

SUS-FY18-002-00

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FISCAL YEAR 2018 CITY OF SAN DIEGO COMMUNITY DEVELOPMENT  
BLOCK GRANT PROGRAM SUBRECIPIENT AGREEMENT

**[COVER SHEET]**

Subrecipient Name: Ocean Discovery Institute

Term: This Agreement shall commence on 7/1/2017, (Effective Date), subject to approval by City Attorney in accordance with San Diego Charter Section 40, and shall continue until the earlier of [Term]: (a) completion of the Activity or (b) 6/30/2019

CFDA Number: CDBG -14.218

Activity Site/Location: 2211 Pacific Beach Drive,  
Suite A,  
San Diego  
California, 92109

Activity Title: Living Lab Solar Tree Project

Activity Category: Sustainability

CDBG Activity Budget: \$300,000.00

Leveraged Activity Budget: \$126,500.00

City Council Approval Date: April 27, 2017

Resolution Number: R-311071

IO Number: FK1000003-18

WBS Number:

IDIS Number: 7075

CDBG Grant Award Number: B-17-MC-06-0542

Consolidated Plan Goal: Invest in community services and non-profit facilities that maximize impact by providing new or increased access to programs that serve highly vulnerable populations such as youth, seniors, and food insecure households.

Consolidated Plan Strategy: Goal 2: Objective 2

HUD Matrix Code: 03E Neighborhood Facilities

CDBG Citation: 570.201(c)

National Objective: LMC

Project Outcome Measure: Suitable Living Environment  
Availability/Accessibility  
People

Annual Units: 10000

IN WITNESS WHEREOF, this Agreement is entered into by the City of San Diego, acting by and through its Mayor or designee, pursuant to City Council Resolution R-311071, effective April 27, 2017, authorizing entry into this Agreement, and by Subrecipient, by and through the signature of Subrecipient’s authorized representative(s), as follow:

Subrecipient Electronic Signature	8/14/2017 6:06 PM
Economic Development Department Electronic Signature	8/16/2017 1:20 PM
Office of the City Attorney Electronic Signature	9/20/2017 10:43 AM

This Agreement is comprised of the following documents:

1. General Terms and Conditions;
2. Exhibit A – Budget;
3. Exhibit B – Conflict of Interest and Procurement Policy for Non-Profit Corporations Contracting with the City of San Diego;
4. Exhibit C – Insurance Requirements;
5. Exhibit D – Scope of Work;
6. Exhibit E – Additional Provisions Applicable to Improvements; and
7. Exhibit F – Real Property Restriction Form

## **GENERAL TERMS AND CONDITIONS**

This Fiscal Year 2018 Community Development Block Grant Program Subrecipient Agreement [Agreement] is entered into by and between City and Subrecipient, as of the Effective Date. City and Subrecipient enter into this Agreement with reference to the following recited facts [Recitals]:

### **RECITALS**

WHEREAS, City has entered into or will enter into a grant agreement with the United States Department of Housing and Urban Development [HUD] to receive Fiscal Year 2018 Community Development Block Grant [CDBG] entitlement funds; and

WHEREAS, City requested proposals for funding of eligible activities through City's Fiscal Year 2018 CDBG program; and

WHEREAS, Subrecipient submitted a proposal to City that was selected for funding from City's Fiscal Year 2018 CDBG program through City's competitive proposal evaluation process; and

WHEREAS, Subrecipient's proposal was approved for funding from City's Fiscal Year 2018 CDBG program by City Council through its Resolution R-311071 effective April 27, 2017; and

WHEREAS, City desires to provide funding to Subrecipient through City's Fiscal Year 2018 CDBG Program for performance of the Activity (defined in Section 1);

NOW THEREFORE, in consideration of the above Recitals, the covenants, conditions and agreements set forth in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which is acknowledged, the Parties agree as follows:

**1. DEFINITIONS.** In addition to the terms defined on the cover page to this Agreement or in the Recitals to this Agreement, the following terms in this Section 1 are defined for use in this Agreement:

- 1.1. Activity.** Collectively, all actions to be performed by Subrecipient as described in the Scope of Work.
- 1.2. Budget.** The total amount of CDBG Funds available pursuant to this Agreement for reimbursement of Activity costs, as set forth in Exhibit A.
- 1.3. CDBG.** United States Department of Housing and Urban Development Community Development Block Grant program.
- 1.4. CDBG Funds.** Funds allocated to City by HUD for City's Fiscal Year 2018 CDBG program and disbursed by City to Subrecipient to reimburse certain Activity costs.
- 1.5. City.** The City of San Diego, a California municipal corporation.
- 1.6. Closeout Notice.** Defined in Section 10.

- 1.7. Effective Date.** Defined on the Cover Sheet to this Agreement.
- 1.8. Environmental Documents.** Any and all documents (if any) required to comply with the National Environmental Policy Act (42 U.S.C. sections 4321 - 4347) or the California Environmental Quality Act (Cal. Pub. Res. Code sections 21000 – 21178) for performance of the Activity.
- 1.9. Federal.** Relating or pursuant to the authority of the federal government of the United States of America.
- 1.10. Fiscal Year 2018.** City's fiscal year starting July 1, 2017, and ending June 30, 2018.
- 1.11. Grant Amount.** The total dollar amount of the Budget.
- 1.12. HUD.** U.S. Department of Housing and Urban Development.
- 1.13. Improvements.** Any and all alteration, demolition, repair, maintenance, construction, or improvement to real property that is part of the Activity.
- 1.14. Intellectual Property.** All materials and deliverables subject to copyright protection that arise, or are developed in performance of this Agreement, including editorial drafts, original copy, photographs, proofs, corrected proofs, camera-ready boards and similar editorial materials and all negatives, flats, engravings, Photostats, drawings, and other production materials, and for information technology [IT] procurements, executable code, source code, fixes patches, updates, upgrades, documentation embedded or otherwise, original copy, and other production materials.
- 1.15. Notice.** Any consent, demand, designation, election, notice or request relating to this Agreement. All Notices must be in writing, which includes Notice by e-mail.
- 1.16. Notify.** To give a Notice.
- 1.17. Operating Manual.** City's most current "Operating Manual" containing procedures for fiscal management and accountability for Activities receiving CDBG Funds.
- 1.18. Parties.** Collectively, City and Subrecipient.
- 1.19. Party.** Individually, either City or Subrecipient, as applicable.
- 1.20. Playing by the Rules Handbook.** A HUD published handbook, dated March 2005, setting forth administrative recommendations applicable to entities receiving and using CDBG Funds.
- 1.21. Program Income.** Any income that accrues to Subrecipient as a result of its receipt or use of CDBG Funds under this Agreement, as further described in 24 C.F.R. section 570.500(a).
- 1.22. Records.** All administrative or financial records relating to the Activity prepared or gathered by Subrecipient, including all books, papers, invoices, receipts, accounting

records in accordance with Generally Accepted Accounting Principles [GAAP] and 2 C.F.R. section 200, payroll records, personnel records, designs, plans, reports, financial disclosures, audits, other disclosures, certifications, investigative videos, work product, and any other documents, data or records pertaining to any or all matters covered by this Agreement, or required by applicable provisions of 24 C.F.R. section 570.506 or the Operating Manual.

**1.23. Reporting Period.** Each calendar month during which any Work is performed.

**1.24. Scope of Work.** Exhibit D.

**1.25. SDMC.** San Diego Municipal Code.

**1.26. Site.** The physical location where the Activity will take place.

**1.27. State.** The State of California.

**1.28. Subcontractor.** Any entity, other than City, furnishing material, labor or services to Subrecipient in connection with the Activity, pursuant to a contract with Subrecipient.

**1.29. Term.** Defined in the Cover Page to this Agreement.

**1.30. Work.** Any performance described in the Scope of Work.

**2. NATIONAL OBJECTIVES CERTIFICATIONS.** Subrecipient certifies that the Activity meets one of the national objectives for use of CDBG Funds pursuant to 24 C.F.R. section 570.208.

**3. BUDGET.** The total of all payments to be reimbursed to or on behalf of Subrecipient under this Agreement shall not, under any circumstances, exceed the Grant Amount. Subrecipient acknowledges and agrees that any expenditures by Subrecipient that are not within the prescribed limitations of the Budget or the Grant Amount, the Operating Manual, or applicable laws, rules, or regulations governing this Agreement, are not chargeable to the Activity under the Budget and shall be borne solely by Subrecipient.

#### **4. REIMBURSEMENT OF EXPENDITURES.**

**4.1. Reimbursement Requests.** Subrecipient shall make timely, complete requests for reimbursement in accordance with this Agreement, using forms and instructions provided by City. City will reimburse Subrecipient on a Reporting Period basis for eligible expenditures, provided that all reports from Subrecipient required under this Agreement (including those required by the Operating Manual) are received by City (on such forms as City may require) within fifteen (15) calendar days after the last day of the immediately preceding Reporting Period. The final payment to Subrecipient shall be withheld by City until all Reporting Period reports required from Sub Recipient under this Agreement have been received by City. City additionally reserves the right to withhold ten percent (10%) of the total Budget, until Subrecipient has submitted all Activity closeout documentation to City. Subrecipient shall not be reimbursed for any expenditure without sufficient documentation that the expenditure is eligible for reimbursement and that such eligible expenditure has been paid in full by Subrecipient.

**4.2. Ineligible Expenditures.** Subrecipient shall not be reimbursed for travel, meals,

lodging, entertainment expenses, or alcoholic beverages, under any circumstances. Subrecipient shall not be reimbursed for any expenditures, directly or indirectly, during any period of Federal, State, City or other debarment, suspension, or ineligibility of Subrecipient from participation in the CDBG program, when Subrecipient has notice (actual, constructive, or implied) of such debarment, suspension, or ineligibility.

**4.3. Supporting Information.** Subrecipient shall provide to City authentic, accurate, and legible written documentation for all expenditures relating to the Activity and for which Subrecipient requests reimbursement under this Agreement on a Reporting Period basis. Written invoices from Subrecipient's Subcontractors shall be provided to City in the form originally provided to Subrecipient, with no alterations or other markings on such invoices. Subrecipient shall make original invoices immediately available to City upon request. The documentation provided by Subrecipient to City shall include an itemized description of the completed work, the date such work was done, and all supporting invoices and documentation sufficient for City to adequately determine eligibility for reimbursement of each and every expenditure and that such expenditure has been paid in full by Subrecipient. Partial reimbursement may be made for reimbursement requests that receive only partial approval. Subrecipient's Chief Executive Officer or Chief Financial Officer shall sign each and every request for reimbursement, attesting to its truthfulness and accuracy under penalty of perjury. Subrecipient acknowledges and agrees that City reserves the right to deny reimbursement for any request that is not properly submitted.

**4.4. Time for Submittal.** Subrecipient shall timely and properly submit a minimum of one request for reimbursement for each Reporting Period, even if Subrecipient did not make any expenditures in performance of the Activity that are reimbursable under this Agreement during the Reporting Period and the reimbursement request is for zero dollars (\$0). **Within forty-five (45) calendar days after the date of performance of any labor or services as part of the Activity or within forty-five (45) calendar days after receipt of an invoice for any expenditures incurred by Subrecipient relating to the Activity that are reimbursable under this Agreement, Subrecipient shall submit a request for reimbursement for such expenditure(s) to City.** Any failure to so submit a reimbursement request may be deemed a waiver of Subrecipient's right to reimbursement for such expenditure(s). Subrecipient shall submit to City any and all final requests for reimbursement, including any documentation substantiating the requests, within thirty (30) calendar days after the earlier of: (a) completion of the Activity; (b) expiration of the Term; or (c) termination of this Agreement. Subrecipient waives any and all right to submit any documentation of Activity expenditures or to receive reimbursement for any Activity expenditures submitted after such thirty (30) calendar day time period. Furthermore, any remaining CDBG Funds balance in the Budget for which a request for reimbursement has not been properly and timely submitted to City before the expiration of such thirty (30) calendar day time period shall be subject to reprogramming by City, without Notice to Subrecipient.

**4.5. Other Funding Sources.** If Subrecipient receives (or has received) additional funding for the Activity from a source or sources other than City, then Subrecipient shall charge Activity expenditures to the appropriate funding source at the time incurred. Any expenditure incurred in connection with the Activity that is properly chargeable to a funding source other than CDBG Funds allocated to the Activity under this Agreement shall not be allowed as a reimbursable Activity cost under this Agreement.

**4.6. Timely Expenditure.** Subrecipient acknowledges and understands that City must

comply with HUD's requirement that CDBG Funds allocated for the Activity be expended in a timely manner and that City must monitor and administer all contracts involving City CDBG Funds. Subrecipient further acknowledges and agrees to expend all CDBG Funds allocated to the Budget and complete the Activity before expiration of the Term. Any CDBG Funds not expended by Subrecipient before expiration of the Term are subject to reprogramming by City Council without Notice to Subrecipient and will not be available to reimburse Subrecipient for any Activity costs incurred, after expiration of the Term.

**4.7. Return of Improper Reimbursement.** Upon the determination of City or HUD that any reimbursement provided to Subrecipient under this Agreement was for an ineligible expenditure or based on a fraudulent or other illegal submittal of a request for reimbursement by Subrecipient, Subrecipient shall return such funds to City within fourteen (14) calendar days after Notice to Subrecipient. Upon the determination of City or HUD that any reimbursement provided to Subrecipient was based on an inadequate or improper submittal of a request for reimbursement by Subrecipient, Subrecipient shall provide any and all documentation required by City or HUD to fully remedy such concern(s), within fourteen (14) calendar days after Notice to Subrecipient. If Subrecipient is unable or unwilling to provide documentation to fully remedy such concern(s), Subrecipient shall return the reimbursed funds to City within such fourteen (14) calendar day time period. In addition to the remedies set forth in Section 17, if Subrecipient fails to timely return any funds to City in accordance with this Section 4.7, City reserves the right to deduct such amounts from any future reimbursement becoming due to Subrecipient under this Agreement.

**5. PROGRAM INCOME.** Subrecipient may use Program Income for performance of the Activity, provided that Subrecipient submits to City a written budget detailing Subrecipient's proposed use of Program Income and obtains prior written approval from City of such written budget, in City's sole and absolute discretion. Subrecipient shall separately account for any and all Program Income accrued or used by Subrecipient in its Reporting Period reports under Section 7 and in its annual audits or financial reports or statements submitted to City under Section 8. If City approves Subrecipient's written budget for use of Program Income, all provisions of this Agreement shall apply to the use of such Program Income. Subrecipient agrees that substantially all Program Income approved by City for use by Subrecipient shall be used by Subrecipient for eligible activities before Subrecipient requests disbursement of additional CDBG Funds from City. If City does not approve Subrecipient's written budget for use of Program Income, Subrecipient shall return to City any and all Program Income balances (including investments thereof) held by Subrecipient within thirty (30) calendar days after the later of: (a) City's Notice of disapproval of Subrecipient's proposed budget; (b) expiration of the Term; (c) termination of this Agreement; or (d) Subrecipient's receipt of the Program Income.

**6. INSURANCE.** Prior to the Effective Date and prior to Subrecipient's performance of any Work, Subrecipient shall obtain all insurance coverage required in Exhibit C attached to this Agreement and deliver written certificates or policies of insurance evidencing all required insurance coverage to City. Subrecipient shall require and ensure that any and all Subcontractors obtain and maintain all of the insurance coverage required in Exhibit C. Neither Subrecipient nor any Subcontractor shall commence any Work, unless and until written evidence of all insurance required to be carried by Subrecipient and such Subcontractor under this Section 6 has been submitted to and approved by City.

## **7. SUBRECIPIENT REPORTS.**



**7.1. Periodic Reports.** Subrecipient shall submit to City a fiscal and programmatic report on a Reporting Period basis that summarizes Subrecipient's expenditures in pursuing the Activity and progress on the Activity accomplished during the applicable Reporting Period, along with any and all invoices and other documentation required by City. Such a report shall be submitted within fifteen (15) calendar days after the end of each Reporting Period. Subrecipient shall participate in any annual reporting workshop regarding use of CDBG Funds, as requested by City.

**7.2. End of Agreement Report.** Subrecipient shall submit to City a report containing a narrative summary of the Activity progress as of the date of the report, a financial summary of Activity expenditures claimed to and reimbursed by City under this Agreement, and a list of any real property acquired or improved, in whole or in part, with CDBG Funds provided under this Agreement exceeding \$25,000, all within thirty (30) calendar days after the earlier of: (a) completion of the Activity; (b) expiration of the Term; or (c) termination of this Agreement.

## **8. SUBRECIPIENT AUDITS.**

**8.1. Subrecipient Financial Statements.** For each fiscal year that Subrecipient receives CDBG Funds, Subrecipient shall have audited financial statements prepared by an independent certified public accountant, in accordance with GAAP and Generally Accepted Government Audit Standards [GAGAS]. Subrecipient shall provide City a copy of Subrecipient's audited financial statements within nine (9) months after the end of Subrecipient's fiscal year. Extensions of up to thirty (30) calendar days may be granted by City, in City's sole and absolute discretion, upon written request by Subrecipient. Audited financial statements shall include all of the following: (a) a balance sheet, income statement, and cash flow statement showing use of revenues and expenditures for all funds received by Subrecipient; (b) a statement certifying compliance with all terms and conditions of this Agreement, and that all reports and disclosures required from Subrecipient under this Agreement have been completed, signed, and submitted by an authorized and approved officer of Subrecipient.

**8.2. Subrecipient Audit.** If Subrecipient is expending \$750,000 or more (or the current Federal threshold) in total Federal funding from all sources in a year, Subrecipient shall have an audit conducted in accordance with 2 C.F.R. Subpart F (sections 200.500 – 200.520) within nine (9) months after the end of Subrecipient's fiscal year. Subrecipient shall electronically submit a copy of the audit to the Federal Audit Clearinghouse, including the required data collection and reporting package described in 2 C.F.R. section 200.512, within the earlier of thirty (30) calendar days after Subrecipient's receipt of the audit or nine (9) months after the end of Subrecipient's fiscal year. Subrecipient must submit a copy of any management letters issued by the auditor for the audit to City within nine (9) months after the end of Subrecipient's fiscal year.

**8.3. City and Federal Government Access to Audit Information.** Subrecipient shall provide in any agreement Subrecipient enters into with an audit firm that the audit firm shall provide access for City or the Federal government to the working papers of the auditor(s) who prepare(s) the audit(s) for Subrecipient, that Subrecipient waives any claim of privilege or confidentiality regarding, and consents to and authorizes the audit firm to release to City or the Federal government, any and all information obtained and utilized by such audit firm as the basis of any audit report issued by the audit firm and relating to

Subrecipient.

**8.4. Other Audits.** If Subrecipient is subject to an audit from a source other than City, Subrecipient shall provide a copy of the audit to City within thirty (30) calendar days after Subrecipient's receipt of the audit. City, in its sole and absolute discretion, may conduct a review of any such third party audit(s). Subrecipient shall fully cooperate with any such review by City, including providing any and all documentation associated with any such third party audit(s) within fourteen (14) calendar days after Notice from City.

**8.5. Adverse Audit Findings.** If any type of audit or monitoring review reveals any pattern of suspicious or questionable requests for reimbursement by Subrecipient under this Agreement, City shall have the right, in its sole and absolute discretion, to take remedial action under Section 17. If an independent audit identifies any concerns about Subrecipient's accounting practices or internal controls that results in an independent auditor's opinion other than an unqualified opinion, City shall have the right to suspend or terminate this Agreement, effective immediately upon Notice to Subrecipient. On any such termination, City shall have the right to reprogram any and all unexpended CDBG Funds allocated to the Budget under this Agreement.

**8.6. Subrecipient Cooperation.** Subrecipient shall fully cooperate with City and any other auditors in any review or investigation of Subrecipient's conduct or action(s) relating to this Agreement. Failure by Subrecipient to so cooperate shall be a material breach of this Agreement.

## **9. RECORDS.**

**9.1. Maintenance, Inspection and Photocopying.** Subrecipient and its Subcontractors shall maintain all Records during the Term and the Retention Period (defined in Section 9.3). At any time during normal business hours and as often as requested, Subrecipient and its Subcontractors shall permit City, HUD, the Comptroller General of the United States [Comptroller General], or any of their duly authorized representatives, to inspect and photocopy, at a reasonable location within the County of San Diego (e.g., the offices of Subrecipient), all Records for the purposes of making audits, examinations, excerpts, or transcriptions, or monitoring and evaluating Subrecipient's performance of its obligations under this Agreement. Upon any request by City, HUD, Comptroller General, or any of their duly authorized representatives, for any Records, Subrecipient and its Subcontractors shall submit exact duplicates of the originals of the requested Records to the requesting party for the purposes described in this Section 9.1. City, HUD, and Comptroller General may retain copies of the Records, if such retention is deemed necessary by City, HUD, or Comptroller General, in their respective sole and absolute discretion. If Subrecipient or a Subcontractor is unable to make any Records available for inspection within the County of San Diego, then Subrecipient shall pay all of City's travel-related costs to inspect and photocopy the Records at the location where the Records are maintained. Any refusal by Subrecipient or a Subcontractor to fully comply with the provisions of this Section 9.1 shall be a material breach of this Agreement.

**9.2. Ownership of Original Records.** Once Subrecipient has received any reimbursement from City under this Agreement, all Records shall be the property of City. City's ownership of the Records includes the use, reproduction, or reuse of the Records, and all incidental rights, whether or not the work for which the Records were prepared has been performed. No Records shall be shown to any other public or private person or entity, except as

authorized by City in writing, or where such Records are subject disclosure pursuant to the California Public Records Act, as determined by the City Attorney. Subrecipient shall retain originals of all Records for the Retention Period specified in Section 9.3.

**9.3. Records Retention Period.** Subrecipient and its Subcontractors shall retain all Records for at least three (3) years after the later of [Retention Period]: (a) Subrecipient's submission of all required reports under this Agreement; or (b) City and Subrecipient make all final payments and resolve all pending matters (including audit findings) under this Agreement. All Records shall be kept at Subrecipient's (or relevant Subcontractor's) regular place of business. At any time during the Retention Period, Subrecipient and its Subcontractors shall permit City, HUD, Comptroller General, or any of their duly authorized representatives, to inspect and photocopy any and all Records for the purposes described in Section 9.1. After expiration of the Retention Period, Subrecipient and its Subcontractors, shall provide City with thirty (30) calendar days' advance Notice of their respective intent to dispose of any Records. During this thirty (30) calendar day time period, Subrecipient and its Subcontractors shall provide any and all Records to City upon Notice from City.

**10. GRANT CLOSEOUT.** City will close out the grant provided under this Agreement to Subrecipient for the Activity when: (1) all Activity or other costs to be paid with CDBG Funds pursuant to the terms of this Agreement have been expended and drawn down by the Subrecipient, with the exception of closeout costs (e.g., audit costs); (2) the Activity for which CDBG Funds were expended is physically completed, eligible for use of CDBG Funds, has met a national objective under Title 24 C.F.R. section 570.208, and Subrecipient has reported on all accomplishments resulting from the Activity; (3) all audits and reports to be provided by Subrecipient under this Agreement have been properly completed and delivered to City; and (4) all other responsibilities of Subrecipient under this Agreement and applicable laws and regulations have been satisfactorily performed or there is no further City interest in keeping this Agreement open for the purpose of securing such performance. When all of the conditions to grant close out set forth in the immediately preceding sentence are satisfied, City will Notify Subrecipient that the grant has been closed out [Closeout Notice].

**11. COMPLIANCE WITH LAWS AND POLICIES.** Subrecipient and its Subcontractors shall comply with all applicable laws, statutes, rules, regulations, orders, ordinances, resolutions, permits, requirements, and policies of the Federal, State, City and other government, as they pertain to this Agreement or the Activity. In addition, Subrecipient and its Subcontractors shall immediately comply with all directives issued by City, or its duly authorized representatives, under authority of any law, statute, rule, regulation, order, ordinance, resolution, permit, requirement, or policy of Federal, State, City or other government. Failure by Subrecipient or any Subcontractor to accept or comply with the provisions of this Section 11 shall be a material breach of this Agreement.

**12. CONFLICT OF INTEREST.** Subrecipient and its Subcontractors shall comply with all Federal, State, and City conflict of interest laws, regulations, and policies applicable to this Agreement, including the applicable provisions of each of the following: (a) the conflict of interest provisions in 24 C.F.R. section 570.611 and 2 C.F.R. section 200.318; (b) California Government Code sections 1090 - 1099 and sections 81000 - 91014; (c) California Corporations Code sections 7230 – 7238 (applicable to nonprofit mutual benefit corporations) and sections 5230 – 5240 (applicable to nonprofit public benefit corporations); and (d) the "Conflict of Interest and Procurement Policy for Non-profit Corporations Contracting with City of San Diego" attached to this Agreement as Exhibit B.

**12.1. Public Officer or Employee Economic Interests.** The Parties are unaware of any financial or economic interest of any public officer or employee of City relating to this Agreement. If Subrecipient becomes aware during the Term of any financial or economic interest of any public officer or employee of City relating to this Agreement, Subrecipient shall immediately Notify City. If such a financial or economic interest is determined by City to exist, City shall have the right to immediately terminate this Agreement by giving Notice of termination to Subrecipient.

**12.2. Statements of Economic Interests.** The Parties are unaware of any financial or economic interest of any public officer or employee of City relating to this Agreement. If Subrecipient becomes aware during the Term of any financial or economic interest of any public officer or employee of City relating to this Agreement, Subrecipient shall immediately Notify City. If such a financial or economic interest is determined by City to exist, City shall have the right to immediately terminate this Agreement by giving Notice of termination to Subrecipient. City may take any other action for a breach or default under this Agreement, including remedies set forth in Section 17.

**12.3. City Conflict of Interest Code Restrictions.** If City requires any employee or representative of Subrecipient to file a Form 700, that person shall be considered a “City Official,” subject to the provisions of City’s Ethics Ordinance (SDMC sections 27.3501-27.3595), including the prohibition against lobbying City for one (1) year following the expiration or termination of this Agreement. Subrecipient shall establish, and make known to its employees and representatives, appropriate safeguards to prohibit them from using their positions for a purpose that is, or that gives the appearance of being, motivated by the desire for private gain for themselves or others, particularly those with whom they have family, business, or other relationships. Subrecipient's personnel employed in performing Subrecipient's obligations under this Agreement, shall not accept gratuities, or any other favors, from any Subcontractor or potential Subcontractor. Subrecipient shall not recommend or specify any product, supplier, or contractor with whom Subrecipient or any of its employees or representatives has a direct or indirect financial or organizational interest or relationship that would violate conflict of interest laws, regulations, or policies. If Subrecipient or any of its employees or representatives violates any conflict of interest law, or any of the provisions of this Section 12, the violation shall be a material breach of this Agreement. Further, any such violation shall subject Subrecipient to liability to City for attorney’s fees and all damages sustained as a result of the violation.

**13. EMPLOYMENT OF CITY STAFF.** Pursuant to City Council Policy 300-11, if Subrecipient employs an individual, who, within twelve (12) months immediately preceding such employment, did, in the individual’s capacity as a City officer or employee, participate in, negotiate with, or otherwise have an influence on the recommendation made to City Council in connection with the selection of Subrecipient for the award of CDBG Funds, City, at its sole discretion, shall have the right to unilaterally and immediately terminate this Agreement by Notice to Subrecipient.

#### **14. CITY MUNICIPAL CODE AND POLICY COMPLIANCE.**

**14.1. Non-Discrimination in Contracting.** Subrecipient and each Subcontractor shall comply with City’s Nondiscrimination in Contracting Ordinance, codified in SDMC sections 22.3501 – 22.3517. Subrecipient shall not discriminate, and shall require its

Subcontractors not to discriminate, on the basis of race, color, gender, religion, national origin, ethnicity, sexual orientation, age, familial status, or disability, in the solicitation, selection, hiring, or treatment of its employees, any applicants for employment, or any subcontractors, vendors, or suppliers. Within sixty (60) calendar days after a request by City, Subrecipient shall provide City a truthful and complete list of the names of all subcontractors, vendors, and suppliers that Subrecipient has used in the past five years on any of its contracts that were undertaken within the County of San Diego, including the total dollar amount paid by Subrecipient for each subcontract or supply contract. Subrecipient shall fully cooperate in any investigation conducted by City pursuant to City's Nondiscrimination in Contracting Ordinance. Subrecipient's violation of any provision of this Section 14.1 shall be a material breach of this Agreement.

**14.2. Local Business and Employment.** Subrecipient acknowledges that City seeks to promote employment and business opportunities for local residents and firms on all City contracts. Subrecipient shall, to the extent reasonably possible and allowed by law, solicit applications for employment and bids and proposals for subcontracts for work associated with the Activity, from local residents and firms, as opportunities occur. Subrecipient shall hire qualified local residents and firms, whenever feasible and allowed by law.

**14.3. Living Wage Ordinance.** As applicable, Subrecipient shall comply with the City's Living Wage Ordinance, codified in SDMC sections 22.4201-22.4245, in performing any Work under this Agreement.

**14.4. Americans with Disabilities Act.** Subrecipient and each Subcontractor shall comply with City Council Policy 100-04, relating to the Federally mandated Americans with Disabilities Act [ADA], and incorporated into this Agreement by this reference. Subrecipient and each Subcontractor shall be individually responsible for their own ADA compliance program.

**14.5. Drug-Free Workplace.** Subrecipient and each Subcontractor shall comply with City's Drug-Free Workplace requirements set forth in City Council Policy 100-17. Subrecipient and each Subcontractor shall certify that each of them will provide a drug-free workplace. Such certification shall be in electronic form reasonably required by City and signed by an authorized representative of Subrecipient or the applicable Subcontractor, respectively. Delivery of this certification by Subrecipient shall be a condition precedent to this Agreement. Subrecipient and each Subcontractor shall post in a prominent place at the Site a statement setting forth its drug-free workplace policy, notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the workplace, and specifying the actions that shall be taken against employees for violating the policy. Subrecipient and each Subcontractor shall establish a drug-free awareness program to inform employees about each of the following: (a) the dangers of drug abuse in the workplace; (b) the policy of maintaining a drug-free workplace; (c) the availability of drug counseling, rehabilitation, and employee assistance programs; and (d) the penalties that may be imposed upon employees for drug abuse violations. Subrecipient shall ensure that all subcontracts in connection with this Agreement contain language requiring the Subcontractor to comply with the provisions of this Section 14.5, as required by City Council Policy 100-17. Subrecipient shall not allow any Subcontractor to perform any labor or services regarding the Activity, unless and until such Subcontractor delivers the certification required by this Section 14.5 to City. Subrecipient and its Subcontractors shall be individually responsible for their own drug-free workplace program.

**14.6. Storm Water Pollution Prevention.** As applicable, Subrecipient and each Subcontractor shall comply with City's Storm Water Management and Discharge Control Ordinance, codified in SDMC sections 43.0301-430312, in performance of this Agreement.

**14.7. Product Endorsement.** Subrecipient shall comply with the provisions of City Administrative Regulation 95.65 regarding product endorsements or creating any advertisement or writing that identifies or refers to City as the user of a product or service, without obtaining the prior written approval of City, in City's sole and absolute discretion.

**14.8. Equal Benefits Ordinance.** In accordance with City's Equal Benefits Ordinance, codified in SDMC sections 22.4301-22.4308 [EBO], Subrecipient and each Subcontractor shall provide and maintain equal benefits, as defined in SDMC section 22.4302, throughout the Term. Subrecipient's or any Subcontractor's failure to maintain equal benefits consistent with the EBO is a material breach of this Agreement (SDMC section 22.4304(e)). Subrecipient and each Subcontractor shall notify their respective employees of the equal benefits policy at the time of hire and during open enrollment periods and must post a copy of the following statement in an area frequented by their respective employees:

"During the performance of a contract with City of San Diego, this employer will provide equal benefits to its employees with spouses and its employees with domestic partners."

**14.8.1.** Subrecipient and each Subcontractor shall immediately give City access to documents and records sufficient for City to verify that Subrecipient and each Subcontractor are providing equal benefits and otherwise complying with the EBO requirements. The full text of the EBO and the "Rules Implementing the Equal Benefits Ordinance" are posted on City's website at [www.sandiego.gov/purchasing/](http://www.sandiego.gov/purchasing/) or can be requested from City's Equal Benefits Program Office at (619) 533-3948.

**14.9. Business Tax Certificate.** In accordance with SDMC section 31.0301, Subrecipient shall obtain a Business Tax Certificate from City or submit an IRS letter of non-profit status to City before the Effective Date. Subrecipient shall also submit its Taxpayer Identification number (form W-9) to City prior to entering into this Agreement.

**14.10. Operating Manual.** Subrecipient acknowledges receipt of and Subrecipient and each Subcontractor shall comply with the Operating Manual. Any desired changes to the procedures set forth in the Operating Manual must be requested by Subrecipient in writing and approved by City in writing, in City's sole and absolute discretion, before such changes may be implemented.

**15. IMPROVEMENTS.** If the Activity includes any Improvements all of the provisions of Exhibit E to this Agreement apply to this Agreement and the Activity.

## **16. COMPLIANCE WITH FEDERAL LAWS, REGULATIONS, AND REQUIREMENTS.**

**16.1. Uniform Administrative Requirements.** Subrecipient and each Subcontractor shall comply with 2 C.F.R. Part 200, "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards," as modified by 24 C.F.R. section 570.502.

**16.2. General Federal CDBG Program Requirements.** Subrecipient and each Subcontractor shall comply with all Federal laws and regulations described in 24 C.F.R. section 570, including subpart K (sections 570.600-570.614), except that: (a) Subrecipient does not assume City's environmental responsibilities described at 24 C.F.R. section 570.604; and (b) Subrecipient does not assume City's responsibility for initiating the review process under the provisions of 24 C.F.R. Part 52.

**16.3. Lobbying and Political Activities.** Subrecipient and each Subcontractor shall not use any of the CDBG Funds received pursuant to this Agreement to pay any person for influencing or attempting to influence any decision or election by any electorate, legislative body, government agency, grantee, bureau, board, commission, district, or any other instrument of Federal, State, City or other government. The phrase "influencing or attempting to influence" means making, with the intent to influence, any communication to, or appearance before, a board, body, officer, or employee of a governmental entity, as well as any communication made to any electorate, regarding any ballot measure or candidate election. Subrecipient and each Subcontractor shall comply with 31 USC section 1352 and 24 C.F.R. Part 87. Subrecipient shall electronically complete, sign, and submit to City the certification set forth in 24 C.F.R. Part 87, Appendix A, prior to entering into this Agreement and as a condition precedent to this Agreement. Subrecipient shall also require this same certification to be included in all subcontracts, sub-grants, and cooperative agreements relating to the Activity. Additionally, Subrecipient shall disclose to City any funds from any other source paid by Subrecipient (or its principals or agents) to any person or entity, within the last year, for influencing or attempting to influence decisions of the Federal government, by electronically completing, signing, and submitting to City, Standard Form LLL, "Disclosure of Lobbying Activities," found at 24 C.F.R. Part 87, Appendix B. Subrecipient understands that the duty to disclose lobbying activities is a continuing requirement and Subrecipient agrees to make such disclosures at the end of each calendar quarter during the Term in which any activity requiring disclosure occurs or more often, if required by applicable law.

**16.4. Recognition of Funding Source.** Subrecipient and each Subcontractor shall recognize the role of City's CDBG Funds in financing the Activity under this Agreement. All activities performed, facilities and items utilized, and publications prepared, in connection with this Agreement or the Activity shall be prominently labeled to reference the use of City CDBG Funds from HUD as a funding source, as follows: "This Activity is funded in whole or in part with Community Development Block Grant Program funds provided by the U.S. Department of Housing and Urban Development to the City of San Diego."

**16.5. Playing by the Rules Handbook.** Subrecipient and each Subcontractor shall certify that each has received, read, and understood the contents of the Playing by the Rules Handbook and shall fully comply with all of the administrative recommendations set forth in such handbook.

**16.6. No Discrimination.** Subrecipient and each Subcontractor shall comply with Title VI of the Civil Rights Act of 1964 and the implementing regulations in 24 C.F.R. Part 1, Executive Order 11063, as amended by Executive Order 12259, and the implementing regulations in 24 C.F.R. Part 107, the California Fair Employment Practices Act, and any other applicable Federal or State laws or regulations prohibiting discrimination on any basis, enacted before or after the Effective Date. Subrecipient and each Subcontractor shall not discriminate on the basis of race, color, gender, religion, national origin, sexual orientation, age, familial status, or disability, in performing this Agreement, including in

employment opportunities, the provision of labor, services, privileges, facilities, advantages, or accommodations. Subrecipient's or any Subcontractor's failure to comply with the requirements of this Section 16.6 shall be a material breach of this Agreement and, in addition to all other rights or remedies of City regarding such breach, City shall have the right to: (a) withhold reimbursement payments under this Agreement until Subrecipient or the applicable Subcontractor complies with the requirements of this Section 16.6; (b) terminate this Agreement; (c) debar Subrecipient or the applicable Subcontractor; or (d) impose other sanctions on Subrecipient or the applicable Subcontractor, including suspension from participating in future City contracts (as a grantee, Subrecipient, or subcontractor). Failure to satisfy sanctions imposed by City pursuant to this Section 16.6 shall prohibit Subrecipient or the applicable Subcontractor from participating in future City contracts, until all sanctions have been satisfied. Nothing in this Section 16.6 shall be interpreted to hold Subrecipient liable for any discriminatory practice of its Subcontractors.

**16.7. Contract Work Hours and Safety Standards Act.** Subrecipient and each Subcontractor shall comply with 40 USC sections 3702 and 3704 of the Contract Work Hours and Safety Standards Act, as supplemented by the Department of Labor regulations at 29 C.F.R. Part 5.

**16.8. Copeland "Anti-Kickback" Act.** Subrecipient and each Subcontractor shall comply with the Copeland "Anti-Kickback" Act (18 USC section 874), as supplemented by the Department of Labor regulations at 29 C.F.R. part 3.

**16.9. Energy Policy and Conservation Act.** Subrecipient and each Subcontractor shall comply with the mandatory standards and policies relating to energy efficiency contained in the State's energy conservation plan issued in compliance with the Energy Policy and Conservation Act (P.L. 94-163, 89 Stat. 871).

**16.10. Clean Air Act and Federal Water Pollution Control Act.** Subrecipient and each Subcontractor shall comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 USC sections 7401-7671q) and the Federal Water Pollution Control Act, as amended (33 USC sections 1251-1387), for contracts in excess of \$150,000.

**16.11. Religious Activities.** Subrecipient and each Subcontractor shall comply with all applicable HUD requirements governing the use of CDBG Funds by religious organizations, including 24 C.F.R. section 570.200(j), referring to 24 C.F.R. section 5.109, and Executive Order 11245, as amended by Executive Order 13279.

**16.12. Section 3 Clause.** If applicable under 24 C.F.R. section 135.3, then pursuant to 24 C.F.R. section 135.38, Subrecipient (and, if indicated below, City) shall comply with the following "Section 3 Clause":

A. The work to be performed under this Agreement is subject to the requirements of Section 3 of the Housing and Urban Development Act of 1968, as amended, 12 USC section 1701u [Section 3]. The purpose of Section 3 is to ensure that employment and other economic opportunities generated by HUD assistance or HUD-assisted activities covered by Section 3, shall, to the greatest extent feasible, be directed to low- and very low-income persons, particularly persons who are recipients of HUD assistance for housing.



B. The Parties to this Agreement agree to comply with HUD's regulations in 24 C.F.R. Part 135, which implement Section 3. As evidenced by their execution of this Agreement, the Parties to this Agreement certify that they are under no contractual or other impediment that would prevent them from complying with the part 135 regulations.

C. Subrecipient agrees to send to each labor organization or representative of workers with which Subrecipient has a collective bargaining agreement or other understanding, if any, a notice advising the labor organization or workers' representative of Subrecipient's commitments under this Section 3 Clause, and will post copies of the notice in conspicuous places at the work site where both employees and applicants for training and employment positions can see the notice. The notice shall describe the Section 3 preference, shall set forth minimum number and job titles subject to hire, availability of apprenticeship and training positions, the qualifications for each, the name and location of the person(s) taking applications for each of the positions and the anticipated date the work shall begin.

D. Subrecipient agrees to include this Section 3 clause in every subcontract subject to compliance with the regulations in 24 C.F.R. Part 135, and agrees to take appropriate action, as provided in an applicable provision of the subcontract or in this Section 3 clause, upon a finding that the subcontractor is in violation of the regulations in 24 C.F.R. Part 135. Subrecipient will not subcontract with any subcontractor where Subrecipient has notice or knowledge that the subcontractor has been found in violation of the regulations in 24 C.F.R. Part 135.

E. Subrecipient will certify that any vacant employment positions, including training positions, that are filled (1) after Subrecipient is selected, but before this Agreement is executed, and (2) with persons other than those to whom the regulations of 24 C.F.R. Part 135 require employment opportunities to be directed, were not filled to circumvent Subrecipient's obligations under 24 C.F.R. Part 135.

F. Noncompliance with HUD's regulations in 24 C.F.R. Part 135 may result in sanctions, termination of this Agreement for default, and debarment or suspension from future HUD assisted agreements.

G. With respect to work performed in connection with Section 3 covered Indian housing assistance, Section 7(b) of the Indian Self-Determination and Education Assistance Act [25 USC section 450e] also applies to the work to be performed under this Agreement. Section 7(b) requires that to the greatest extent feasible (i) preference and opportunities for training and employment shall be given to Indians, and (ii) preference in the award of contracts and subcontracts shall be given to Indian organizations and Indian-owned Economic Enterprises. Parties to this agreement that are subject to the provisions of Section 3 and Section 7(b) agree to comply with Section 3 to the maximum extent feasible, but not in derogation of compliance with Section 7(b).

**16.12.1.** Subrecipient shall document its good faith efforts to comply with the terms and conditions of the above Section 3 Clause and furnish such documentation to City, upon request.

**16.13. Reversion of Assets.** Upon the expiration or termination of this Agreement, Subrecipient and each Subcontractor shall transfer to City any CDBG Funds or Program Income held by Subrecipient or such Subcontractor, respectively, and assign to City any accounts receivable attributable to the use of CDBG Funds or Program Income by Subrecipient or such Subcontractor, respectively. Subrecipient shall comply with the requirements of 24 C.F.R. section 570.503(b)(7) regarding the use or disposition of any real property acquired or improved with CDBG Funds in excess of \$25,000. In addition to any other remedies available to City under this Agreement or otherwise, if Subrecipient does not use the real property to meet one of the national objectives in 24 C.F.R. section 570.208 for at least five (5) years after the date of the Closeout Notice, Subrecipient shall pay City an amount equal to the current market value of the property, less any portion of the value attributable to expenditures of funds other than CDBG Funds or Program Income for the acquisition of, or improvement to, the property, which payment shall be Program Income to City.

**16.14. Fair Housing Act.** As applicable, Subrecipient and each Subcontractor shall comply with Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), as amended, which prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions, based on race, color, national origin, religion, sex, familial status (including children under the age of 18 living with parents or legal custodians, pregnant women, and people securing custody of children under the age of 18), age or disability. Subrecipient shall post in a prominent place at the Site the Equal Housing Opportunity Logo provided by City, which may be obtained through the City's Economic Development Department. Subrecipient shall also post in a prominent place at the Site any other Fair Housing materials provided by City during the Term. Subrecipient shall attend the City's annual mandatory fair housing workshop for CDBG Subrecipients.

**16.15. Section 504.** Subrecipient and each Subcontractor shall comply with any and all Federal regulations issued pursuant to Section 504 of the Rehabilitation Act of 1973, prohibiting discrimination against persons with disabilities in any Federally assisted program. City shall provide Subrecipient with any guidelines necessary for compliance with that portion of the regulations applicable during the Term of this Agreement.

**16.16. Limited English Proficiency.** As applicable, Subrecipient and each Subcontractor shall comply with Executive Order 12166, enacted on August 11, 2000, mandating that any recipient of HUD assistance funds reduce barriers to access for limited English proficiency (LEP) persons. Subrecipient and each Subcontractor shall comply with and make good faith and reasonable efforts to carry out the purposes of Executive Order 12166 relating to "Improving Access to Services by Persons with Limited English Proficiency." Subrecipient acknowledges that failure to ensure LEP access to HUD benefits may violate Title VI of the Civil Rights Act of 1964.

**16.17. Lead-Based Paint.** Subrecipient and each Subcontractor shall comply with 24 C.F.R. section 570.608 relating to the Lead-Based Paint Poisoning Prevention Act (42 USC sections 4821-4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 USC sections 4851-4856), and implementing regulations at Part 35, subparts A, B, J, K, and R.

**17. REMEDIES FOR DEFAULT.** Notwithstanding any provision of this Agreement to the contrary, if Subrecipient or any Subcontractor fails to comply with any term or condition of this Agreement, City may exercise any or all of the following remedies: (a) suspending one or more

payments to Subrecipient, until Subrecipient and each Subcontractor is in compliance with this Agreement; (b) not reimbursing Subrecipient for all or part of the cost of the Activity or action not in compliance with this Agreement; (c) wholly or partly suspending the award of CDBG Funds to Subrecipient under this Agreement; (d) terminating the award of CDBG Funds to Subrecipient under this Agreement; (e) terminating this Agreement in accordance with Section 18; (f) those remedies set forth in 24 C.F.R. section 570.910, pursuant to 24 C.F.R. section 570.501(b); (g) deeming Subrecipient ineligible from consideration for any future CDBG funding from City; (h) any other remedy specified in this Agreement; or (i) any remedy available at law or in equity. If City notifies Subrecipient that City has suspended payments or disallowed funds, or that City has partly suspended the award of CDBG Funds to Subrecipient under this Agreement, Subrecipient shall not expend any CDBG Funds related to, or connected with, any area of controversy or conflict that resulted in the suspension, disallowance, or partial suspension of funding. If City wholly suspends or terminates the award of CDBG Funds to Subrecipient under this Agreement, Subrecipient shall cease expending CDBG Funds in connection with the Activity. The rights and remedies of City under this Agreement are cumulative and exercise of any one or more of such rights or remedies shall not limit, waive, or prevent City's exercise of other rights or remedies under this Agreement, at law or in equity, that may be available to City.

## **18. TERMINATION**

**18.1. Convenience.** Notwithstanding the Term of this Agreement or any provision of this Agreement to the contrary, in accordance with 24 C.F.R. section 85.44, City or Subrecipient may terminate this Agreement for any reason, at any time, upon thirty (30) calendar days' Notice of termination to the other Party.

**18.2. Curable Default.** Notwithstanding any provision of this Agreement to the contrary, City, in its sole and absolute discretion, may terminate this Agreement upon fifteen (15) calendar days' Notice to Subrecipient, if Subrecipient fails to comply with (i.e., defaults on) any term or condition of this Agreement. The Notice shall include a description of Subrecipient's default. If Subrecipient fails to cure the default within fifteen (15) calendar days after the date Subrecipient receives the Notice, City may immediately terminate this Agreement. City reserves the right to suspend payments to Subrecipient during the fifteen (15) calendar day Notice period.

**18.3. Incurable Default.** Notwithstanding any provision of this Agreement to the contrary, City, in its sole and absolute discretion, may immediately terminate this Agreement upon Notice to Subrecipient if:

**18.3.1.** Subrecipient makes a material misrepresentation to City in Subrecipient's CDBG funding application or otherwise relating to this Agreement, regardless of whether Subrecipient had knowledge or intent with respect to the misrepresentation;

**18.3.2.** Subrecipient violates any term or condition of this Agreement for which immediate termination is authorized;

**18.3.3.** Subrecipient, or any of its officers or directors, becomes subject to any court action or proceeding relating to the performance of Subrecipient's obligations under this Agreement that materially and adversely affects Subrecipient's performance of its obligations under this Agreement;

**18.3.4.** Subrecipient misappropriates any funds under this Agreement;

**18.3.5.** Subrecipient files a voluntary petition in bankruptcy, is adjudicated bankrupt, or makes a general assignment for the benefit of creditors;

**18.3.6.** Any or all of the CDBG Funds allocated to City by HUD (not just funds awarded under this Agreement) are suspended, terminated, delayed or recovered by the Federal government; or

**18.3.7.** Subrecipient is unable or unwilling to comply with any additional terms or conditions governing the Activity or this Agreement that may be required by newly enacted (or amended) Federal, State, City or other laws, statutes, rules, regulations, orders, ordinances, resolutions, permits, requirements, policies, or directives.

**18.4. Effect of Termination.** City's termination of this Agreement shall terminate each and every right of Subrecipient, and any person claiming any rights by or through Subrecipient, under this Agreement, except Subrecipient's right to fair and reasonable compensation under Section 19.

**19. SUBRECIPIENT RESPONSIBILITIES ON EXPIRATION OR TERMINATION OF THIS AGREEMENT.** If this Agreement expires or is terminated, Subrecipient shall complete any and all additional work necessary for the orderly filing of documents and closing of Subrecipient's performance of its obligations under this Agreement. Subrecipient shall be entitled to fair and reasonable compensation for work performed on the Activity by Subrecipient before the effective date of expiration or termination of this Agreement, subject to the Budget. By accepting payment for completion of performance of its obligations under this Agreement, Subrecipient discharges City of all of City's obligations and liabilities under this Agreement.

**20. INFORMAL DISPUTE RESOLUTION.** If City and Subrecipient have any dispute as to their respective rights, obligations, or duties under this Agreement, or the meaning or interpretation of any provision contained in this Agreement, they shall first attempt to resolve such dispute by informal discussion between their respective representatives. Within five (5) calendar days of determining the existence of any such dispute, the Party determining there is such a dispute shall give Notice to the other Party of the existence of the dispute and the need to meet informally to resolve such dispute. The Parties shall endeavor thereafter to meet within five (5) calendar days of the second Party's receipt of such Notice, or at such time thereafter as is reasonable under the circumstances.

**21. MANDATORY ASSISTANCE.** If a third party dispute or litigation, or both, to which City is a party, arises out of, or relates in any way to, this Agreement, and Subrecipient's obligations under Section 22 do not apply to such dispute or litigation, then upon City's request, Subrecipient, its agents, officers, and employees shall fully assist City in resolving the dispute or litigation. Subrecipient's assistance to City, referred to as "Mandatory Assistance," includes providing professional consultations, attending mediations, arbitrations, depositions, trials, or any event related to the dispute or litigation. In providing City with Mandatory Assistance, if Subrecipient, its agents, officers, or employees incur costs (excluding attorney's fees), subject to Section 22, City will compensate Subrecipient for such costs. However, if it is determined through resolution of the third party dispute or litigation, or both, that such third party dispute or litigation was attributable, in whole or in part, to one or more acts or omissions of Subrecipient, its agents, officers, or employees, Subrecipient shall fully reimburse City for all funds paid to Subrecipient, its agents, officers, or employees relating to Mandatory Assistance. Any attorney's

fees Subrecipient may incur as a result of providing Mandatory Assistance are not reimbursable from City.

**22. INDEMNIFICATION AND HOLD HARMLESS AGREEMENT.** Subrecipient shall defend, indemnify, protect, and hold harmless City, its elected officials, officers, employees, representatives, and agents from and against any and all claims asserted, or liability established, for damages or injuries to any person or property, including injury to Subrecipient's officers, employees, invitees, guests, agents, or Subcontractors, that arise from, or are connected with, or are caused, or claimed to be caused, by this Agreement, or by one or more acts or omissions of Subrecipient, its officers, employees, representatives, agents, or Subcontractors in performing this Agreement, and all expenses of investigating and defending against same, including attorney's fees and costs. However, Subrecipient's duty to indemnify and hold harmless shall not include any claims or liability arising from the established sole negligence or willful misconduct of City, its elected officials, officers, employees, representatives, or agents. City may, in its sole and absolute discretion, conduct its own defense, or participate in its own defense, of any claim subject to this indemnification provision. If City elects to conduct its own defense, participate in its own defense, or obtain independent legal counsel in its defense of any claim subject to this indemnification provision, Subrecipient shall pay City for all costs related thereto, including attorney's fees and costs. Subrecipient shall pay City any and all costs City incurs enforcing the indemnity and defense provisions set forth in this Section 22. The provisions of this Section 22 are not limited by the insurance requirements of Section 6.

**23. SUBCONTRACTS AND SUBCONTRACTOR LIST.** Subrecipient shall provide to City a copy of all subcontracts Subrecipient has entered into (or intends to enter into contingent upon entering into this Agreement) in connection with the Activity, along with a written statement describing the justification for the subcontract and an itemization of all costs for the subcontract. Subrecipient shall procure all subcontracts in conformance with the procedures set forth in Exhibit B. Subrecipient shall maintain documentation of the process used to procure all subcontracts and shall provide a copy of all such documentation to City, within ten (10) calendar days after Notice from City requesting such documentation. Within ten (10) calendar days after Notice from City requesting a list of Subrecipient's Sub-Contractors, Subrecipient shall also provide City with a complete list of Subrecipient's Subcontractors, listing the names and contact information of all Subcontractors Subrecipient has hired or retained, or intends to hire or retain, in connection with the Activity. Subrecipient shall monitor all subcontracts on a regular basis to ensure contract compliance. Results of monitoring efforts shall be summarized in written reports and supported with documented evidence of follow-up actions to correct areas of noncompliance and shall be made available to City during monitoring reviews or within ten (10) calendar days after Notice from City requesting such reports and evidence. Subrecipient shall comply with 2 C.F.R. section 200.321, as applicable, regarding affirmative efforts to contract with minority businesses, women's business enterprises, and labor surplus area firms. Subrecipient shall provide City, at the time of Activity completion, a report on the minority business or women's business enterprise status of all Subcontractors with contracts of \$10,000 or greater. If, during the Term, Subrecipient identifies a need for one or more additional subcontracts, Subrecipient shall, within ten (10) calendar days after the date of any such subcontract, provide a copy of the subcontract to City, along with a written statement describing the justification for the additional subcontract, an itemization of all costs for the additional subcontract, and an updated list of Subcontractors.

**23.1. Required Subcontract Language.** Subrecipient shall ensure that all subcontracts entered into in connection with the Activity contain the provisions set forth in

Sections 8 through 16 and Section 27 of this Agreement.

**23.2. Contract Activity Report.** Within ten (10) calendar days after Notice from City requesting such information, Subrecipient shall provide City: (a) statistical information (as described in City's then current form of Contract Activity Report), including the amount of subcontracting provided by firms during the period covered by the Contract Activity Report; and (b) an invoice from each Subcontractor listed in the Contract Activity Report.

**23.3. Prohibition on Use of Certain Subcontractors.** Subrecipient shall not employ, award any contract to, engage the services of, or fund any Subcontractor, during any period when Subrecipient has notice (actual, constructive, or implied) of such Subcontractor's Federal, State, City or other debarment, suspension, or ineligibility. Subrecipient shall electronically certify to City that Subrecipient is in compliance with this Section 23.3. A contract award must not be made to any person or entity listed on the Federal government wide Excluded Parties List System in the Federal System Award Management, in accordance with 2 C.F.R. Part 180.

**24. NOTICE.** In all cases where Notice is required under this Agreement, delivery of such Notice shall be effective on the date transmitted by e-mail, on the third business day after the Notice is deposited with the United States Postal Service, or on the first business day after deposit with a nationally recognized overnight delivery service for next business day delivery, in each of the latter two cases with postage or delivery costs paid and addressed to City as specified below in this Section 24 or to Subrecipient at Subrecipient's address set forth on the Cover Page to this Agreement. City or Subrecipient may change its Notice address by Notice delivered in accordance with this Section 24. Notice delivered by personal service shall be effective on delivery. As of the Effective Date, the Notice address for the City is: City of San Diego, Economic Development Department, Attn: Community Development Division Program Manager, 1200 Third Avenue, Suite 1400, San Diego, CA 92071; Email address: CDBG@sandiego.gov.

**25. CITY REPRESENTATIVE.** City's Economic Development Department is the City's administrator for this Agreement. The Community Development Division Program Manager in City's Economic Development Department is the "City Representative" for all purposes of this Agreement. The City Representative shall communicate with Subrecipient on all matters related to the administration of this Agreement and Subrecipient's performance of its obligations under this Agreement. When this Agreement refers to communications to or with City, those communications shall be with the City Representative, unless this Agreement or the City Representative specifies otherwise. When this Agreement refers to an act or approval to be performed by City, that act or approval shall be performed by the Mayor or his or her designee, unless this Agreement specifies otherwise. City, in its sole and absolute discretion, may change the identity of the City Representative at any time by Notice to Subrecipient.

**26. SUBRECIPIENT REPRESENTATIVE.** The "Subrecipient's Primary Representative" identified in City's ED Grants System is the "Subrecipient Representative" who shall act and receive Notices on behalf of Subrecipient for all purposes of this Agreement. Subrecipient may change the identity of the Subrecipient Representative by Notice to City at least ten (10) calendar days before the date of such change. City may communicate with the Subrecipient Representative on all matters relating to this Agreement.

**27. INDEPENDENT CONTRACTOR.** Subrecipient acknowledges, and shall require its Subcontractors to acknowledge, that Subrecipient and its Subcontractors are independent

contractors, and not agents or employees of City. Any provision of this Agreement that may appear to give City a right to direct Subrecipient concerning the details of performing its obligations under this Agreement, or to exercise any control over such performance, shall mean only that Subrecipient shall follow the direction of City concerning the end results of the performance. Subrecipient shall have no authority to bind City in any manner, or to incur any obligation, debt or liability of any kind, on behalf of or against City, whether by contract or otherwise, unless such authority is expressly conferred under this Agreement or is otherwise expressly conferred in writing by City.

**28. NO ASSIGNMENT.** Because this Agreement is entered into by City in reliance upon Subrecipient's qualifications, experience, and personnel, Subrecipient shall not assign or subcontract any of its rights, obligations, or duties under this Agreement, without obtaining the prior written consent of City, which may be given, withheld or conditioned in City's sole and absolute discretion. Any assignment of Subrecipient's rights, obligations, or duties under this Agreement without the prior written consent of City shall not create a contractual relationship between City and the asserted assignee, and any such assignment shall be ineffective, null and void. Any assignment in violation of this Section 28 is grounds for immediate termination of this Agreement by City, in City's sole and absolute discretion.

**29. CONFIDENTIALITY OF INFORMATION.** All information provided by City to Subrecipient in connection with this Agreement is for the sole use of Subrecipient. Subrecipient shall not release any of this information to any third party, without the prior written consent of City, which consent may be given, withheld, or conditioned in City's sole and absolute discretion. City consent is not required for release of information that: (a) was publicly known, or otherwise known to Subrecipient, at the time the information was provided to Subrecipient by City; (b) subsequently becomes publicly known, through no act or omission of Subrecipient; (c) becomes known to Subrecipient from a source or means other than City; or (d) is considered a "public record," pursuant to the California Public Records Act (California Government Code sections 6250 – 6276.48).

**30. INTELLECTUAL PROPERTY.** All rights to discoveries or inventions that arise or are developed in the course of performance of this Agreement shall be the property of City and may be disposed of in accordance with City policy. City, in its sole and absolute discretion, may file for patents in connection with all rights to any such discoveries or inventions. Subrecipient acknowledges that all Intellectual Property shall constitute a "work for hire," as that term is defined in the Copyright Act of 1976, as amended. Accordingly, all right, title, and interest in and to all Intellectual Property shall be the exclusive property of City, including all copyrights and other intellectual property rights in any and all Intellectual Property. If for any reason any Intellectual Property is not deemed to be a "work for hire," Subrecipient grants, transfers, sells, and assigns, exclusively to City, all right, title, and interest in and to said Intellectual Property, including all copyrights and other intellectual property rights in such Intellectual Property. Subrecipient shall execute and deliver to City a confirming grant and assignment of all rights in and to all Intellectual Property, and shall execute any other document City deems necessary to ensure the complete and effective transfer of all right, title, and interest in and to such Intellectual Property to City. Subrecipient shall deliver all Intellectual Property to City within fifteen (15) calendar days after the expiration or termination of this Agreement. If Subrecipient fails to deliver all Intellectual Property to City and City desires to use such Intellectual Property, Subrecipient shall provide City with equivalent materials, at Subrecipient's expense, or reimburse City, in full, for the cost of developing equivalent materials. Subrecipient represents and warrants that any materials or deliverables, including all Intellectual Property, provided under this Agreement are original, not encumbered, and do not infringe upon the copyright,

trademark, patent, or other intellectual property rights of any third party, or are in the public domain. If deliverables, materials, or Intellectual Property provided under this Agreement become the subject of a claim, suit, or allegation of copyright, trademark, or patent infringement, City shall have the right, in City's sole and absolute discretion, to require Subrecipient to produce, at Subrecipient's own expense, new non-infringing materials, deliverables, or Intellectual Property as a means of remedying any claim of infringement, in addition to any other remedy available to City at law or in equity. Subrecipient shall indemnify and hold harmless City, its elected officials, officers, employees, representatives, and agents from and against any and all claims, actions, costs, judgments, or damages of any type, alleging or threatening that any materials, deliverables, supplies, equipment, services, or Intellectual Property provided under this Agreement infringe the copyright, trademark, patent, or other intellectual property or proprietary rights of any third party [Third Party Infringement Claim]. If a Third Party Infringement Claim is threatened or made before Subrecipient receives payment under this Agreement, City shall be entitled, upon Notice to Subrecipient, to withhold some or all of any future payments becoming due to Subrecipient under this Agreement.

### **31. MISCELLANEOUS PROVISIONS.**

**31.1. Municipal Powers.** Nothing contained in this Agreement shall be construed as a limitation upon the powers of City as a chartered city of the State.

**31.2. Governing Law.** The terms and conditions of this Agreement shall be construed and interpreted in accordance with the laws of the State. In addition, the terms and conditions of this Agreement are subject to HUD rules or regulations in effect on or after the Effective Date. Any newly adopted government rules or regulations or changes to existing government rules or regulations shall become effective for the administration of this Agreement upon receipt by City.

**31.3. Jurisdiction and Venue.** The Parties agree to submit to the personal jurisdiction of, and that venue shall be in, any State court within the County of San Diego, State of California, for any dispute, claim, or matter arising out of, or related to, this Agreement, subject to the requirements of Section 20.

**31.4. Integration and Amendment.** This Agreement, the attached exhibits, and all documents or materials referred to in this Agreement constitute the entire agreement of the Parties concerning the subject matter of this Agreement. All prior negotiations and agreements between the Parties about the subject matter of this Agreement are merged into this Agreement. No change, alteration, amendment, or modification of the terms or conditions of this Agreement, and no verbal understanding of the Parties, their officers, agents, or employees shall be valid, unless made in the form of a written amendment to this Agreement signed by the authorized representatives of both Parties. The Parties agree to enter into any and all amendments to this Agreement that are necessary to comply with any and all new or modified Federal or State laws affecting this Agreement. City Council Policy 700-02 requires City Council approval of any amendment to this Agreement that allows Subrecipient to expend or commit CDBG Funds beyond the expiration or earlier termination of the Term.

**31.5. No Waiver.** No failure of either City or Subrecipient to insist upon the strict performance by the other of any term, covenant, or condition of this Agreement, nor any failure to exercise any right or remedy upon a breach of any term, covenant, or condition of this Agreement, shall constitute a waiver of any such breach or the requirement to



comply with such term, covenant, or condition. No waiver of any breach shall affect or alter this Agreement, and each and every term, covenant, and condition, in this Agreement shall continue in full force and effect regarding any existing or subsequent breach.

**31.6. Successors in Interest.** This Agreement, and all rights, obligations, or duties under this Agreement, shall be in full force and effect, whether or not any Party to this Agreement has been succeeded by another entity, and all rights, obligations, or duties under this Agreement shall be binding on any Party's successor in interest, subject to the limitations of Section 28.

**31.7. Severability.** The unenforceability, invalidity, or illegality of any provision of this Agreement shall not render any other provision of this Agreement unenforceable, invalid, or illegal.

**31.8. Conflicts between Terms.** If an apparent conflict or inconsistency exists between the main body of this Agreement and any exhibit attached to this Agreement, the exhibit shall control. If a conflict exists between an applicable Federal, State, City, or other law, rule, regulation, order, or code and this Agreement, then the law, rule, regulation, order, or code shall control. Varying degrees of stringency among the main body of this Agreement, the attached exhibits, and laws, rules, regulations, orders, or codes are not deemed conflicts, and the most stringent requirement shall control. Each Party shall Notify the other immediately upon the identification of any apparent conflict or inconsistency concerning this Agreement.

**31.9. Principles of Interpretation.** No inference in favor of or against any Party shall be drawn from the fact that such Party has drafted any part of this Agreement. The Parties have both participated substantially in the negotiation, drafting, and revision of this Agreement, with advice from legal and other counsel and advisers of their own selection. A word, term or phrase defined in this Agreement may be used in the singular, plural, past tense or future tense, regardless of how it is defined, all in accordance with ordinary principles of English grammar, which shall govern all language in this Agreement. The words "include" and "including" in this Agreement shall be construed to be followed by the words: "without limitation." Each collective noun in this Agreement shall be interpreted as if followed by the words "(or any part of it)," except where the context clearly requires otherwise. Every reference to any document, including this Agreement, refers to such document, as modified from time to time (excepting any modification that violates this Agreement), and includes all exhibits, schedules, addenda and riders to such document. The word "or" in this Agreement includes the word "and," except where the context clearly requires otherwise. Every reference to a law, statute, regulation, order, form or similar governmental requirement in this Agreement refers to each such requirement as amended, modified, renumbered, superseded or succeeded, from time to time.

**31.10. Signing Authority.** Subrecipient shall provide City with evidence satisfactory to City that Subrecipient's signatory to this Agreement is authorized to enter into this Agreement on behalf of Subrecipient and that Subrecipient is a valid, qualified corporation or limited liability company in good standing in its home state and, if necessary, qualified to do business in the State.

**31.11. Counterparts.** This Agreement may be signed in multiple counterparts, which, when taken together, shall constitute a single signed original, as though all Parties had signed

the same Agreement.

**31.12. Headings.** All headings in this Agreement are for convenience of reference only and shall not affect the interpretation of this Agreement.

**31.13. Exhibits Incorporated.** All exhibits, documents, or materials referenced in this Agreement are incorporated into this Agreement by such reference.

**31.14. Compliance with Law.** Subrecipient shall comply with all laws, ordinances, regulations, and policies of the Federal, State, City and other local governments applicable to this Agreement. In addition, Subrecipient shall comply immediately with all directives issued by City or its authorized representatives under authority of this Agreement or any law, statute, ordinance, rule, or regulation.

**31.15. Survival of Obligations.** All representations, indemnifications, warranties, and guarantees made in, required by, or given in accordance with this Agreement, and all continuing obligations set forth in this Agreement, shall survive the expiration or termination of this Agreement.

**31.16. Incorporation of Recitals.** The Recitals preceding this Agreement are true and correct and are incorporated into and made a part of this Agreement.

**31.17. Time of Essence.** Time is of the essence of each provision of this Agreement, unless otherwise specified in this Agreement.

**[Remainder of page intentionally left blank.]**

**EXHIBIT A**  
**Budget**

<b>Total Project Funds</b>								
#	Budget Category	City Amount						
1	PE: Salary and Wages	\$ 0						
2	PE: Fringe Benefits	\$ 0						
3	<b>Total Personnel Budget</b>	<b>\$0</b>						
4	NPE: Direct Program Delivery Expenses	\$ 0						
5	NPE: Supplies-Administration Use	\$ 0						
6	NPE: Supplies-Client Use	\$ 0						
7	NPE: Publications/Printing	\$ 0						
8	NPE: Rent/Lease	\$ 0						
9	NPE: Maintenance/Repair	\$ 0						
10	NPE: Utilities	\$ 0						
11	NPE: Communications	\$ 0						
12	NPE: Equipment Rental	\$ 5,000						
<table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 15%;">Title</th> <th style="width: 70%;">Narrative</th> <th style="width: 15%;">Sub Total - City</th> </tr> </thead> <tbody> <tr> <td>Equipment Rental</td> <td>Costs for rental of boom lifts, on site storage containers, and fall protection for the solar tree project. Material will be stored on site within the storage containers, and use the boom lifts and fall protection during the installation and energizing of the trees themselves. The storage containers will only be used to house the equipment and parts needed for the installation of the solar trees. No other Ocean Discovery Institute materials and equipment will be stored in these containers.</td> <td style="text-align: right;">\$ 5,000</td> </tr> </tbody> </table>			Title	Narrative	Sub Total - City	Equipment Rental	Costs for rental of boom lifts, on site storage containers, and fall protection for the solar tree project. Material will be stored on site within the storage containers, and use the boom lifts and fall protection during the installation and energizing of the trees themselves. The storage containers will only be used to house the equipment and parts needed for the installation of the solar trees. No other Ocean Discovery Institute materials and equipment will be stored in these containers.	\$ 5,000
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13	NPE: Insurance	\$ 0						
14	NPE: Federally Approved Indirect Cost Rate*	\$ 0						
15	NPE: Construction/Renovation	\$ 295,000						
<table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 20%;">Title</th> <th style="width: 60%;">Narrative</th> <th style="width: 20%;">Sub Total - City</th> </tr> </thead> <tbody> <tr> <td>Construction/Renovation</td> <td>Construction Costs including materials, fabrication, installation, and procurement of the general contractor.</td> <td style="text-align: right;">\$ 295,000</td> </tr> </tbody> </table>			Title	Narrative	Sub Total - City	Construction/Renovation	Construction Costs including materials, fabrication, installation, and procurement of the general contractor.	\$ 295,000
Title	Narrative	Sub Total - City						
Construction/Renovation	Construction Costs including materials, fabrication, installation, and procurement of the general contractor.	\$ 295,000						
16	NPE: Construction Management (max. 6% of Project Budget)	\$ 0						
17	NPE: Loans	\$ 0						
18	NPE: Consultant Services	\$ 0						
19	NPE: Direct Loans to Businesses	\$ 0						

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20	<b>Total Non-Personnel Budget</b>	\$300,000
21	<b>Total Budget</b>	\$300,000

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**EXHIBIT B**  
**Conflict of Interest and Procurement Policy for Non-Profit Corporations**  
**Contracting with City of San Diego**

Purpose

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

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

Board Roster

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

Procedures for Procurement of Goods and Services

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

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

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

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

Remedies

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

## **EXHIBIT C**

### **Insurance Requirements**

**1. General Requirements.** Sub-Recipient shall not begin any performance under this Agreement until it has: (1) provided City insurance certificates and endorsements evidencing all insurance policies and endorsements described in this Exhibit C; (2) obtained City approval of each insurance company or companies issuing such insurance policies or endorsements; and (3) confirmed that all insurance policies contain the special provisions described in this Exhibit C. Sub-Recipient's liabilities, including Sub-Recipient's indemnity obligations under this Agreement, shall not be limited in any way to the insurance coverage described in this Exhibit C. Maintenance of the insurance coverage described in this Exhibit C is a material term of this Agreement and Sub-Recipient's failure to maintain or renew any such insurance coverage or to provide evidence of renewal or replacement of any such insurance coverage during the Term of this Agreement may be treated by City as material breach of this Agreement by Sub-Recipient.

**2. Specific Insurance.** Sub-Recipient shall procure and maintain for the duration of this Agreement insurance against claims for injuries to Persons or damages to property that may arise from or in connection with Sub-Recipient's performance under this Agreement and performance by any agents, representatives, employees or subcontractors of Sub-Recipient. Sub-Recipient shall provide, at a minimum, the following insurance coverage:

2.1. Commercial General Liability. Insurance Services Office Form CG 00 01 covering commercial general liability on an "occurrence" basis, including products and completed operations, property damage, bodily injury, and personal and advertising injury, with liability limits no less than \$1,000,000 per occurrence. If a general aggregate limit applies, either the general aggregate limit shall apply separately to this Agreement (ISO CG 25 03 or 25 04) or the general aggregate limit shall be twice the amount of the required occurrence limit.

2.2. Commercial Automobile Liability. Insurance Services Office Form Number CA 0001 covering Code 1 (any auto) or, if Sub-Recipient has no owned autos, Code 8 (hired) and Code 9 (non-owned), with a liability limit no less than \$1,000,000 per accident for bodily injury and property damage.

2.3. Workers' Compensation. Workers' Compensation Insurance as required by the State, with statutory liability limits, and Employer's Liability Insurance with a liability limit of no less than \$1,000,000 per accident for bodily injury or disease.

2.4. Other Insurance Provisions. The insurance policies required by this Agreement are to contain, or be endorsed to contain, the following provisions:

2.4.1. *Additional Insured Status.* City, its officers, officials, employees, and agents are to be covered as additional insured on the required Commercial General Liability insurance policy with respect to liability arising out of work or operations performed by or on behalf of Sub-Recipient, including materials, parts, or equipment furnished in connection with such work or operations. General liability coverage can be provided in the form of an endorsement to Sub-Recipient's Commercial General Liability insurance policy (at least as broad as ISO Form CG 20 10 11 85 or if not available, through the addition of both CG 20 10, CG 20 26, CG 20 33, or CG 20 38; and CG 20 37, if a later edition is used).

2.4.2. *Primary Coverage.* For any claims related to this Agreement, Sub-Recipient's insurance coverage shall be primary coverage at least as broad as ISO CG 20 01 04 13 as respects City, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by City, its officers, officials, employees, or volunteers shall be excess of Sub-Recipient's insurance and shall not contribute with it.

2.4.3. *Notice of Cancellation.* Each insurance policy shall provide that coverage shall not be canceled, except after thirty (30) calendar days' Notice of cancellation to City.

2.4.4. *Waiver of Subrogation.* Sub-Recipient grants to City a waiver of any right to subrogation that any insurer of Sub-Recipient may acquire against City by virtue of the payment of any loss under any insurance policy. Sub-Recipient agrees to obtain any endorsement that may be necessary to effect this waiver of subrogation, but this waiver applies regardless of whether or not Sub-Recipient obtains such a waiver of subrogation endorsement from the insurer.

2.5. Deductibles/Self Insured Retentions. All deductibles under any insurance policy shall be the sole responsibility of Sub-Recipient and shall be disclosed to City at the time the evidence of the insurance coverage is provided to City. Self-insured retentions under any insurance policy shall be the sole responsibility of Sub-Recipient and must be declared to and approved by City at the time the evidence of the insurance coverage is provided to City. City may require Sub-Recipient to purchase coverage with a lower deductible or retention or provide proof of ability to pay losses and related investigation, claim administration, and defense expenses within the deductible or retention. Each insurance policy with a self-insured retention shall provide, or be endorsed to provide, that the self-insured retention may be satisfied by either the named insured or City.

2.6. Acceptability of Insurers. Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A-VI, unless otherwise approved in writing by City. City will accept insurance provided by non-admitted, "surplus lines" carriers only if the carrier is authorized to do business in the State and is included on the List of Approved Surplus Lines Insurers (LASLI list). All policies of insurance issued by non-admitted carriers are subject to all of the requirements of this Agreement applicable to insurance policies issued by admitted carrier.

2.7. Verification of Coverage. Sub-Recipient shall furnish City with original certificates and amendatory endorsements or copies of all applicable insurance policy language effecting insurance coverage described in this Exhibit C. All insurance certificates and endorsements are to be received and approved by City before any performance commences under this Agreement. Failure to obtain the required insurance documents prior to the beginning performance shall not waive Sub-Recipient's obligation to provide the required insurance coverage or evidence of such insurance coverage. City reserves the right to require complete, certified copies of all insurance policies, including endorsements, described in this Exhibit C, at any time.

2.8. Special Risks or Circumstances. City reserves the right to modify the insurance requirements of this Agreement, including liability limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.

2.9. Additional Insurance. Sub-Recipient may obtain additional insurance not required by

this Agreement, as long as the City, its officers, officials, employees, and agents are named additional insured under such insurance policies

2.10. Excess Insurance. All policies providing excess coverage to City shall follow the form of the primary policy or policies, including, but not limited to, all endorsements.

2.11. Subcontractors. Sub-Recipient shall require and verify that all subcontractors maintain insurance meeting all the insurance requirements of this Agreement. Sub-Recipient shall also ensure that City is an additional insured on insurance required from subcontractors. For commercial general liability insurance coverage, subcontractors shall provide coverage with a form at least as broad as the CG 20 38 04 13 endorsement.



## **EXHIBIT D**

### **Scope of Work**

#### **1. TARGET POPULATION/GEOGRAPHICAL AREA**

The Living Lab facility is located in the heart of City Heights in central San Diego. Efforts will be focused to reach young individuals and their families living in this community with 100% tuition free science and conservation programming in their neighborhood.

#### **2. PROJECT DESCRIPTION**

Living Lab Solar Tree Project will install two solar trees – free standing structures that hold solar panels – to be integrated into Ocean Discovery Institute’s Living Lab facility and educational programming.

#### **3. PROJECT OUTCOME**

A total of 10,000 unduplicated individuals will have improved access to services for the purpose of creating a suitable living environment upon completion of facility improvements.

#### **4. PROJECT ACTIVITIES**

Ocean Discovery Institute is currently in the final stages of construction on the Living Lab, a new community educational facility that is scheduled to open its doors to the public later this year. The Living Lab will be a model of sustainability for the high needs area and population of City Heights, and will serve as a place for the community to learn and engage in science and conservation programs.

This project will consist of engineering, fabricating, and installing two solar trees at the Living Lab facility. The two solar trees, one tracking and one stationary, will be installed in the parking plaza at the Living Lab. The addition of the solar trees will help to attain Platinum LEED certification, which will both ensure the highest level of sustainability and allow Ocean Discovery Institute to orient curriculum around resource use, engineering, and related fields. The solar incorporation will also ensure zero net energy design is achieved, which will enable students to measure the impact of a green roof, solar panels, passive heating and cooling, natural day-lighting, and the highest efficiency fixtures.

The cost savings produced by the two solar trees is projected at \$12,000/year and equates to \$300,000 over the useful life of the solar trees. This savings will be diverted back into implementing and expanding programs to reach all young people in City Heights.

A more detailed description of the specific construction activities to be completed shall be approved by the Community Development Division (CDD) after the FY 2018 CDBG Agreement between the City and Subrecipient is executed and Ocean Discovery Institute completes the required bidding process. Approved project activities to be paid with CDBG funds shall not be implemented by Ocean Discovery Institute prior to issuance of the Notice to Proceed by the CDD Project Manager.

#### **5. Applies to PS/CG/CED Projects**

5.1 Subrecipient represents and warrants to City that the Project activities do not and will not include any form of construction, repair or real property rehabilitation work.

5.2 Subrecipient may contract with a third person Subcontractor to perform some of the activities for the Project.

**6. Applies to NCIP/HR/SUS Projects**

Subrecipient may act as Prime Contractor for the Project or contract with a third person Prime Contractor for the Project.

**7. CLOSEOUTS**

The Subrecipient's obligation to the City shall not end until all closeout requirements are completed. Activities during this close-out period shall include, but are not limited to:

7.1 Making final payments;

7.2 Disposing of program assets (including the return of all unused materials, program income balances, and accounts receivable to the City); and

7.3 Determining the custodianship of records.

Notwithstanding the foregoing, the terms of the Agreement shall remain in effect during any period that the Subrecipient has control over CDBG funds, including program income.

**EXHIBIT E**  
**Additional Provisions Applicable to Improvements**

1. Definitions.

1.1. *Federally Assisted Construction Contract.* Any agreement between Subrecipient and another person for Improvements paid for in whole or in part with CDBG Funds or borrowed on the credit of City or the Federal government pursuant to the CDBG program, where Subrecipient participates in the performance of the Improvements, including supervision, inspection, and other onsite functions incidental to the actual Improvements.

1.2. *Notice to Proceed.* Notice from City to Subrecipient that all conditions precedent to commencement of the Activity under this Agreement have been satisfied or waived.

1.3. *Prime Contractor.* Any Subcontractor that is acting as a general contractor or prime contractor for Improvements as part of the Activity.

1.4. *Real Property Restriction.* The document attached to this Agreement as Exhibit F.

2. Improvements Construction. Subrecipient shall construct all Improvements, as described in the Scope of Work, in accordance with the Budget and subject to the terms, conditions and covenants of this Agreement. Subrecipient may act as Prime Contractor for such construction or contract with a third person Prime Contractor for such construction. Subrecipient shall not use, or allow to be used, any donated or volunteered labor to perform any labor or services under this Agreement, except as permitted by Federal law and HUD regulations. Use of donated or volunteered labor or services in performance of any Work shall be promptly reported to City.

3. Compliance Documentation. Subrecipient shall provide City with all Environmental Documents and any other documents required by law or this Agreement for construction of any and all Improvements, within fourteen (14) calendar days after Notice from City, unless otherwise specified in the Notice from City. Subrecipient shall also provide written documentation to the satisfaction of City of Subrecipient's legal authority to construct all Improvements in accordance with this Agreement.

4. Contractor Selection. Subrecipient shall use competitive bidding and contractor selection procedures consistent with Federal procurement requirements to select each Prime Contractor or Subcontractor that will participate in any construction work that is part of the Activity, if any.

5. Pre-Construction Actions. Subrecipient shall not begin work on any Improvement, unless and until: (a) Subrecipient obtains all required permits and approvals from City and other government entities with jurisdiction over such work on the Site; (b) City approves all final construction plans and specifications for such work on the Site; (c) City reviews and approves all subcontracts proposed by Subrecipient regarding such work on the Site; and (d) Subrecipient holds a pre-construction meeting with the City Representative, any third person Prime Contractor, and all Subcontractors expected to participate in such work [collectively, Pre-Construction Requirements]. Subrecipient shall complete all of the Pre-Construction Requirements and Notify City of such completion. Upon City's confirmation of Subrecipient's completion of all of the Pre-Construction Requirements, City shall issue a Notice to Proceed to Subrecipient. Under no circumstances shall Subrecipient or any Subcontractor commence work on any Improvement, until Subrecipient receives Notice to Proceed from City.

6. Commencement of Construction. Within forty-five (45) calendar days after the date of City issuance of a Notice to Proceed, Subrecipient shall commence work on the Improvements in accordance with the Scope of Work, the Budget, and the terms, conditions and covenants of this Agreement.
7. Construction Schedule. Subrecipient is responsible for ensuring that work on the Improvements proceeds to completion within the Term. Completion of the Improvements shall be evidenced by Subrecipient recording a Notice of Completion in accordance with California Civil Code section 8182 or section 9204, as applicable, and City issuance of a final certificate of occupancy for the Improvements, if applicable, or alternatively, final City inspector sign-off on the Improvements, if a certificate of occupancy is not required for the Improvements. Subrecipient is also responsible for ensuring that written reports are completed on a regular basis, that any Prime Contractor's and any and all Subcontractors' requests for progress payments are reviewed before payments are made, and that necessary change orders are prepared and submitted to City for approval, prior to implementation.
8. Maintenance of Documents. Subrecipient is responsible for ensuring maintenance of all written guarantees and warranties, instruction books, diagrams, charts, and a maintenance manuals for all Improvements following completion of the Improvements.
9. Scope of Work Changes. Should circumstances require and the Parties agree, in their respective sole and absolute discretion, that the Scope of Work should be changed or amended, such change or amendment shall be accomplished only as follows: (a) a change to the Scope of Work that does not affect the total amount to be paid or reimbursed to Subrecipient under this Agreement shall be accomplished by a written "Scope of Work Adjustment" form provided by City that is signed by the authorized representatives of both City and Subrecipient; or (b) a change to the Scope of Work that increases the total amount to be paid or reimbursed to Subrecipient under this Agreement shall be made by a written amendment to this Agreement in accordance with Section 31.4.
10. Builder's Risk Insurance. In accordance with the requirements for insurance coverage in Exhibit C and as additional required coverage when the Activity includes Improvements, Subrecipient shall maintain builder's risk or course of construction insurance covering all risks of loss, less policy exclusions, on a completed value (non-reporting) basis, in an amount sufficient to prevent coinsurance, but in any event not less than one hundred percent (100%) of the completed value of the subject Improvements, including cost of debris removal, but excluding foundation and excavations. Such insurance shall also: (a) grant permission to occupy; and (b) cover, for replacement cost, all materials on or about any offsite storage location intended for use in, or in connection with, the Improvements.
11. City Prevailing Wage Requirements. Subrecipient and all Subcontractors shall comply with SDMC section 22.3019 requiring compliance with California Labor Code sections 1720 through 1861 (State prevailing wage law) for any and all construction work performed or funded pursuant to this Agreement cumulatively exceeding \$25,000 and for any and all alteration, demolition, repair and maintenance work performed or funded pursuant to this Agreement cumulatively exceeding \$15,000. Pursuant to San Diego Municipal Code section 22.3019 (PWO), construction work performed or funded pursuant to this Agreement cumulatively exceeding \$25,000 and alteration, demolition, repair and maintenance work performed or funded pursuant to this Agreement cumulatively exceeding \$15,000 is subject to the State of California prevailing wage law set forth in California Labor Code section 1720 through 1861 ("Prevailing Wage Law") and in undertaking any and all such work, Subrecipient and its

Subcontractors shall comply with Prevailing Wage Law, including the requirements set forth in this Exhibit E. This requirement to comply with Prevailing Wage Law is in addition to any requirement to pay “living wage” pursuant to San Diego Municipal Code section 22.4201 through 22.4245 (LWO) and Section 14.3 of this Agreement. If both Prevailing Wage Law and the LWO are applicable to particular work, Subrecipient must determine which per diem rate is highest for each classification of work between the applicable prevailing wage rate and living wage rate, and pay the higher of the two rates to their employees. The LWO may apply to work that is not subject to Prevailing Wage Law.

11.1. *Compliance with Prevailing Wage Requirements.* Pursuant to Prevailing Wage Law, Subrecipient and its Subcontractors shall ensure that all workers who perform work that is subject to Prevailing Wage Law are paid not less than the prevailing rate of per diem wages, as determined by the Director of the California Department of Industrial Relations (DIR), including work performed during the design and preconstruction phases of construction, which encompasses, without limitation, inspection and land surveying work.

11.1.1. Copies of the prevailing rate of per diem wages are on file at City and are available for inspection to any interested party on request. Copies of the prevailing rate of per diem wages also may be found at <http://www.dir.ca.gov/OPRL/DPreWageDetermination.htm>. Subrecipient or its Subcontractors shall post a copy of the prevailing rate of per diem wages determination at each job site and shall make this information available to any interested party upon request. Subrecipient shall deliver evidence of the required job site posting to City, within 5 calendar days after such posting.

11.1.2. The wage rates determined by the DIR refer to expiration dates. If the published wage rate does not refer to a predetermined wage rate to be paid after the expiration date, then the published rate of wage shall be in effect for the term of this Agreement. If the published wage rate refers to a predetermined wage rate to become effective upon expiration of the published wage rate and the predetermined wage rate is on file with the DIR, such predetermined wage rate shall become effective on the date following the expiration date and shall apply to this Agreement in the same manner as if it had been published in said publication. If the predetermined wage rate refers to one or more additional expiration dates with additional predetermined wage rates, which expiration dates occur during the life of this Agreement, each successive predetermined wage rate shall apply to this Agreement on the date following the expiration date of the previous wage rate. If the last of such predetermined wage rates expires during the term of this Agreement, such wage rate shall apply to the balance of the term of this Agreement.

11.2. *Penalties for Violations.* Subrecipient and its Subcontractors shall comply with California Labor Code section 1775, in the event a worker is paid less than the prevailing wage rate for the work or craft in which the worker is employed. Compliance with California Labor Code section 1775 shall be in addition to any other applicable penalties allowed under California Labor Code section 1720-1861.

11.3. *Payroll Records.* Subrecipient and its Subcontractors shall comply with California Labor Code section 1776, which generally requires keeping accurate payroll records, verifying and certifying payroll records, and making them available for inspection. Subrecipient shall, and shall require its Subcontractors to, comply with California Labor Code section 1776, including having provisions requiring such compliance in all contracts

with Subcontractors. Any requirement to submit certified payroll records to DIR shall include, without limitation, submitting certified payroll records to DIR through its online system for submission of certified payroll records, as required by DIR. Further, Subrecipient and its Subcontractors shall furnish the records specified in California Labor Code section 1776 directly to the Labor Commissioner in the manner required in California Labor Code section 1771.4. Subrecipient is responsible for ensuring that its Subcontractors submit certified payroll records to City, the Labor Commissioner and DIR.

11.4. *Apprentices.* Subrecipient and its Subcontractors shall comply with California Labor Code section 1777.5, 1777.6 and 1777.7 concerning the employment and wages of apprentices. Subrecipient shall be held responsible for its compliance and the compliance of its Subcontractors with California Labor Code section 1777.5, 1777.6 and 1777.7.

11.5. *Working Hours.* Subrecipient and its Subcontractors shall comply with California Labor Code section 1810 through 1815, including: (i) restricting working hours on public works contracts to eight hours a day and forty hours a week, unless all hours worked in excess of 8 hours per day are compensated at not less than 1½ times the basic rate of pay; and (ii) specifying penalties to be imposed on design professionals and subcontractors of \$25 per worker per day for each day the worker works more than 8 hours per day and 40 hours per week in violation of California Labor Code sections 1810 through 1815.

11.6. *Required Provisions for Subcontracts.* Subrecipient shall include, at a minimum, a copy of the following provisions in any contract it enters into with a Subcontractor: California Labor Code section 1771, 1771.1, 1775, 1776, 1777.5, 1810, 1813, 1815, 1860 and 1861.

11.7. *Labor Code Section 1861 Certification.* In accordance with California Labor Code section 3700, Subrecipient and its Subcontractors are required to secure the payment of compensation of their respective employees and by signing this Agreement or any subcontract, respectively, Subrecipient and each of its Subcontractors certifies that “I am aware of the provisions of Section 3700 of the California Labor Code which require every employer to be insured against liability for workers’ compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this contract.” Subrecipient shall include this certification by each Subcontractor in each contract with a Subcontractor.

11.8. *Subrecipient and Subcontractor Registration Requirements.* All work is subject to compliance monitoring and enforcement by DIR. A contractor or subcontractor shall not be qualified to bid on, be listed in a bid proposal subject to the requirements of Public Contract Code section 4104, or engage in the performance of any contract for public work, as defined in Prevailing Wage Law, unless currently registered and qualified to perform the work pursuant to California Labor Code section 1725.5. In accordance with California Labor Code section 1771.1(a), “[i]t is not a violation of this section for an unregistered contractor to submit a bid that is authorized by Section 7029.1 of the Business and Professions Code or by Section 10164 or 2103.5 of the Public Contract Code, provided the contractor is registered to perform public work pursuant to Section 1725.5 at the time the contract is awarded.”

11.8.1. A contractor’s inadvertent error in listing a subcontractor who is not registered pursuant to California Labor Code section 1725.5 in a response to a

solicitation shall not be grounds for filing a bid protest or grounds for considering the bid non-responsive, provided that any of the following apply: (1) the subcontractor is registered prior to bid opening; (2) within twenty-four hours after the bid opening, the subcontractor is registered and has paid the penalty registration fee specified in Labor Code section 1725.5; or (3) the subcontractor is replaced by another registered contractor pursuant to Public Contract Code section 4107.

11.8.2. A contract entered into with any contractor or subcontractor in violation of Labor Code section 1771.1(a) shall be subject to cancellation, provided that a contract for public work shall not be unlawful, void, or voidable solely due to the failure of the awarding body, contractor, or any subcontractor to comply with the requirements of Labor Code section 1725.5.

11.8.3. By entering into this Agreement, Subrecipient is certifying that it has verified or will verify that all Subcontractors used on work subject to Prevailing Wage Law are registered with the DIR in compliance with Labor Code sections 1771.1 and 1725.5, and shall provide proof of such Subcontractor registration to City.

11.9. *Filing of Form PWC-100.* Subrecipient shall timely file a PWC-100 Form (or other form required by DIR) with DIR, as and when required by Prevailing Wage Law, and concurrently deliver a copy of such filed form to City.

11.10. *Filing of Notice of Completion.* Subrecipient shall record a notice of completion in accordance with California Civil Code section 8182, et seq., with the Recorder for the County of San Diego, California, and concurrently deliver a copy of such recorded notice of completion to City.

12. Federal Davis-Bacon Act Compliance. Subrecipient and each Subcontractor shall comply with the Federal "Davis-Bacon Act" (40 USC sections 3141-3144 and sections 3146-3148), as supplemented by Department of Labor regulations (29 C.F.R. Part 5), for construction contracts in excess of \$2,000. Subrecipient and each Subcontractor shall ensure that all laborers and mechanics performing work relating to the Activity are paid at a rate not less than the prevailing wage rate specified in a wage determination made by the United States Secretary of Labor and are paid not less than once per week. If wage rates higher than those required under the Davis-Bacon Act are imposed by State, City or other local law, nothing in this Section 12 is intended to relieve Subrecipient or any Subcontractor of the obligation, if any, to pay the higher wage rate. Subrecipient and each Subcontractor shall submit certified payroll records to City on a weekly basis, including the original statements of compliance.

13. Federally Assisted Construction Contract Required Clauses. Federally assisted construction contracts entered into by Subrecipient or any Subcontractor, shall include the following clause:

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer, recruitment or recruitment

advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided by City's contracting officer, advising the labor union or workers' representative of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by City and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further government contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance; provided, however, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

14. Real Property Restriction. In accordance with 24 C.F.R. section 570.505, if the Activity involves the acquisition or improvement of real property with more than \$25,000 of CDBG



Funds, Subrecipient shall make and enter into the Real Property Restriction and authorizes City to record the Real Property Restriction in the official records of the County with respect to the subject real property. Subrecipient represents and warrants to City that Subrecipient has the, right, power, and authority to make and enter into the Real Property Restriction and authorize City to record the Real Property Restriction in the official records of the County with respect to the subject real property.

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**EXHIBIT F**

**Real Property Restriction (Form)**

*[Attached behind this cover page.]*

RECORDING REQUESTED BY WHEN RECORDED MAIL TO:	
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SPACE ABOVE LINE FOR RECORDER'S USE ONLY

**EXEMPT FROM RECORDING FEES PURSUANT TO GOVT. CODE §27383**

**CITY OF SAN DIEGO  
 COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM  
 DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS  
 RESTRICTING USE OF PROPERTY  
 ( [INSERT SUBRECIPIENT NAME OR PROPERTY IDENTIFICATION] )**

THIS CITY OF SAN DIEGO COMMUNITY DEVELOPMENT BLOCK GRANT DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS RESTRICTING USE OF PROPERTY (this "Regulatory Agreement") is dated as of **[TO BE DETERMINED]**, and is made by and between the CITY OF SAN DIEGO, a California municipal corporation ("City"), and **[INSERT NAME, ENTITY FORM, AND STATE OF DOMICILE OF PROPERTY OWNER]** ("Owner"), with reference to the following recited facts (each, a "Recital").

**RECITALS**

- A. City and Owner previously entered into that certain Fiscal Year 2018 City of San Diego Community Development Block Grant Program Subrecipient Agreement, dated as of July 1, 2017 ("Subrecipient Agreement"), through which City provided certain United States Department of Housing and Urban Development ("HUD") Community Development Block Grant ("CDBG") program funds to Owner for Owner to acquire or improve, in whole or in part, that certain real property specifically defined as the "Property" in Section1;
- B. CDBG program regulations at Title 24 C.F.R. section 570.505 prohibit changing the use or planned use of real property acquired or improved, in whole or in part, with more than \$25,000 of CDBG grant funds;
- C. Owner is willing to enter into and make this Regulatory Agreement to assure City of the use of the Property for the Eligible Activity (defined in Section1) for at least five (5) years after closeout of the grant provided to Owner under the Subrecipient Agreement;
- D. This Regulatory Agreement shall restrict the use of the Property following the date of the first recording of this Regulatory Agreement in the official records of the County of San Diego, California ("Recording Date"), to ensure that the Property shall, at all times from the Recording Date until expiration of this Regulatory Agreement, be used for the Eligible Activity;

NOW, THEREFORE, IN CONSIDERATION OF THE PROMISES, COVENANTS AND UNDERTAKINGS SET FORTH IN THIS REGULATORY AGREEMENT AND FOR OTHER GOOD AND VALUABLE CONSIDERATION, THE RECEIPT AND SUFFICIENCY OF WHICH ARE ACKNOWLEDGED, OWNER COVENANTS, DECLARES AND AGREES FOR THE BENEFIT OF CITY, AS FOLLOWS:

1. **DEFINITIONS.** All words, terms or phrases indicated to be defined words, terms or phrases by initial capitalization in this Regulatory Agreement that are not specifically defined in this Regulatory Agreement shall have the meaning given to the word, term or phrase, respectively, in the Subrecipient Agreement. As used in this Regulatory Agreement, the following words, terms or phrases shall have the meaning as provided in the initial paragraph of this Regulatory Agreement, the Recitals, or in this Section 1, unless the specific context of usage of a particular word, term or phrase requires otherwise.

1.1 **Affiliate.** Any other Person, directly or indirectly, Controlling or Controlled by or under common Control with the specified Person.

1.2 **Application.** Any agreement, application, certificate, document or submission (or amendment of any of the foregoing): (a) necessary or appropriate for Construction of any Improvements, including any application for any building permit, Certificate of Occupancy, utility service or hookup, easement, covenant, condition, restriction, subdivision or such other instrument as Owner may request; or (b) to enable Owner to seek any Approval or to operate the Property in accordance with the Subrecipient Agreement and this Regulatory Agreement.

1.3 **Approval.** Any license, permit, approval, consent, certificate, ruling, variance, authorization, conditional use permit or amendment to any of the foregoing, as shall be necessary or appropriate under any Law to commence, perform or complete any Improvements or to use or occupy any Improvements.

1.4 **Bankruptcy Proceeding.** Any proceeding, whether voluntary or involuntary, under Title 11 of the United States Code or any other or successor State or Federal statute relating to assignment for the benefit of creditors, appointment of a receiver or trustee, bankruptcy, composition, insolvency, moratorium, reorganization or similar matters.

1.5 **CDBG.** Defined in Recital A.

1.6 **Certificate of Occupancy.** A “certificate of occupancy” as defined in the Uniform Building Code published by the International Conference of Building Officials, as adopted by the City, from time to time.

1.7 **City.** Defined in the initial paragraph of this Regulatory Agreement.

1.8 **City Parties.** Collectively, City, the City Council, and the elected officials, employees, agents and attorneys of City.

1.9 **City Party.** Individually, City, the City Council, or the elected officials, employees, agents or attorneys of City.

1.10 **Claim.** Any claim, loss, cost, damage, expense, liability, lien, action, cause of action (whether in tort, contract, under statute, at law, in equity or otherwise), charge, award, assessment, fine or penalty of any kind (including consultant and expert fees and expenses and investigation costs of whatever kind or nature, and if an Indemnitor improperly fails to provide a defense for an Indemnitee or provides a defense under a reservation of rights, then Legal Costs of the Indemnitee) and any judgment.

1.11 **Closeout Date.** The date on the “Closeout Notice” issued by City to Owner pursuant to the Subrecipient Agreement.

1.12 **Condemnation.** Any temporary or permanent taking of (or of the right to use or occupy) all or any part of the Property by a Government through exercise of the power of eminent domain or other similar proceeding.

1.13 **Construction.** Any alteration, construction, excavation, demolition, grading, development, expansion, reconstruction, redevelopment, repair, restoration or other work affecting the Property, including new construction.

1.14 **Control.** Possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether by ownership of Equity Interests, by contract or otherwise.

1.15 **Controlling and Controlled.** Exercising or having Control.

1.16 **County.** The County of San Diego, California.

1.17 **Default.** Any Monetary Default or Non-Monetary Default.

1.18 **Eligible Activity.** The activity described in Exhibit B attached to this Regulatory Agreement.

1.19 **Environmental Claim.** Any and all claims, demands, damages, losses, liabilities, obligations, penalties, fines, actions, causes of action, judgments, suits, proceedings, costs, disbursements or expenses, including Legal Costs and fees and costs of environmental consultants and other experts, and all foreseeable and unforeseeable damages or costs of any kind or of any nature whatsoever, directly or indirectly, relating to or arising from any actual or alleged violation of any Environmental Law or any Hazardous Substance Discharge.

1.20 **Environmental Law.** All Federal, State, local or municipal laws, rules, orders, regulations, statutes, ordinances, codes, decrees or requirements of any Government regulating, relating to, or imposing liability or standards of conduct concerning any Hazardous Substance, or pertaining to occupational health or industrial hygiene (only to the extent that the occupational health or industrial hygiene laws, ordinances, or regulations relate to Hazardous Substances affecting the Property), occupational or environmental conditions affecting the Property, as now or may at any later time be in effect, and any other Federal, State, local or

municipal law, statute, ordinance or regulation now in effect or later enacted that pertains to occupational health or industrial hygiene, to the extent the occupational health or industrial hygiene laws, ordinances or regulations relate to Hazardous Substances affecting the Property, or the regulation or protection of the environment, including ambient air, soil, soil vapor, groundwater, surface water or land use.

**1.21 Equity Interest.** All or any part of any direct equity or ownership interest(s) (whether stock, partnership interest, beneficial interest in a trust, membership interest in a limited liability company, or other interest of an ownership or equity nature) in any entity, at any tier of ownership, that directly owns or holds any ownership or equity interest in a Person.

**1.22 Event of Default.** The occurrence of any one or more of the following:

**1.22.1 Monetary Default.** A Monetary Default that continues for ten (10) calendar days after Notice from City, specifying in reasonable detail the amount of money not paid and the nature and calculation of each such payment or evidence of insurance not provided;

**1.22.2 Non-Monetary Default.** Any Non-Monetary Default that is not cured within thirty (30) days after Notice to Owner describing the Non-Monetary Default in reasonable detail. In the case of a Non-Monetary Default that cannot with reasonable diligence be cured within thirty (30) days after the effective date of a Notice of Default, the Owner shall only be in Default if the Owner does not do all of the following: (a) within thirty (30) days after Notice of such Non-Monetary Default, advise the City of Owner's intention to take all reasonable steps to cure such Non-Monetary Default; (b) duly commence such cure within such thirty (30) day period; and (c) diligently prosecute such cure to completion within a reasonable time under the circumstances.

**1.23 Federal.** Relating or pursuant to the authority of the federal government of the United States of America.

**1.24 Government.** Any and all courts, boards, agencies, commissions, offices or authorities of any nature whatsoever of any governmental unit (Federal, State, County, district, municipal or otherwise) whether now or later in existence.

**1.25 Hazardous Substance.** Any flammable substance, explosive, radioactive material, asbestos, asbestos-containing material, polychlorinated biphenyl, chemical known to cause cancer or reproductive toxicity, pollutant, contaminant, hazardous waste, medical waste, toxic substance or related material, petroleum, petroleum product or any "hazardous" or "toxic" material, substance or waste that is defined by those or similar terms or is regulated as such under any Law, any matter, waste or substance that is subject to any Law regulating, relating to or imposing obligations, liability or standards of conduct concerning protection of human health, plant life, animal life, natural resources, property or the enjoyment of life or property free from the presence in the environment of any solid, liquid, gas, odor or any form of energy from whatever source or in the regulations adopted pursuant to Law.

**1.26 Hazardous Substance Discharge.** Any deposit, discharge, generation, release or spill of a Hazardous Substance that occurs at, on, under, into, from or

around the Property, or during transportation of any Hazardous Substance to or from the Property, whether or not caused by a Party.

1.27 **HUD.** Defined in Recital A.

1.28 **Improvements.** Any and all physical improvements or modifications to the Property, including building systems or other systems used in the operation of the Property.

1.29 **Indemnify.** Where this Regulatory Agreement states that any Indemnitor shall “indemnify” any Indemnitee from, against, or for a particular Claim, the Indemnitor shall indemnify the Indemnitee and defend and hold the Indemnitee harmless from and against such Claim (alleged or otherwise). “**Indemnified**” shall have the correlative meaning.

1.30 **Indemnitee.** Any Person entitled to be Indemnified under the terms of this Regulatory Agreement.

1.31 **Indemnitor.** A Party that agrees to Indemnify any other Person under the terms of this Regulatory Agreement.

1.32 **Law.** Every law, ordinance, requirement, order, proclamation, directive, rule or regulation of any Government applicable to the Property, in any way, including any development, Construction, use, maintenance, taxation, operation, occupancy of or environmental condition affecting the Property, or otherwise relating to this Regulatory Agreement or any Party’s rights, obligations or remedies under this Regulatory Agreement, or any transfer of any of the foregoing, whether in force on the date of this Regulatory Agreement or passed, enacted, modified, amended or imposed at some later time, subject in all cases, however, to any applicable waiver, variance or exemption.

1.33 **Legal Costs.** In reference to any Person, all reasonable costs and expenses such Person incurs in any legal proceeding (or other matter for which such Person is entitled to be reimbursed for its Legal Costs), including reasonable attorneys’ fees, court costs and expenses, and consultant and expert witness fees and expenses.

1.34 **Mayor.** The Mayor of City or his or her designee or successor in function.

1.35 **Monetary Default.** Any failure by Owner to pay or deposit, when and as this Regulatory Agreement requires, any amount of money or evidence of any insurance coverage required to be provided under this Regulatory Agreement, or the Subrecipient Agreement, whether to or with City or a Third Person.

1.36 **Non-Monetary Default.** The occurrence of any of the following described events, except to the extent constituting a Monetary Default: (a) Owner’s failure to perform any of Owner’s obligations under this Regulatory Agreement; (b) Owner’s failure to comply with any affirmative or negative covenant or material restriction or prohibition in this Regulatory Agreement; or (c) any other event or circumstance that, with the passage of time or giving of Notice, or both, would constitute a breach of this Regulatory Agreement by Owner.

1.37 **Notice.** Any consent, demand, designation, election, notice or request relating to this Regulatory Agreement, including any Notice of Default. All Notices must be in writing, which includes Notice by e-mail.

1.38 **Notice of Default.** Any Notice of a Default or alleged Default.

1.39 **Notify.** To give a Notice.

1.40 **Owner.** Defined in the initial paragraph of this Regulatory Agreement.

1.41 **Owner Parties.** Collectively, Owner and all of the partners, members, directors, officers, employees, agents, managers and holders of Equity Interests in Owner.

1.42 **Parties.** Collectively, City and Owner.

1.43 **Party.** Individually, either City or Owner, as applicable.

1.44 **Person.** Any association, corporation, governmental entity or agency, individual, joint venture, joint-stock company, limited liability company, partnership, trust, unincorporated organization or other entity of any kind.

1.45 **Property.** That certain real property located within the City of San Diego, County of San Diego, State of California, specifically described in the legal description attached as Exhibit "A" to this Regulatory Agreement, which is incorporated into this Regulatory Agreement by this reference.

1.46 **Recital.** Defined in the initial paragraph of this Regulatory Agreement.

1.47 **Record, recorded, recording or recordation.** Recordation of the referenced document in the official records of the County.

1.48 **Recording Date.** Defined in Recital D.

1.49 **Restoration.** After a loss, the alteration, clearing, rebuilding, reconstruction, repair, replacement, restoration or safeguarding of the damaged or remaining Improvements, substantially consistent with their condition before the loss, subject to any changes in Law that would limit the foregoing.

1.50 **Restore.** Accomplish a Restoration.

1.51 **State.** The State of California.

1.52 **Subrecipient Agreement.** Defined in Recital A.

1.53 **Term.** The period of time beginning on the Recording Date and ending on the fifth (5th) anniversary of the Closeout Date.

1.54 **Third Person.** Any Person that is not a Party, an Affiliate of a Party or an elected official, officer, director, manager, shareholder, member, principal, partner,



employee or agent of a Party.

**1.55 Unavoidable Delay.** A delay in either Party performing any obligation under this Regulatory Agreement, arising from or on account of any cause whatsoever beyond the Party's reasonable control, including strikes, labor troubles or other union activities, casualty, war, acts of terrorism, riots, litigation, governmental action or inaction, regional natural disasters or inability to obtain required materials. Unavoidable Delay shall not include delay caused by a Party's financial condition or insolvency.

## 2. CDBG COVENANTS AND RESTRICTIONS

**2.1 Owner Acknowledgment of Potential Impact of Regulatory Agreement.** Owner acknowledges and agrees that this Regulatory Agreement imposes certain covenants, conditions and restrictions on the use and occupancy of the Property during the Term that may not constitute the highest and best use of the Property.

\_\_\_\_\_  
Initials Authorized  
Owner Representative(s)

**2.2. Agreement to Record.** Owner agrees that City may record this Regulatory Agreement against the Property in the official records of the County.

**2.3 CDBG Restrictive Covenants.** Subject to the terms, conditions and provisions of this Regulatory Agreement, Owner covenants to and for the benefit of City that Owner shall develop, own, manage and operate, or cause the management and operation of, the Property at all times during the Term for the Eligible Activity and excluding any use inconsistent with the Eligible Activity.

**2.4 Continuous Operation Covenant.** Owner covenants to and for the benefit of City to cause the Property to be continuously operated, in accordance with the other provisions of this Section2, throughout the Term.

**2.5 Abandonment.** Owner shall not abandon or surrender the operation of all or any part of the Property during the Term, except due to material casualty or Condemnation that reasonably justifies such abandonment or surrender.

**2.6 Compliance.** Owner shall, at all times during the Term and at Owner's sole cost and expense, in all material respects: (a) comply with all Laws; and (b) procure and comply with all Approvals required by Law.

**3. MONITORING.** City shall have the right, but not the obligation, to monitor and enforce the obligations of Owner under this Regulatory Agreement. Owner covenants that it shall comply with any reasonable monitoring program set up by City to monitor or enforce the obligations of Owner under this Regulatory Agreement, including paying all costs associated with the monitoring and enforcement of the obligations of Owner under this Regulatory Agreement.

## 4. HAZARDOUS SUBSTANCES

**4.1 Restrictions.** Owner shall not cause or permit to occur on, under, at or from the

Property during the Term: (a) any violation of any Environmental Law; or (b) the use, generation, release, manufacture, refining, production, processing, storage or disposal of any Hazardous Substance, or transportation to or from the Property of any Hazardous Substance, unless both: (i) reasonably necessary and customary to construct, operate or maintain the Property for uses this Regulatory Agreement permits; and (ii) in compliance with all Environmental Laws.

4.2 Compliance; Clean-Up. Owner shall, at Owner's sole cost and expense: (a) comply with all Environmental Laws applicable to the Property and, to the extent Environmental Law requires, clean up any Hazardous Substance Discharge; (b) make all submissions to, deliver all information required by, and otherwise fully comply with all requirements of any Government under any Environmental Law; (c) if any Government requires any clean-up plan or clean-up because of a Hazardous Substances Discharge, prepare and submit the required plans and all related bonds and other financial assurances; (d) promptly and diligently carry out all such clean-up plans; and (e) Indemnify the City Parties against any Hazardous Substance Discharge or violation of Environmental Law, in accordance with Section 7. Owner's obligations under this Section 4 shall not limit Owner's rights against Third Persons (exclusive of the City Parties).

## 5. OBLIGATION TO REPAIR

5.1 Obligation to Repair and Restore Damage Due to Casualty Covered by Insurance. Subject to Section 5.4, if the Improvements on the Property shall be totally or partially destroyed or rendered wholly or partly uninhabitable by fire or other casualty required to be insured against by Owner pursuant to the Subrecipient Agreement, Owner shall promptly proceed to obtain the proceeds of such insurance and take all steps necessary to begin Restoration and, immediately upon receipt of such insurance proceeds, promptly and diligently commence the Restoration of the Improvements to as close as possible to the same condition as the Improvements were in before the casualty, to the extent of the insurance proceeds available to pay the actual cost of Restoration, except that Owner shall pay all deductible or self-insured retention amounts required under the applicable insurance policy or policies, at Owner's expense. Owner shall complete Restoration of the Improvements as soon as reasonably possible, so that the Property can continue to be used for the Eligible Activity in accordance with this Regulatory Agreement. Subject to extensions of time for Unavoidable Delay, Restoration shall begin within six (6) months after the date Owner obtains the proceeds of insurance covering the casualty, unless the Mayor, in his or her reasonable discretion, approves a longer period of time.

5.2 Failure to Obtain Insurance. If Owner fails to obtain insurance covering casualty loss to the Improvements as required by the Subrecipient Agreement, Owner shall be obligated to Restore any and all partial or total damage to the Improvements in accordance with this Section 5.2 at Owner's expense.

5.3 Continued Operations. During any period of Restoration of the Improvements, Owner shall continue, or cause the continuation of, the operation of the Property to the extent reasonably practicable from the standpoint of prudent business management.

#### 5.4 Damage or Destruction Due to Cause Not Required to be Covered by Insurance

. If the Improvements are completely destroyed or substantially damaged by a casualty that Owner is not required to insure against under the Subrecipient Agreement (and Owner has not insured against), then Owner shall not be required to Restore such Improvements and may elect not to Restore such Improvements within ninety (90) days after such substantial damage or destruction by delivering Notice of such election to City. If Owner is not required to Restore damaged Improvements and Owner timely Notifies City of Owner's election not to Restore, Owner shall nevertheless remove all debris from the Property. As used in this Section 5.4, "substantial damage" caused by a casualty not required to be (and not) covered by insurance shall mean damage or destruction that is more than ten percent (10%) of the replacement cost of the Improvements. This Regulatory Agreement shall not be affected by Owner's election not to Restore any Improvements.

6. **CONDEMNATION.** If any portion of the Property is taken by Condemnation during the Term, then Owner shall Restore the remaining portions of the Property with reasonable promptness, to the extent practicable, and this Regulatory Agreement shall not be affected.

#### 7. **INDEMNITY.**

7.1 Owner Indemnity Obligations. Owner shall Indemnify the City Parties against any Claim to the extent such Claim arises from: (a) any wrongful intentional act or negligence of Owner Parties; (b) any Application made by or at Owner's request; (c) any agreements that Owner (or anyone claiming by or through Owner) makes with a Third Person regarding the Property; or (d) any Environmental Claim attributable to any action or failure to act by Owner Parties.

7.2 No City Liability. During the Term: (a) Owner is and shall be responsible for operation of the Property; and (b) City shall not be liable for any injury or damage to any property (of Owner or any other Person) or any Person occurring on or about the Property, except to the extent caused by City's wrongful intentional act or negligence.

7.3 Independent of Insurance Obligations. Owner's indemnification obligations under this Regulatory Agreement shall not be construed or interpreted as in any way restricting, limiting or modifying Owner's insurance or other obligations under this Regulatory Agreement or the Subrecipient Agreement. Owner's obligation to Indemnify the City Parties under this Regulatory Agreement is independent of Owner's insurance and other obligations under this Regulatory Agreement or the Subrecipient Agreement. Owner's compliance with Owner's insurance obligations under the Subrecipient Agreement and obligations under this Regulatory Agreement shall not in any way restrict, limit or modify Owner's indemnification obligations under this Regulatory Agreement and are independent of Owner's other obligations under the Subrecipient Agreement or this Regulatory Agreement.

7.4 Survival of Indemnification and Defense Obligations. The indemnity and defense obligations of Owner under this Regulatory Agreement shall survive the expiration or earlier termination of this Regulatory Agreement, until any and all actual or

prospective Claims regarding any matter subject to an indemnity obligation under this Regulatory Agreement are fully, finally, absolutely and completely barred by the applicable statutes of limitations or entry of a court judgment that cannot be appealed or further reviewed.

**7.5 Immediate Duty to Defend.** The duty to defend under this Regulatory Agreement includes Claims for which an Indemnitee may be liable without fault or strictly liable and applies regardless of whether the issues of negligence, liability, fault, default or other obligation on the part of the Indemnitor or the Indemnitee have been determined. The duty to defend applies immediately, regardless of whether the Indemnitee has paid any sums or incurred any detriment arising out of or relating (directly or indirectly) to any Claims. It is the express intention of the Parties that an Indemnitee be entitled to obtain summary adjudication or summary judgment regarding an Indemnitor's duty to defend the Indemnitee at any stage of any Claim within the scope of the Indemnitor's indemnity obligations under this Regulatory Agreement.

**7.6 No Limitation.** Owner acknowledges and agrees that Owner's duties, obligations and liabilities under this Regulatory Agreement, including under Section 4 and Section 6, are in no way limited or otherwise affected by any information any of the City Parties may have concerning the Property or the presence within the Property of any Hazardous Substance, whether the City Parties obtained such information from Owner, from their own investigations or from a Third Person.

**8. NO CITY RESPONSIBILITY FOR PROPERTY.** City shall have no responsibility for the Construction, installation, management, operation or maintenance of the Improvements or the Property, financially or otherwise.

**9. NOTICE OF LIENS.** Owner shall promptly Notify City of any lien or interest asserted against or attached to all or any portion of the Improvements or the Property, whether by voluntary act of Owner or otherwise, including any and all filings of mechanic's liens.

**10. COVENANTS RUN WITH THE LAND.** Owner and City declare their mutual specific intent that the covenants, conditions, restrictions, reservations and agreements set forth in this Regulatory Agreement are part of a plan for the implementation of CDBG eligible activities pursuant to Title 24 Code of Federal Regulations sections 570.1 through 570.913 within the territorial jurisdiction of City, and that each shall be deemed covenants running with the land of the Property, binding upon each successor-in-interest of Owner in the Property for the duration of the Term. Regardless of classification or characterization, each of the covenants, conditions, restrictions and agreements contained in this Regulatory Agreement touch and concern the land of the Property and each of them is expressly declared to be for the benefit and in favor of City for the duration of the Term, regardless of whether City is or remains an owner of any land or interest in land to which such covenants, conditions, restrictions or agreements relate. City, in the event of any Event of Default under this Regulatory Agreement, has the right to exercise all of the rights and remedies and maintain any actions at law or suits in equity or other proper proceedings, relating to such Event of Default, as provided in this Regulatory Agreement. Owner expressly assumes the duty and obligation to perform each of the agreements and covenants and to honor each of the reservations and restrictions set forth in this Regulatory Agreement. Each and every contract, deed or other instrument hereafter executed covering or conveying all or any portion of the Property or any interest in the

Property shall incorporate all of the provisions of this Regulatory Agreement, either expressly or by reference. Each and every contract, deed or other instrument transferring any estate or interest in the Property shall conclusively be deemed to have been executed, delivered and accepted subject to the agreements, covenants, conditions, reservations and restrictions of this Regulatory Agreement, regardless of whether such agreements, covenants, conditions, reservations and restrictions are set forth in or referenced in such contract, deed or other instrument.

## 11. REMEDIES

11.1 **Remedies.** If an Event of Default occurs, then City shall, in City's sole and absolute discretion, have the right to exercise any or all of the following described remedies, all cumulative (so exercise of one remedy shall not preclude exercise of another remedy), in addition to such other remedies as may be available at law or in equity or under any other provision of this Regulatory Agreement:

11.1.1 **Recover CDBG Investment.** City may recover from Owner the current fair market value of the Property, less any portion of such fair market value attributable to expenditures of non-CDBG funds for acquisition of, and improvements to, the Property.

11.1.2 **Suits Before End of Term.** City may sue Owner for damages or other relief, from time to time, without terminating this Regulatory Agreement, including action in mandamus, specific performance, or other suit, action or proceeding at law or in equity, to require Owner to perform the covenants or agreements or observe the conditions or restrictions of this Regulatory Agreement, or enjoin any acts or things that may be unlawful or in violation of the rights of City under this Regulatory Agreement, or by other action at law or in equity, as necessary or convenient to enforce the covenants, agreements, conditions or restrictions of this Regulatory Agreement. Nothing in this Section 11.1.2 shall be construed to prohibit City from suing Owner following expiration or termination of the Term, subject to applicable Laws.

11.1.3 **Receipt of Money.** No receipt of money by City from Owner after any Notice of Default shall affect any Notice previously given to Owner, or waive City's right to enforce payment or deposit of any amount payable or later falling due. City and Owner agree that after service of Notice of Default or the commencement of suit or proceedings, or after final order or judgment, City may demand, receive and collect any money due or thereafter falling due, without in any manner affecting such Notice, proceeding, order, suit or judgment, all such money collected being deemed payments on account of Owner's liability to City.

11.1.4 **No Implied Waiver.** No failure by City to insist upon strict performance of any condition, covenant, agreement, restriction or reservation of this Regulatory Agreement or to exercise any right or remedy upon an Event of Default, and no acceptance of full or partial payment of any amount of money due or becoming due to City during the continuance of any such Event of Default, shall waive any such Default or such condition, covenant, agreement, restriction or reservation. No obligation of Owner under this Regulatory Agreement, and no Default or Event of Default, shall be modified, except by a

written instrument signed by City. No waiver of any Default or Event of Default shall modify this Regulatory Agreement and each and every covenant, agreement, condition, restriction and reservation of this Regulatory Agreement shall continue in full force and effect with respect to any other then-existing or subsequent Default or Event of Default relating to such condition, covenant, agreement, restriction or reservation of this Regulatory Agreement.

**11.1.5 Damages.** City may recover from Owner all damages City incurs by reason of Owner's Event of Default and reimbursement of City's reasonable out of pocket costs, including Legal Costs. City may recover such damages at any time after Owner's Event of Default, including after the expiration of the Term. Notwithstanding any Law to the contrary, City need not commence separate actions to enforce Owner's obligations for each amount or payment not paid or each month's accrual of damages or costs for Owner's Event of Default, but may bring and prosecute a single combined action for all such damages and costs.

**11.1.6 Injunction of Breaches.** Whether or not an Event of Default has occurred, City may obtain a court order enjoining Owner from continuing any Default or from committing any threatened Default. Owner specifically and expressly acknowledges that monetary damages would not constitute an adequate remedy to City for any Non-Monetary Default.

**11.2 Specific Enforcement.** Owner agrees that specific enforcement of Owner's non-monetary obligations under this Regulatory Agreement is one of the reasons that City entered into the Subrecipient Agreement and that, if Owner breaches any such obligation, potential monetary damages to City, would be difficult, if not impossible, to evaluate or quantify. Therefore, in addition to any other relief to which City may be entitled as a consequence of Owner's Event of Default under this Regulatory Agreement, Owner agrees to the imposition of the remedy of specific performance against Owner under this Regulatory Agreement.

**11.3 Enforcement.** City shall have the power to enforce this Regulatory Agreement and no other Person shall have any right or power to enforce any provision of this Regulatory Agreement on behalf of City or to compel City to enforce any provision of this Regulatory Agreement against Owner or the Property.

## 12. GENERAL PROVISIONS

**12.1 Relationship of Parties.** Nothing contained in this Regulatory Agreement shall be interpreted or understood by the Parties or by any Third Person, as creating the relationship of employer and employee, principal and agent, limited or general partnership, or joint venture between City and Owner or Owner's agents, employees or contractors. Owner shall at all times be an independent contractor and shall be wholly responsible for the manner in which Owner or Owner's agents, or both, perform any services required of them by the terms of this Regulatory Agreement. Except as otherwise expressly provided in this Regulatory Agreement, Owner has the right to exercise full control of employment, direction, compensation and discharge of all Persons assisting Owner in the development, operation or maintenance of the Property. Owner shall be solely responsible for all matters relating to payment of Owner's employees and agents, including compliance with tax

withholding and all other Laws governing such employees or agents. Owner shall be solely responsible for Owner's own acts and those of Owner's agents and employees.

12.2 No Subordination. Owner acknowledges and agrees that this Regulatory Agreement shall, at all times and under all circumstances, be prior, paramount, and senior to any other non-statutory lien, encumbrance, interest or estate (whether recorded or not) relating to all or any part of the Property. City shall be under no obligation, under any circumstance or for any reason, to subordinate all or any part of this Regulatory Agreement to any lien, encumbrance, interest, estate or other obligation of Owner relating to all or any part of the Property. Owner shall obtain and record all agreements and instruments necessary to place this Regulatory Agreement in first lien position with respect to the Property.

12.3 No Claims. Nothing contained in this Regulatory Agreement shall create or justify any claim against City by any Person that Owner may have employed or with whom Owner may have contracted relative to the purchase of materials, supplies or equipment, or the furnishing or the performance of any work or services with respect to Construction, operation or maintenance of the Property.

12.4 Approvals. Any approvals required from a Party under this Regulatory Agreement shall not be unreasonably withheld, conditioned or delayed, except where otherwise specifically provided in this Regulatory Agreement. Wherever this Regulatory Agreement states that a Party's approval shall be "reasonable" or not unreasonably withheld: (a) such approval shall not be unreasonably withheld, delayed or conditioned; (b) no withholding of approval shall be deemed reasonable, unless withheld by Notice specifying reasonable grounds, in reasonable detail, for such withholding, and indicating specific reasonable changes in the proposal under consideration that would make it acceptable (if any); and (c) if a Party grants its consent to any matter, this shall not waive its right to require such consent for any further or similar matter.

12.5 Non-liability of City Officials or Employees. No City Party shall be personally liable to Owner or any successor in interest to Owner, in the event of any breach by City under this Regulatory Agreement.

12.6 Governing Law. This Regulatory Agreement shall be governed by the procedural and substantive laws of the State, without application of conflicts of laws principles or statutes.

12.7 Amendment. This Regulatory Agreement may be amended only by a written instrument signed by the authorized representatives of Owner and City, respectively.

12.8 Principles of Interpretation. No inference in favor of or against any Party shall be drawn from the fact that such Party has drafted any part of this Regulatory Agreement. The Parties have participated substantially in the negotiation, drafting and revision of this Regulatory Agreement, with advice from legal counsel and other advisers of their own selection. A term defined in the singular in this Regulatory Agreement may be used in the plural and vice versa, all in accordance with ordinary principles of English grammar, which govern all language in this Regulatory Agreement. The words "include" and "including" in this Regulatory Agreement shall

be construed to be followed by the words: “without limitation.” Each collective noun in this Regulatory Agreement shall be interpreted as if followed by the words “(or any part of it),” except where the context clearly requires otherwise. Every reference to any document, including this Regulatory Agreement, refers to such document as modified from time to time (except, at City’s option, any modification that violates this Regulatory Agreement), and includes all exhibits, attachments, schedules and riders to such document. The word “or” in this Regulatory Agreement includes the word “and,” except where the context clearly requires otherwise. Every reference to a law, statute, regulation, order, form or similar governmental requirement refers to each such requirement as amended, modified, renumbered, superseded or succeeded, from time to time.

**12.9 Attorney’s Fees.** If a Party brings a legal action to enforce this Regulatory Agreement or otherwise arising out of this Regulatory Agreement, the prevailing Party in such action shall be entitled to recover Legal Costs to be fixed by the court in which a judgment is entered, as well as the costs of such legal action, from the other Party. For the purposes of this Regulatory Agreement, in the case of City, Legal Costs include the salaries, costs and overhead of the lawyers employed in the office of the City Attorney who are legal counsel to City in such an action.

**12.10 Severability.** If any term or provision of this Regulatory Agreement or its application to any Person or circumstance shall to any extent be invalid or unenforceable, then the remainder of this Regulatory Agreement, or the application of such term or provision to Persons or circumstances, other than those as to which the term or provision is invalid or unenforceable, shall not be affected by such invalidity. All remaining terms and provisions of this Regulatory Agreement shall be valid and be enforced to the fullest extent Law allows.

**12.11 Time is of the Essence.** Time is of the essence with respect to the performance of each term, provision, covenant, condition, restriction, reservation or agreement contained in this Regulatory Agreement.

**12.12 Unavoidable Delay: Extension of Time of Performance.**

**12.12.1 Notice.** Subject to any specific provisions of this Regulatory Agreement stating that they are not subject to Unavoidable Delay or otherwise limiting or restricting the effects of an Unavoidable Delay, performance by either Party under this Regulatory Agreement shall not be deemed or considered to be in Default, where any such Default is due to the occurrence of an Unavoidable Delay. Any Party claiming an Unavoidable Delay shall Notify the other Party: (a) within twenty (20) days after such Party knows of any such Unavoidable Delay; and (b) within twenty (20) days after such Unavoidable Delay ceases to exist. To be effective, any Notice of an Unavoidable Delay must describe the Unavoidable Delay in reasonable detail. The Party claiming an extension of time to perform due to an Unavoidable Delay shall exercise commercially reasonable efforts to cure the condition causing the Unavoidable Delay, within a reasonable time.

**12.12.2 Assumption of Economic Risks.** OWNER EXPRESSLY AGREES THAT ADVERSE CHANGES IN ECONOMIC CONDITIONS OF OWNER SPECIFICALLY OR THE ECONOMY GENERALLY OR CHANGES IN



MARKET CONDITIONS OR DEMAND OR CHANGES IN THE ECONOMIC ASSUMPTIONS OF OWNER THAT MAY HAVE PROVIDED A BASIS FOR ENTERING INTO THIS REGULATORY AGREEMENT SHALL NOT OPERATE TO EXCUSE OR DELAY THE PERFORMANCE OF EACH AND EVERY ONE OF OWNER'S OBLIGATIONS AND COVENANTS ARISING UNDER THIS REGULATORY AGREEMENT. ANYTHING IN THIS REGULATORY AGREEMENT TO THE CONTRARY NOTWITHSTANDING, OWNER EXPRESSLY ASSUMES THE RISK OF UNFORESEEABLE CHANGES IN ECONOMIC CIRCUMSTANCES OR MARKET DEMAND OR CONDITIONS AND WAIVES, TO THE GREATEST EXTENT ALLOWED BY LAW, ANY DEFENSE, CLAIM OR CAUSE OF ACTION BASED IN WHOLE OR IN PART ON ECONOMIC NECESSITY, IMPRACTICABILITY, CHANGED ECONOMIC CIRCUMSTANCES, FRUSTRATION OF PURPOSE OR SIMILAR THEORIES. OWNER AGREES THAT ADVERSE CHANGES IN ECONOMIC CONDITIONS, EITHER OF OWNER SPECIFICALLY OR THE ECONOMY GENERALLY, OR CHANGES IN MARKET CONDITIONS OR DEMANDS, SHALL NOT OPERATE TO EXCUSE OR DELAY THE STRICT OBSERVANCE OF EACH AND EVERY ONE OF THE OBLIGATIONS, COVENANTS, CONDITIONS AND REQUIREMENTS OF THIS REGULATORY AGREEMENT. OWNER EXPRESSLY ASSUMES THE RISK OF SUCH ADVERSE ECONOMIC OR MARKET CHANGES, WHETHER OR NOT FORESEEABLE AS OF THE RECORDING DATE.

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Initials of Authorized  
Owner Representative(s)

12.13 Titles and Headings for Reference Only. The titles and headings of the articles, paragraphs or sections of this Regulatory Agreement are for convenience of reference only and are not to be considered a part of this Regulatory Agreement and shall not in any way interpret, modify or restrict the meaning of any term, provision, covenant, condition, restriction, reservation or agreement contained in this Regulatory Agreement.

12.14 Notices. Any and all Notices sent by either Party to the other Party pursuant to or as required by this Regulatory Agreement shall be proper, if in writing and transmitted to the address of City or Owner, as applicable, as set forth in Exhibit C attached to this Regulatory Agreement, by one or more of the following methods: (a) e-mail, (b) messenger for immediate personal delivery, (c) a nationally recognized overnight (one business day) delivery service (i.e., Federal Express, United Parcel Service, etc.) or (d) registered or certified mail, postage prepaid, return receipt requested, through the United States Postal Service. Notices may be sent in the same manner to such other addresses as either Party may from time to time designate by Notice, in accordance with this Section 12.14. A Notice shall be deemed to be received by the addressee, regardless of whether or when any return receipt is received by the sender or the date set forth on such return receipt, when the Notice is transmitted by e-mail, on the date the Notice is delivered by personal delivery, on the date the Notice is delivered (or the date of the second attempted delivery, as set forth in a written statement of the delivery service) by a nationally recognized overnight delivery service or three (3) calendar days after the Notice is deposited with the United States Postal Service as provided in this Section 12.14.

Rejection, other refusal to accept or the inability to deliver a Notice because of a changed address of which no Notice was given, shall be deemed receipt of the Notice. Any attorney representing a Party may give any Notice on behalf of such Party.

12.15 Counterparts. This Regulatory Agreement may be signed in multiple counterpart originals, each of which shall be deemed to be an original, and all of which together shall constitute one and the same instrument. This Regulatory Agreement includes seventeen (17) pages and three (3) attached exhibits.

12.16 Integration. This Regulatory Agreement constitutes the entire understanding and integrates all of the terms, conditions, covenants, restrictions, reservations, terms, provisions and agreements of City and Owner regarding the subject matter of this Regulatory Agreement, and supersedes all prior negotiations or previous agreements between City and Owner with respect to the subject matter of this Regulatory Agreement.

12.17 No Merger. None of the terms, conditions, covenants, restrictions, reservations, terms, provisions or agreements set forth in this Regulatory Agreement shall be deemed to be merged with any deed conveying title to any estate or interest in the Property.

**[Remainder of page intentionally blank. Signatures appear on following page.]**

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**SIGNATURE PAGE  
TO  
CITY OF SAN DIEGO COMMUNITY DEVELOPMENT BLOCK GRANT  
DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS  
RESTRICTING USE OF PROPERTY  
( [INSERT SUB-RECIPIENT NAME OR PROPERTY IDENTIFICATION] )**

IN WITNESS WHEREOF, Owner and City have signed and entered into this Regulatory Agreement by and through the signatures of their respective authorized representative(s), as set forth below:

**CITY:**

CITY OF SAN DIEGO,  
a municipal corporation

**OWNER:**

[INSERT OWNER SIGNATURE BLOCK]

By: \_\_\_\_\_  
Lydia Moreno  
Deputy Director  
Economic Development Department

Approved as to form:

MARA W. ELLIOTT  
City Attorney

By: \_\_\_\_\_  
Delmar G. Williams  
Deputy City Attorney

**EXHIBIT "A"  
TO  
CITY OF SAN DIEGO COMMUNITY DEVELOPMENT BLOCK GRANT  
DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS  
RESTRICTING USE OF PROPERTY  
( [INSERT SUB-RECIPIENT NAME OR PROPERTY IDENTIFICATION] )**

**Property Legal Description**

**[To be inserted.]**

**EXHIBIT "B"**  
**TO**  
**CITY OF SAN DIEGO COMMUNITY DEVELOPMENT BLOCK GRANT**  
**DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS**  
**RESTRICTING USE OF PROPERTY**  
**( [INSERT SUB-RECIPIENT NAME OR PROPERTY IDENTIFICATION] )**

**Eligible Activity**

**[To be inserted.]**

**EXHIBIT "C"**  
**TO**  
**CITY OF SAN DIEGO COMMUNITY DEVELOPMENT BLOCK GRANT**  
**DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS**  
**RESTRICTING USE OF PROPERTY**  
**( [INSERT SUB-RECIPIENT NAME OR PROPERTY IDENTIFICATION] )**

**Notice Addresses**

If to Owner:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attention: \_\_\_\_\_  
E-Mail: \_\_\_\_\_

If to City:

City of San Diego  
Economic Development Department  
Attn: Community Development Division  
Program Manager  
1200 Third Avenue  
Suite 1400  
San Diego, CA 92101  
E-Mail: CDBG@sandiego.gov