased by Contractor to restore the required limits. This coverage shall be maintained for a minimum of two years following termination or completion of Contractor’s work pursuant to the Agreement.

(iv) Each Design Professional’s annual practice policy may provide a self-insured retention, as evidenced on a certificate of insurance. Any self-insured retention limit shall not be greater than $250,000 per occurrence/event for Developer, $50,000 per occurrence/event for Design Professionals and others providing professional services, without written approval of County’s Risk Manager.

(v) All project-specific or annual practice policies shall maintain a retroactive date that shall be no later than the first date that the firm required to maintain professional liability insurance began providing professional services with respect to the Project.

(e) **Builder’s Risk Insurance.** Commencing upon issuance of a Notice to Proceed for any NCF Phase E under the Agreement, Developer shall procure and keep in force, or cause to be procured and kept in force, a policy of builder’s risk insurance as specified below.

(i) The policy shall provide the broadest coverage available (coverage at least as broad as the ISO “all risk” permanent property form CP 10 30) for "all risks" of direct physical loss or damage to the portions or elements of the Project under construction is, including coverage for terrorism, earthquake, earth movement, volcanic activity, tsunami, flood, storm, tempest, windstorm, hurricane, tornado, ice flow, subsidence, or loss of materials while waterborne or under the water. The policy shall contain extensions of coverage that are typical for a project of the nature of the Project and shall contain only those exclusions that are typical for a project of the nature of the Project.

(ii) The policy shall cover all property, buildings, other structures, fixtures, materials, supplies, foundations, pilings, machinery and equipment that are part of or, related to the portions or elements of the Project under construction, and the works of
improvement, including permanent and temporary works and materials, and including goods intended for incorporation into the works.

(iii) The policy shall provide coverage up to the full replacement cost, without risk of co-insurance, with only those sublimits as are required by applicable Law or as specified in this Section F:

(iv) Developer, County and the Contractor and Contractors of every tier shall be named insureds on the policy. Developer may provide for all Contractors to be named insureds by a single endorsement, with County’s prior, written approval, given in its reasonable discretion. The policy shall be written so that no act or omission of any insured shall vitiate coverage of the other insureds (i.e., “separation of insureds”).

(v) The policy shall include coverage for:

(1) foundations, including pilings, but excluding normal settling, shrinkage, or expansion,

(2) physical damage resulting from machinery accidents but excluding normal and natural wear and tear, corrosion, erosion, inherent vice or latent defect in the machinery,

(3) plans, blueprints and specifications,

(4) physical damage resulting from faulty work or faulty materials, but excluding the cost of making good such faulty work or faulty materials,

(5) physical damage resulting from design error or omission but excluding the cost of making good such design error or omission,

(6) demolition and debris removal coverage, with a sublimit of 20% of the loss insuring the buildings, structures, machinery, equipment, materials, facilities, fixtures and all other properties constituting a part of the Project,

(7) the increased replacement cost due to any change in applicable Laws with a sublimit of no less than 15% of completed value,

(8) expense to reduce loss,

(9) building ordinance compliance, with the building ordinance exclusion deleted,

(10) transit, including ocean marine coverage (unless insured by the supplier or through a separate marine cargo policy), with sub-limits sufficient to insure the full replacement value of any key equipment item,

(11) full collapse, including collapse resulting from design error.

Exhibit F
-5-
(12) property stored off site, and

(13) flood and earthquake coverage with a sublimits of no less than 25% of completed value or as determined by a Probable Maximum Loss study approved by the County Risk Manager.

(f) **Contractor’s Pollution Liability Insurance.** At all times during any period where Developer is performing, or causing to be performed, construction Work on or for the Project, Developer shall procure and keep in force, or cause to be procured and kept in force, contractor’s pollution liability insurance on an occurrence basis as specified below.

(i) The policy shall cover sums (collectively, “Clean-Up Costs”) that the insured becomes legally obligated to pay to a third party or for the investigation, removal, remediation (including associated monitoring) or disposal of soil, surface water, groundwater or other contamination to the extent required by Environmental Laws (as defined in Section 1.02(FF) of the Agreement) caused by pollution conditions resulting from covered operations, subject to the policy terms and conditions, including bodily injury, property damage (including natural resource damages), clean-up costs, and legal defense costs. Such policy shall cover claims related to pollution conditions to the extent such are caused (A) by the performance of Work, (B) by transportation, including loading and unloading, by owned and non-owned vehicles and/or (C) by other activities performed by or on behalf of Developer that occur on the Project. Coverage shall apply to sudden and non-sudden pollution conditions resulting from the escape or release of smoke, vapors, fumes, acids, alkalis, toxic chemicals, liquids, or gases, waste materials, or other irritants, contaminants, or pollutants resulting from the conditions described in clauses (A) through (C) of this section.

(ii) Developer and the County shall be insureds under such policy. The policy shall provide for separation of insureds. The policy shall not contain any insured vs. insured exclusion.

(iii) Such policy shall have a limit of not less than $5,000,000 per occurrence and in the aggregate per policy period, unless applicable regulatory standards impose more stringent coverage requirements.

(iv) The policy shall contain no exclusions that will restrict coverage for loss on, about or under water.

1.1.2 **General Insurance Requirements.**

(a) **Deductibles and Self-Insured Retentions.** County shall have no liability for deductibles (whenever the term deductible is used, it shall also mean self-insured retention) and amounts in excess of the coverage provided. Any self-insured retention must be declared to and approved by County’s Risk Manager, which shall not be unreasonably withheld. If not approved, at the option of County, either: the insurer shall reduce or eliminate self-insured retentions as respects County, County, the members of the Board of Supervisors of Supervisors of County and the officers, agents, employees and volunteers; or the Developer or Contractor...
shall provide a financial guarantee satisfactory to County guaranteeing payment of losses and related investigations, claim administration and defense expenses.

(b) **Additional Insured Endorsement.** Each general liability policy provided by Developer or Developer Representatives shall contain an additional insured endorsement or provision applying coverage to County and County Indemnitees (collectively, the “Additional Insured Parties”).

(c) **Primary and Non-Contributory.** For any claims related to the Project, Developer’s, Design Professional’s, Contractor’s, Subcontractor’s and other Developer Representative’s insurance coverage shall be primary insurance as respects the Additional Insured Parties. Any insurance or self-insurance maintained by an Additional Insured Party shall be excess of the insurance provide by Developer, Design Professionals, Contractors, Subcontractors and other Developer Representatives and shall not contribute with it. The foregoing shall not diminish or impair (i) the County’s obligation pursuant to Section 15.22(D), if applicable to pay Developer for PLL Policy Insured Costs, or (ii) Developer’s rights as an additional insured under the PLL Policy.

(d) **Notice of Cancellation:** Each required insurance policy shall contain a provision, or shall be endorsed to state, that coverage shall not be canceled by either party, except after thirty (30) Days’ prior written notice, has been given to County at the address shown in section of the Agreement entitled "Notices".

(e) **Severability of Interest Clause:** General Liability and Auto Liability policy will contain a provision that coverage applies separately to each insured, except with respect to the limits of liability, and that an act or omission by one of the named insureds shall not reduce or avoid coverage to the other named insureds or Additional Insured Parties.

(f) **Loss Payee Clause:** Any Builder’s Risk policy shall name County as loss payee. Loss, if any, shall be adjustable with and payable to County as trustee for all entities having an insurable interest, except in such cases as may require payment of all or a proportion of such insurance to be made to others as their interests may appear.

(g) **Qualifying Insurers.** All required policies of insurance shall be issued by companies which have been approved to do business in the State of California by the State Department of Insurance, and which hold a current policy holder’s alphabetic and financial size category rating of not less than A-: VI according to the current Best’s Key Rating guide, or a company of equal financial stability that is approved in writing by County’s Risk Manager.

(h) **Evidence of Insurance.** Prior to the Effective date of the Agreement, but in no event later than commencement of Developer’s work under the Agreement, Developer shall furnish County with certificates of insurance and amendatory endorsements effecting coverage required of Developer by this Section. Prior to its commencement of Work by any Design Professional, Contractor, Subcontractor or other Developer Representative pursuant to the Agreement, Developer shall cause such Design Professional, Contractor, Subcontractor or other Developer Representative to furnish Developer with certificates of insurance and amendatory endorsements effecting coverage required by this clause. Developer
shall maintain such evidence until the fifth (5th) anniversary of completion or earlier cancellation of the NCF Phase to which they relate, at which time Developer shall forward to the County Risk Manager, all collected evidence of insurance relating to the NCF Phase being completed or cancelled, or copies thereof. Developer shall permit, and Developer shall cause each Developer Representative to permit, County to inspect any policies of insurance that have not been delivered to County.

(i) Failure to Obtain or Maintain Insurance; County’s Remedies. Failure of Developer, or Developer Representatives to provide insurance specified or failure to deliver certificates of insurance, or failure to make premium payments required by such insurance, shall constitute a material breach of the Agreement. In the event any policy of insurance required under this Agreement to be maintained by Developer, any Design Professional, Contractor, Subcontractor or other Developer Representative does not comply with these requirements or is canceled and not replaced, County has the right but not the duty to obtain the insurance it deems necessary and any premium paid by County will be promptly reimbursed by Developer or County will withhold amounts sufficient to pay premium from Developer payments, to the extent such amounts would not be permitted Indirect Expenses under the Agreement.

(j) No Limitation of Obligations: The foregoing insurance requirements as to the types and limits of insurance coverage to be maintained by Developer and each Design Professional, Contractor, Subcontractor and other Developer Representative, and any approval of said insurance by County is not intended to and shall not in any manner limit or qualify the liabilities and obligations otherwise assumed by Developer pursuant to the Agreement, including, but not limited to, the provisions concerning indemnification.

(k) No Recourse: The insurer shall have no recourse against County or any other Additional Insured Party for payment of any premium or for assessments under any insurance policy maintained to be maintained by Developer, any Design Professional, Contractor, Subcontractor or other Developer Representative under the Agreement, other than as expressly provided in the Agreement.

(l) Review of Coverage: County retains the right at any time to review the coverage, form and amount of insurance required by the Agreement and may require insurance reasonably sufficient in coverage, form and amount to provide adequate protection against the kind and extent of risk which exists at the time a change in insurance is required. County may change the insurance coverages and limits set forth below by written notice to Developer, whereupon Developer shall, within ninety (90) Days, procure such additional and/or modified insurance coverages. Upon such change, the applicable Phase Budget will be increased to reflect any additional costs associated with the procurement and maintenance of such revised insurance requirements.

(m) Claims Made Coverage. If coverage is written on a "claims made" basis, the Certificate of Insurance shall clearly so state. In addition to the coverage requirements specified above, such policy shall provide that:

Exhibit F
-8-
(i) The policy retroactive date coincides with or precedes commencement of Work under the Agreement (including subsequent policies purchased as renewals or replacements).

(ii) The named insured will maintain similar insurance during the required extended period of coverage following expiration of the Agreement, including the requirement of adding all additional insureds.

(iii) If insurance is terminated for any reason, the named insured shall purchase an extended reporting provision of at least two years to report claims arising in connection with the Agreement.

(iv) The policy allows for reporting of circumstances or incidents that might give rise to future claims.

(n) Subcontractors’ Insurance. Developer and each Developer Representative shall require that any and all Subcontractors under it are insured for general liability, worker’s compensation, auto liability, and if applicable, professional liability. Developer shall receive, review and monitor evidence of insurance from each Developer Representative for compliance with the foregoing provisions, other than coverage limits. Developer shall have sole responsibility for determining the limits of coverage required to be obtained by such Subcontractors, which determination shall be made in accordance with reasonable and prudent business practices. Developer shall advise County in writing promptly if any Developer Representative does not comply with the insurance requirements in the Agreement. Developer shall not permit any Developer Representative who does not meet the insurance requirements to perform work in connection with the Project.

(o) Waiver of Subrogation. All insurers shall waive all rights of recovery or subrogation against County, its agents, officers and employees which might arise by reason of any payment under the policies, or shall permit waiver of recovery rights by the named insured prior to loss. Developer hereby waives all rights to recovery against County, its agents, officers and employees, on account of loss or damage to the extent such loss or damage is insured against under any insurance policies which may be in force at the time of the loss or damage, and shall require the same waiver from each Developer Representative. This provision does not apply to Professional Liability coverage.

(p) Requirements Not Limiting. The Parties acknowledge and agree that (i) requirements of specific coverage features or limits contained in this Exhibit F are not intended as a limitation on coverage, limits or other requirements, or a waiver of any coverage normally provided by any Insurance Policy (ii) specific reference to a given coverage feature is not intended by to be all inclusive, or to the exclusion of other coverage, or a waiver of any type and (iii) all insurance coverage and limits provided by Developer, or by third parties pursuant to obligations of Developer hereunder, and, in each case, available or applicable to this Agreement are intended to apply to the full extent of the Insurance Policies, and nothing contained in this Agreement limits, or shall be deemed to limit, the application of such insurance coverage. Except as otherwise specifically set forth in this exhibit or the Agreement, Developer may meet its Insurance Policy and related obligations in any manner Developer deems reasonably

Exhibit F
-9-
appropriate, so long as, in each case, and with respect to the coverages prescribed for each Insurance Policy, Developer meets all the requirements therefor.

(q) **Notice and Prosecution of Claims.** County shall have the right, but not the obligation, to report directly to insurers and process County’s claims against applicable Insurance Policies. Unless otherwise directed by County in writing with respect to County’s insurance claims, Developer shall be responsible for reporting and processing all potential claims by County or Developer against the Insurance Policies placed pursuant to requirements under the Agreement Documents. Developer agrees to report timely to the insurer(s) under such Insurance Policies any and all matters that may give rise to an insurance claim by Developer or County or another Insured Party, and promptly and diligently to pursue such insurance claims in accordance with the claims procedures specified in such Insurance Policies, whether for defense, indemnity, or both. Developer shall enforce all legal rights against the insurer under the applicable Insurance Policies and applicable Laws in order to collect thereon, including pursuing necessary litigation and enforcement of judgments, provided that Developer shall be deemed to have satisfied this obligation if a judgment is not collectible through the exercise of lawful and diligent means.

(i) Developer shall immediately notify County, and thereafter keep County fully informed, of any incident, potential claim, claim or other matter of which Developer becomes aware that involves or could conceivably involve an Insured Party as a defendant.

(ii) County agrees to promptly notify Developer of County’s incidents, potential claims against County, and matters that may give rise to an insurance claim against County, and to tender to the insurer County’s defense of the claim under such Insurance Policies. County shall cooperate with Developer as necessary for Developer to fulfill its duties hereunder, including providing Developer copies of any written materials County receives asserting a claim against County that is subject to defense by an insurer under an Insurance Policy.

(iii) If in any instance Developer has not performed its obligations respecting insurance coverage set forth in this Agreement or is unable to enforce and collect any such insurance for failure to assert claims in accordance with the terms of the Insurance Policies or to prosecute claims diligently, then, for purposes of determining Developer’s liability and the limits thereon or determining reductions in compensation due from County to Developer on account of available insurance, Developer shall be treated as if it has elected to self-insure up to the full amount of insurance coverage which would have been available had Developer performed such obligations and not committed such failure.

(r) **Inadequacy of Required Coverages.** County makes no representation that the scope of coverage and limits of liability specified for any Insurance Policy to be carried pursuant to this Agreement or approved variances therefrom are adequate to protect Developer against its undertakings under this Agreement to County, or its liabilities to any third party. It is the responsibility of Developer and each Contractor to determine if any changes or additional coverages are required to adequately protect their interests. No such limits of liability
or approved variances therefrom shall preclude County from taking any actions as are available to it under the Agreement Documents, or otherwise at Law.
EXHIBIT G

PAYMENT AND PERFORMANCE BOND FORMS

[attached]
EXHIBIT G-1

FAITHFUL PERFORMANCE BOND

MASTER DEVELOPMENT AGREEMENT

SANTA CLARA COUNTY CIVIC CENTER

KNOW ALL PERSONS BY THESE PRESENTS:

WHEREAS, Lowe Enterprises Real Estate Group (hereinafter referred to as “Developer”) and __________________ (hereinafter referred to as “Principal”), have entered into a written contract for furnishing of all labor, materials, equipment, transportation and services for the Santa Clara County Civic Center [describe portion of the Work included in the bonded contract] (hereinafter referred to as the “Agreement”); the terms and conditions of which are incorporated herein by reference; and the terms of the Agreement require the Principal to furnish performance security.

NOW, THEREFORE, Principal and __________________ (“Surety”), are hereby held and firmly bound unto the Developer in the amount of ___________________________ DOLLARS ($__________) for payment of which Principal and Surety hereby bind themselves, their heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT, if Principal (or its heirs, executors, administrators, successors, or assigns approved by the Developer) performs all of the covenants, conditions, and obligations of the Agreement, including the obligation to indemnify, defend, and hold harmless the Developer, then this obligation shall be null and void; otherwise it shall be and remain in full force and effect.

The Surety’s obligation under this bond shall arise after the Developer has provided written notice to the Surety, at the address set forth below, of the Principal’s default under the Agreement, and the Principal’s failure to cure the default in accordance with the terms of the Agreement.

The Surety hereby agrees, for value received, that its obligations under this bond shall in no way be impaired or modified by any modification to the Agreement by the Developer and the Principal, and the Surety hereby waives notice of any such modification.
In the event suit is brought upon this bond, the Surety shall pay reasonable attorneys’ fees and costs incurred by the prevailing parties in such suit, which fees and costs shall be in addition to the face amount of the bond.

IN WITNESS WHEREOF, the undersigned represent and warrant that they have the right, power, legal capacity, and authority to enter into and execute this document on behalf of the Principal and the Surety, and have caused this document to be executed by setting hereto their names, titles, and signatures.

CONTRACTOR, as Principal
By: __________________________
   Its: _________________________
Address: ______________________
         _________________________
         _________________________
         _________________________

SURETY
By: __________________________
   Its: _________________________
Address: ______________________
         _________________________
         _________________________
         _________________________

NOTE: SIGNATURE OF PERSON SIGNING FOR SURETY MUST BE NOTARIZED AND EVIDENCE OF CORPORATE AUTHORITY ATTACHED.
PAYMENT FOR LABOR AND MATERIALS BOND

MASTER DEVELOPMENT AGREEMENT

SANTA CLARA COUNTY CIVIC CENTER

KNOW ALL PERSONS BY THESE PRESENTS:

WHEREAS, the Lowe Enterprises Real Estate Group (hereinafter referred to as “Developer”) and _______________________ (hereinafter referred to as “Principal”), have entered into a written contract for furnishing of all labor, materials, equipment, transportation and services for the Santa Clara County Civic Center [describe portion of the Work included in the bonded contract] (hereinafter referred to as the “Construction Contract”); and

WHEREAS, Principal is required by the terms of the Construction Contract to furnish this bond (“Payment Bond”) to secure payment for all work, labor, materials, equipment or services furnished in connection with the Construction Contract;

NOW, THEREFORE, Principal and _________________________ (hereinafter referred to as “Surety”), as surety, are held and firmly bound unto Claimants, as defined herein, in the penal sum of __________________ DOLLARS ($___________) lawful money of the United States, for the payment of which sum well and truly to be made as provided in this Payment Bond.

1. Principal and Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to Developer to pay for work, labor, materials, equipment, services, or other items furnished for use and actually used in the performance of the Construction Contract, which is incorporated herein by reference.

2. With respect to Developer, this obligation shall be null and void if Principal:
   2.1. Promptly makes payment, directly or indirectly, for all sums due Claimants, and
   2.2. Defends, indemnifies and holds Developer harmless from claims, demands, liens or suits by any person or entity whose claim, demand, lien or suit is for the payment for work, labor, materials, equipment, services or other items furnished for use in the performance of the Construction Contract, provided Developer has promptly notified Principal and Surety (at the address described in Paragraph 12) of any claims, demands, liens or suits and tendered defense of such claims, demands, liens or suits to Principal and Surety.

3. With respect to Claimants, this obligation shall be null and void if Principal promptly makes payment, directly or indirectly, for all sums due.

4. Surety shall have no obligation to Claimants under this Payment Bond until:

Exhibit G-2
4.1. Claimants who are employed by or have a direct contract with Principal have given notice to Surety (at the address described below) and sent a copy, or notice thereof, to Developer, stating that a claim is being made under this Payment Bond and, with substantial accuracy, the amount of the claim.

4.2. Claimants who do not have a direct contract with the Principal:

4.2.1 Have furnished written notice to Principal and as required by and conforming with Civil Code sections 3252 and 3091; and

4.2.2 Not having been paid within 30 days of sending the required notice, have sent a written notice to Surety (at the address described below) and as required by and conforming with Civil Code sections 3252 and 3091, stating that a claim is being made under this Payment Bond and enclosing a copy of the previous written notice furnished to Principal.

5. When the Claimant has satisfied the conditions of Paragraph 4, Surety shall promptly and at Surety’s expense take the following actions:

5.1. Send an answer to the Claimant, with a copy to Developer, within 20 days after receipt of the claim, stating the amounts that are undisputed and the basis for challenging any amounts that are disputed.

5.2. Pay or arrange for payment of any undisputed amounts.

6. Surety’s total obligation shall not exceed the amount of this Payment Bond, and the amount of this Payment Bond shall be credited for any payments made in good faith by Surety.

7. Amounts owed by Developer to Principal under the Construction Contract shall be used for the performance of the Construction Contract and to satisfy claims, if any, under the Performance Bond. By Principal furnishing and Developer accepting this Payment Bond, they agree that all funds earned by Principal in the performance of the Construction Contract are dedicated to satisfy obligations of Principal and Surety under this Payment Bond, subject to the Developer’s priority to use the funds for the completion of the work or the satisfaction of Developer’s claims, including liquidated damages, under the Construction Contract.

8. Surety shall not be liable to Developer, Claimants or others for obligations of the Principal that are unrelated to the Construction Contract. Developer shall not be liable for payment of any costs or expenses of any Claimants under this Payment Bond, and shall have under this Payment Bond no obligation to make payments to, give notices on behalf of, or otherwise have any obligation to Claimants under this Payment Bond.

9. Surety hereby waives notice of any change, including changes of time, to the Construction Contract or to related subcontracts, purchase orders and other obligations.
10. No suit or action shall be commenced by a Claimant under this Payment Bond other than in a court of competent jurisdiction. The prevailing party in any such action shall be entitled to recover its attorneys’ fees, to be taxed as costs.

11. Notice to Surety, Developer or Principal shall be mailed or delivered to the address shown on the signature page.

12. This Payment Bond has been furnished to comply with Civil Code sections 3247 through 3252. Any provision in this Payment Bond conflicting with those statutory requirements shall be deemed deleted and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein. The intent is that this Payment Bond shall be construed as a statutory bond and not as a common law bond.

13. Upon request by any person or entity appearing to be a potential beneficiary of this Payment Bond, the Principal shall promptly furnish a copy of this Payment Bond or shall permit a copy to be made.

14. DEFINITIONS

14.1. Claimant: An individual or entity identified in California Civil Code sections 3181 or 3248.

14.2. Construction Contract: The agreement between Developer and Principal identified above, including all related documents and changes thereto.
IN WITNESS WHEREOF, the undersigned represent and warrant that they have the right, power, legal capacity, and authority to enter into and execute this document on behalf of the Principal and the Surety, and have caused this document to be executed by setting hereto their names, titles, and signatures.

CONTRACTOR, as Principal
By: ____________________________
   Its: ____________________________
Address: _______________________
         _______________________
         _______________________
         _______________________

SURETY
By: ____________________________
   Its: ____________________________
Address: _______________________
         _______________________
         _______________________
         _______________________

NOTE: SIGNATURE OF PERSON SIGNING FOR SURETY MUST BE NOTARIZED AND EVIDENCE OF CORPORATE AUTHORITY ATTACHED
MASTER DEVELOPMENT AGREEMENT
SANTA CLARA COUNTY CIVIC CENTER
EXHIBIT G-2

RIDER

To be attached to and form part of Performance and Payment Bond No.

on behalf of , as Principal

in favor of , as Obligee

dated

It is hereby understood and agreed that , is (are) added as additional Obligee(s).

Provided, however, that:

1. The Principal and the Surety shall not be liable under this bond to the Obligees, or either of them, unless said Obligees, or either of them shall make payments to the Principal (or to Surety if it arranges for performance of the Contract) in accordance with the terms of said contract as to payment and shall perform all the other obligations to be performed under said contract at the time and in the manner therein set forth.

2. Provided, however, that the attached bond as changed by this Rider shall be subject to all its agreements, terms and conditions and limitation except as herein expressly modified and that the liability under the attached bond as changed by this Rider shall not be cumulative and shall be limited in the aggregate to the penalty of the said bond.

Signed and dated this day of ,

By


Exhibit G-2
Rider
The following Scope of Work outlines anticipated services to be provided by Gensler during Pre-Development Phase A (Master Plan and Due Diligence) of the Master Development Agreement for the Santa Clara County Civic Center Campus Master Plan (SC5_MP) for NCF Phase 1 (Richey Site). Gensler anticipates working closely with the County and its agents to refine the proposed schedule, and align critical path items and approvals with meetings of the Board of Supervisors.

Concurrent Study: Santa Clara County Law & Justice Center
County staff are proceeding with services based on a proposal for preparation of an operational plan, program, functional adjacencies and block and stack of the preferred Centralized Justice Center to be located on the Richey site. Gensler will coordinate with staff and the consultant to the county on this study, Anderson Brulé Architects (ABA), to align master plan efforts and the realization of an early phase project on the Richey site.

Scope of Work:
The following outline scope of work identifies draft goals for each phase of the planning process, and identifies key tasks by phase.

Phase 1A.1: **PROJECT START UP & INITIATION**
Phase 1A.2: **INVESTIGATION & SITE DUE DILIGENCE**
Phase 1A.3: **TESTING OF MASTER PLAN OPTIONS**
Phase 1A.4: **MASTER PLAN REFINEMENT**
Phase 1A.5: **BASIS FOR DESIGN FOR NCF PHASE 1 (RICHEY SITE)**
Phase 1A.1: MASTER PLAN PROJECT MANAGEMENT, START UP & INITIATION

Project Management & Start Up

The goal of this phase is to establish a coherent and transparent project management approach to preparation of the Master Plan for the County sites.

- Scoping & Scheduling Workshop & Project Kick Off
- Consultant Selection & Interviews
- Project Management

Deliverables: Gensler anticipates the following deliverables during this phase;

1. Attend project kick-off and scheduling meeting & prepare supporting materials
2. Preparation of Integrated Master Plan Schedule and periodic updates, specifically identifying stakeholder board meeting dates at which master plan graphics will be required
3. Bi-Monthly updates throughout the project
4. Successful consultant selection
5. Project management manual including team, connections, project schedule, file transfer criteria, and other elements sufficient to support the master plan.

Meetings: Gensler anticipates the following meetings during this phase;

- Project Kick-off w/ County staff and consultants to Lowe / the County (all day)
- Consultant Interviews (10)
- Project coordination meetings (2)

Phase 1A.2: INVESTIGATION & SITE DUE DILIGENCE

Site Due Diligence

The goal of this phase of the Master Plan is to develop a comprehensive understanding of the baseline information that will be used to support the
master plan preparation. The following task list is indicative, and will be further refined and confirmed at the Scoping and Scheduling workshop.

*Conceptual Programming - Non Law & Justice Uses (Optional):*

**Document Review:**
- Environmental Site Assessments (if available)
- Historic resources assessments
- Conditions assessment for buildings summarized by Gensler
- Traffic and transportation studies
- Planning studies
- City of San Jose Planning & Urban Villages documents
- Other documents as provided by the County and / or referenced by the City of San Jose

Gaps in data will be identified, and will be shared with the County to determine best means of addressing shortfalls.

- *Site Analysis*
- *Eco-Tech Review of Biometric Site Conditions*
- *Develop a digital model of the Existing Campus*
- *Stakeholder Engagement Support*
- *Eco-Charrette*
- *Opportunities & Constraints*
- *Draft Goals & Objectives Preparation*
- *Meetings / Study Sessions*

**Deliverables:** Gensler anticipates the following deliverables during this phase;
1. Preparation of Materials for Conduct of the Eco-Charrette
2. Written and Graphic Opportunities and Constraints Book.
3. Draft Project Goals and Objectives in written / graphic form.

**Meetings:** Gensler anticipates the following meetings during this phase;
- Project Eco-Charrette (1)
• Project coordination Meetings (4)
• Internal Team Meetings (4)

Phase 1A.3: TESTING OF MASTER PLAN OPTIONS

Site Options Preparation

The goal of this phase of the master plan project is to develop three to five (3-5) alternatives for the planning of the Civic Center (Sites A, B, C and D) that can be used to test ideas, comparatively evaluate various planning and design options, establish fiscally feasible options, and be used to facilitate decision making by internal stakeholders and support ongoing discussions with external stakeholders.

• Conceptual Program Refinement
• Stakeholder Workshops
• Eco-Charrette & Workshop
• Historic Resources Workshop
• Preliminary Public Art Goals
• Detailed Master Plan Alternatives
  Develop up to three (3) Master Plan Alternatives based on prior phases.
• Goals & Objectives Refinement
• Website Interface

Deliverables: Gensler anticipates the following deliverables during this phase;

1. Attend project meetings and prepare supporting materials as necessary.
2. Written and Graphic Site Master Plan Options Book.

Meetings: Gensler anticipates the following meetings during this phase;

• Project coordination meetings with County (4)
• Internal Team Meetings (4)
• County Study Session (1)
Phase 1A.4: MASTER PLAN REFINEMENT & BASIS FOR DESIGN

The goal of this phase of the master plan project is to select a preferred master plan direction for the Civic Center Precinct, and to refine it with input from internal and external stakeholders. The intent of this phase will be to prepare the basis of subsequent environmental approval through preparation of an EIR.

- **Draft Master Plan**
- **Final Master Plan**

**Deliverables:** Gensler anticipates the following deliverables during this phase;

1. Attend project meetings and prepare supporting materials as necessary
2. Written and Graphic **Draft Master Plan Book**
3. Written and Graphic **Final Master Plan Book.**

**Meetings:** Gensler anticipates the following meetings during this phase;

- Project coordination meetings with County (8)
- Internal Team Meetings (12)
- County Study Sessions (2)

---

Phase 1A.5: BASIS FOR DESIGN FOR NCF PHASE 1 (RICHEY SITE)

The goal of this task is to assist the team in developing a comprehensive architectural Basis for Design for the anticipated first phase of the Master Plan, to be the Richey Site (Site A) as a consolidated Law & Justice precinct.

- **Program Review & Initial Ideation**
- **Concept Option Charrette**
- **Preferred Conceptual Options**
- **Preferred Concept Refinements**
- **Finalization of Preferred Concepts and Basis of Design**
Deliverables: Gensler anticipates the following deliverables during this phase;

1. Written and Graphic **Basis of Design for the Law & Justice Precinct**, including but not limited to, an outline specification to establish the general standards / performance standards / qualities & design intent of materials and finishes at sufficient level that preliminary ROM pricing may be developed by County cost estimators.

Meetings: Gensler anticipates the following meetings during this phase;

- Project coordination meetings with County (6)
- Internal Team Meetings (6)
- County Study Session (1)

Stakeholder Participation Assumptions:

During the preparation of the Master Plan and the Basis of Design for the Civic Center Master Plan, Gensler assumes that the consultant team will provide graphics and other supporting materials for use by staff at key public review and comment periods. Gensler have assumed the following:

- Stakeholder meetings will be led and primarily staffed by County staff
- Gensler will be responsible for assembling materials on boards and in other forms of digital presentation as required by County
- Graphic Design will be completed by Gensler staff
- Stakeholder meetings internal to the County (5)
- Public Stakeholder Review Sessions (3).
MASTER DEVELOPMENT AGREEMENT

SANTA CLARA COUNTY CIVIC CENTER

EXHIBIT I

MILESTONES FOR INITIAL NCF PHASE

Initial NCF Phase (Richey Site)- From Exhibit C’s Attachment 2- Schedule

8/31/16- Pre-Development Phase A- Goal M2- County/Anderson Brule Architects (ABA) have completed Service Model & Operational Plan with sufficient information for Lowe/Gensler to proceed at full-speed with the initial master plan options;

11/30/16- Pre-Development Phase A- Goal M5- From Gensler’s 3-5 master plan options, County has selected the two Alternative Preliminary Conceptual Site Plans and County/ABA have completed Program Development with sufficient information for Lowe/Gensler to proceed at full-speed with the master plan refinement;

3/31/17- Pre-Development Phase A- Goal M9- Lowe/Gensler has submitted the two Alternative Preliminary Conceptual Site Plans and the Due Diligence findings to County for County’s selection of one of the two Alternates.

9/30/16- Pre-Development Phase B- Goal M3- County has issued the Notice of Preparation (NOP) for the Environmental Impact Report (EIR).

11/30/16- Pre-Development Phase B- Goal M5- Sufficient parameters have been determined to prepare the pre-EIR documents, specifically including the building locations/sizes to start the Federal Aviation Administration’s applications for Determinations of No Hazard.

11/30/17- Pre-Development Phase B- Goal M17- Final EIR certified by County.

TBD- Pre-Development Phase C- Goal M10- Start Design Documents.

TBD- Pre-Development Phase C- Goal M20- County has obtained all agency approvals, excluding building permits, to develop the Initial NCF Phase.
MASTER DEVELOPMENT AGREEMENT
SANTA CLARA COUNTY CIVIC CENTER

EXHIBIT J
STAFFING PLAN

Developer’s staffing plan will vary depending upon the Business Plan for each Pre-Development Phase (A, B, C, and D) and each Construction Phase (E) of each NCF Phase.

Key Personnel
Alan Chamorro will serve as Developer Lead and have overall responsibility for the Initial NCF Phase. Tom Clyman will serve as the Senior Construction Manager and have overall responsibility for the construction of the Initial NCF Phase.

Alan and Tom will be supported by senior members of the Lowe Enterprises corporate management team.

Project Staff
It is anticipated that the following staff members will be added to the team and be allocated 100% to the Initial NCF Phase:
- Development Manager
- Construction Manager
- Assistant Construction Manager
- Administrative Assistant

Corporate Staffing
It is anticipated that the following staff members will provide support to the Project Team, but will not be allocated 100% to the Initial NCF Phase:
- Risk Manager, if needed
- Accounting Manager
- Project Accountant
- Administrative Assistant
- Website Coordinator
LEGAL DESCRIPTION OR DIAGRAM OF RICHEY FIELD

DIAGRAM

LEGAL DESCRIPTION

From QUITCLAIM DEED DACA05-9-12-566, EXHIBIT “A” LEGAL DESCRIPTION:

REAL PROPERTY in the City of San Jose, County of Santa Clara, State of California, part of Pueblo Tract No. 1, so-called, described as follows:

The parcels of land designated as PARCEL 8 and PARCEL 10, delineated on the Record of Survey made at the request of the Board of Supervisors of the County of Santa Clara in August, 1982 by Arthur C. Devincenzi R.C.E. 17050, filed for record September 7, 1984 in Book 533 of Maps, pages 39-42, Santa Clara County Records.
Said land consists of (a) the land described as containing 8.60 acres in the deed by the County of Santa Clara to the United States of America recorded May 24, 1950 in Book 1984, page 201, Official Records, excepting therefrom that portion thereof described as containing 5.452 acres, more or less, in the deed by the United States of America to the County of Santa Clara recorded July 3, 1962 in Book 5632 page 359, Official Records and (b) the land described as containing 5.452 acres, more or less, in the deed by the County of Santa Clara to the United States of America recorded July 3, 1962 in Book 5632, page 362, Official Records, excepting therefrom that portion thereof described as containing 2.500 acres, more or less, in the deed by the United States of America to the Santa Clara County Transit District recorded August 29, 1985 in Book J442, page 488, Official Records; and (c) the land described as containing 2.500 acres, more or less, in the deed by the Santa Clara County Transit District to the United States of America recorded August 29, 1985 in Book J442, page 485, Official Records.

APN: 230-37-037, 038
ARB: 230-37-19.01.01, 19.02, 24, 25, 28
TABLE 1: Development Management Fee - for Initial and Subsequent NCF Phases*

<table>
<thead>
<tr>
<th>PROJECT</th>
<th>Total DMF over combined schedule of Phases C &amp; D**</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Office Building Project, including associated TI’s FF&amp;E, on-site alterations, parking alterations, and off-sites</td>
<td></td>
</tr>
<tr>
<td>Option A</td>
<td>$1,680,000</td>
</tr>
<tr>
<td>150,000 - 250,000 sf</td>
<td></td>
</tr>
<tr>
<td>Option B</td>
<td>$2,390,000</td>
</tr>
<tr>
<td>300,000 to 400,000 s.f.</td>
<td></td>
</tr>
<tr>
<td>2. Alternate: Parking Structure</td>
<td>$580,000</td>
</tr>
<tr>
<td>550,000 sf accommodating approximately 1,600 spaces</td>
<td></td>
</tr>
<tr>
<td>3. Alternate: Central Plant</td>
<td>$250,000</td>
</tr>
<tr>
<td>1 Lump Sum</td>
<td></td>
</tr>
<tr>
<td>4. Alternate: Specialty Building Space (e.g. Board Chambers, amenity space -cafeteria, etc.)</td>
<td>$320,000</td>
</tr>
<tr>
<td>15,000 – 25,000 sf</td>
<td></td>
</tr>
</tbody>
</table>

* The Development Management Fee and Construction Management Fee shall be escalated annually on January 1st beginning with January 1, 2020 for any Subsequent NCF Predevelopment Phase C or D and for any Subsequent NCF Phase E the start for which would occur after that date. The method of adjustment shall be to use the annual rate of increase for the preceding twelve months as published in the Engineering News Record’s (ENR) Building Cost Index (BCI) for San Francisco, or other equivalent index if the ENR becomes no longer available.

** Reconciliation Provision: the Development Management Fee shall be reconciled and shall not exceed two percent (2%) of the audited final costs of Direct Costs and Offsite Costs for the relevant NCF Phase of County Buildings in accordance with Sections 8.04 and 8.07(D)(8)(d) of the Agreement.

TABLE 2: Construction Management Fee - for Initial and Subsequent NCF Phases***

<table>
<thead>
<tr>
<th>PROJECT</th>
<th>CMF ****</th>
</tr>
</thead>
<tbody>
<tr>
<td>5. Office Building Project, including associated TI’s FF&amp;E, on-site alterations, parking alterations, and off-</td>
<td>$2,900,000</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Option A</td>
<td></td>
</tr>
<tr>
<td>150,000 - 250,000 sf</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td><strong>Option B</strong></td>
<td><strong>300,000 to 400,000 sf</strong></td>
</tr>
<tr>
<td><strong>6. Alternate: Parking Structure</strong></td>
<td><strong>550,000 sf accommodating approximately 1,600 spaces</strong></td>
</tr>
<tr>
<td><strong>7. Alternate: Central Plant</strong></td>
<td><strong>1 Lump Sum</strong></td>
</tr>
<tr>
<td><strong>8. Alternate: Specialty Building Space</strong></td>
<td><strong>15,000 – 25,000 sf</strong></td>
</tr>
</tbody>
</table>

*** The Development Management Fee and Construction Management Fee shall be escalated annually on January 1st beginning with January 1, 2020 for any Subsequent NCF Predevelopment Phase C or D and for any Subsequent NCF Phase E the start for which would occur after that date. The method of adjustment shall be to use the annual rate of increase for the preceding twelve months as published in the Engineering News Record’s (ENR) Building Cost Index (BCI) for San Francisco, or other equivalent index if the ENR becomes no longer available.

****Reconciliation Provision: the Construction Management Fee shall be reconciled and shall not exceed three percent (3%) of the audited final Cost of Work, excluding the Development Management Fee, for the relevant NCF Phase of County Buildings in accordance with Sections 8.07(C) and 8.07(D)(8)(d) of the Agreement.