

POTRERO YARD MODERNIZATION PROJECT

INFRASTRUCTURE FACILITY PROJECT AGREEMENT

BETWEEN

THE CITY AND COUNTY OF SAN FRANCISCO

ACTING BY AND THROUGH THE

SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY

AND

PRG – POTRERO PROPERTIES LLC

DATED AS OF [_____, 2026]

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- Exhibit 16 Federal, State and City Requirements
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INFRASTRUCTURE FACILITY PROJECT AGREEMENT

POTRERO YARD MODERNIZATION PROJECT

This Project Agreement (this “**Agreement**”) is made and entered into this [] day of [], 2026 (the “**Effective Date**”), by and between the City and County of San Francisco (“**City**”), a municipal corporation acting in its proprietary capacity by and through the San Francisco Municipal Transportation Agency (“**SFMTA**”), and PRG – Potrero Properties LLC (“**Non-Profit Entity**” or “**NPE**”), a Delaware limited liability company whose sole member is Provident Resources Group Inc. (the “**Non-Profit Parent**”), a Georgia non-profit corporation and a tax-exempt entity under Section 501(a) of the Internal Revenue Code as an entity organized under Section 501(c)(3) of the Internal Revenue Code, with reference to the following facts:

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

B. This Agreement addresses the design, construction and financing of a transit operations facility (the “**Infrastructure Facility**”), and the integration of the Infrastructure Facility, and its interface with, a future HCC (together, the “**Project**”). If implemented, one or more Housing and Commercial Components will be delivered by a HCC Project Company, under one or more separate agreements. The Infrastructure Facility and the HCC are, collectively, the “**Facility**”.

C. On March 16, 2021, the Board of Supervisors of the City and County of San Francisco (“**Board of Supervisors**”) adopted Ordinance No. 38-21 (“**Ordinance**”), which codifies SFMTA’s authority to procure the Facility under a joint development approach.

D. On April 9, 2021, City issued a request for proposals to design, build, finance, and maintain the Infrastructure Facility and design, build, finance, operate and maintain the Housing and Commercial Component at the Project Site (“**RFP**”), and on September 12, 2022, City determined that the proposal submitted by Potrero Neighborhood Collective LLC (“**PNC**”) offered the best value to City for the development of the Facility.

E. On November 2, 2022, City and PNC, a limited liability company organized under the laws of the State of Delaware, entered into a Predevelopment Agreement for the Potrero Yard Modernization Project (as amended, the “**Predevelopment Agreement**”).

F. Further to the engagement of City and PNC under the Predevelopment Agreement, it was determined to deliver the Infrastructure Facility pursuant to a design-build-finance structure;

G. City and PNC agreed upon the terms provided in this Agreement for the development of the Infrastructure Facility pursuant to the processes described in the Predevelopment Agreement.

H. The Non-Profit Entity will, in turn, contemporaneously with the execution of this Agreement, enter into a project implementation agreement dated as of the date hereof (the “**Project Implementation Agreement**”) with Potrero Neighborhood Collective LLC (the

“Principal Project Company” or “PPC”) whereby the Principal Project Company will design and build the Project and perform certain support and administrative functions with respect to the financing of the Project, all as more particularly described in the Project Implementation Agreement, and perform on behalf of the Non-Profit Entity certain obligations of the Non-Profit Entity under this Agreement.

I. The Non-Profit Entity is not a “tax-exempt entity” but is a disregarded entity for federal tax purposes, such that the activities of the Non-Profit Entity are attributed to its sole member, the Non-Profit Parent. The Non-Profit Entity’s purpose is limited to furthering the charitable purposes of the Non-Profit Parent, and to lessen the burdens of the City by assisting SFMTA in the development, construction and financing of the Project.

J. The SFMTA Board of Directors and the Board of Supervisors of the City have authorized the Work for the Project, as specified in the Contract Documents.

NOW, THEREFORE, for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree as follows:

**ARTICLE 1. DEFINITIONS; CONTRACT DOCUMENTS;
ORDER OF PRECEDENCE; OTHER DOCUMENTS**

1.1 Definitions and Interpretation

1.1.1 Definitions for certain acronyms, abbreviations and terms used in this Agreement and the other Contract Documents are contained in Exhibit 1 (Abbreviations and Definitions).

1.1.2 Unless the context otherwise requires, in this Agreement:

- (a) The words “including”, “includes” and “include” will be read as if followed by the words “without limitation”;
- (b) The meaning of “or” will be that of the inclusive “or”, that is meaning one, some or all of a number of possibilities;
- (c) A reference to any Party or Person includes each of their legal representatives, trustees, executors, administrators, successors, and permitted substitutes and assigns, including any Person taking part by way of novation;
- (d) References to days are references to calendar days, provided that if the date to perform any act or provide any Notice falls on a non-Business Day, such act or Notice may be timely performed on the next Business Day. Notwithstanding the foregoing, requirements contained in this Agreement relating to actions to be taken in the event of an emergency and other requirements for which it is clear that performance is intended to occur on a non-Business Day, shall be required to be performed as specified, even though the date in question may fall on a non-Business Day;
- (e) A reference to any Governmental Entity, institute, association or body is:
 - (i) if that Governmental Entity, institute, association or body is reconstituted, renamed or replaced or if the powers or functions of that Governmental Entity, institute, association or body are transferred to another organization, a reference to the reconstituted, renamed or replaced organization or the organization to which the powers or functions are transferred, as applicable; and
 - (ii) if that Governmental Entity, institute, association or body ceases to exist, a reference to the organization which serves substantially the same purposes or objectives as that Governmental Entity, institute, association or body;
- (f) A reference to this Agreement or to any other deed, agreement, document, or instrument includes a reference to this Agreement or such other deed, agreement, document or instrument as amended, revised, supplemented or otherwise modified from time to time;

- (g) A reference to any legislation or to any section or provision of it includes any amendment to or re-enactment of, or any statutory provision substituted for that legislation, section or provision;
- (h) Words in the singular include the plural (and vice versa) and words denoting any gender include all genders;
- (i) Headings are for convenience only and do not affect the interpretation of this Agreement;
- (j) The captions of the articles, sections and subsections in the Contract Documents are for convenience only and are not to be treated or construed as part of this Agreement;
- (k) Where any word or phrase is given a defined meaning, any other part of speech or other grammatical form of that word or phrase has a corresponding meaning;
- (l) All monetary amounts and obligations in the Contract Documents are expressed and payable in U.S. dollars;
- (m) Each party must perform its obligations in accordance with this Agreement at its own cost, unless expressly provided otherwise;
- (n) If this Agreement requires calculation of an amount payable to a party there must be no double counting in calculating that amount;
- (o) A reference to time is a reference to Pacific Time Zone in the United States;
- (p) In the event of an ambiguity in or dispute regarding the interpretation of this Agreement, this Agreement shall not be interpreted or construed against the Person who prepared this Agreement, and, instead, other rules of interpretation and construction shall be used;
- (q) The Parties acknowledge and agree that: (i) the Contract Documents are the product of an extensive and thorough, arm's-length exchange of ideas, questions, answers, information and drafts during the PDA Term; (ii) each Party has been given the opportunity to independently review the Contract Documents with legal counsel; and (iii) each Party has the requisite experience and sophistication to negotiate, understand, interpret and agree to the particular language of the provisions of the Contract Documents. Accordingly, in the event of a conflict, ambiguity or inconsistency in or Contract Dispute regarding the interpretation of the Contract Documents, the Contract Documents shall not be interpreted or construed against the Party preparing it, and instead the Contract Dispute resolver shall consult other customary rules of interpretation and construction;
- (r) Unless otherwise expressly stated in the Contract Documents, words that have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meaning;

- (s) A reference to a Section or Article is a reference to the section or article in the document or Exhibit where that Section or Article appears.

1.2 Contract Documents; Rules to Reconcile Conflicting Provisions

1.2.1 The term “Contract Documents” shall mean this Agreement and all its exhibits, including the Technical Requirements, as listed in Section 1.2.2. Each of the Contract Documents is an essential part of the agreement between the Parties. The Contract Documents are intended to be complementary and to be read together as a complete agreement.

1.2.2 Unless the context otherwise requires and except as provided otherwise in Sections 1.2.3 and 1.2.4, in the event of any conflict, ambiguity or inconsistency between any terms or provisions within the Contract Documents, the order of precedence, from highest to lowest, shall be as follows:

- (a) For Design Work and other non-Construction Work:
- (i) Change Orders and Unilateral Change Orders directing Non-Profit Entity to implement a City Change in accordance with this Agreement and amendments to this Agreement;
 - (ii) Article 1 (Definitions; Contract Documents; Order of Precedence; Other Documents) through Article 23 (Miscellaneous) and Exhibit 1 (Abbreviations and Definitions);
 - (iii) the Exhibits to this Agreement (excluding Exhibit 1 (Abbreviations and Definitions, Non-Profit Entity’s Implementation Proposal identified in Exhibit 3, and Exhibit 18 (Technical Requirements));
 - (iv) Exhibit 18 (Technical Requirements);
 - (v) Non-Profit Entity’s Implementation Proposal identified in Exhibit 3 (Implementation Proposal); provided that if City determines, in its sole discretion, that the Implementation Proposal contains a provision that is more beneficial to City than is specified elsewhere in the Contract Documents, then that provision shall take precedence; and
 - (vi) Project Management Plan.
- (b) Without limiting Section 1.2.2(a), for Construction Work, the same order of precedence shall apply as for non-Construction Work in subsection (a), except that the Final Design Documents shall also be considered part of this Agreement and shall be included as Section 1.2.2(a)(vii) in the order of precedence subject to the following:
- (i) Specifications have precedence over plans; and
 - (ii) Any other Deviations contained in the Final Design Documents take priority over conflicting requirements of other parts of this Agreement

but only to the extent that Non-Profit Entity specifically identifies the conflicts to City and City approves such Deviations by Notice to Non-Profit Entity.

1.2.3 In the event of any conflict, ambiguity or inconsistency within the Contract Documents, the following rules of interpretation shall apply:

1.2.3.1 If the Contract Documents contain differing provisions on the same subject matter and within the same order of precedence pursuant to Section 1.2.2, the provisions that provide greater detail or establish a higher quality, manner or method of performing the Work or use more stringent standards shall prevail.

1.2.3.2 Additional details in a lower priority Contract Document shall be given effect except to the extent they irreconcilably conflict with requirements, provisions and practices contained in the higher priority Contract Document.

1.2.3.3 If the Contract Documents contain differing provisions on the same subject matter that cannot be reconciled by applying the rules in Section 1.2.3.1 or 1.2.3.2, then the provisions contained in the document of higher order of precedence shall prevail over the provisions contained in the document of lower order of precedence, unless City, in its good faith discretion, approves or directs otherwise in writing.

1.2.3.4 In the event of an irreconcilable conflict between specific provisions of the Contract Documents and any standards, criteria, requirements, conditions, procedures, specifications or other provisions applicable to the Project established by reference to a manual or publication within a lower priority Contract Document, the specific provision of the higher priority Contract Document shall prevail over said standards or other provisions established by reference, to the extent of the irreconcilable conflict, unless City, in its good faith discretion, approves or directs otherwise in writing.

1.2.3.5 In the event of a conflict among any standards, criteria, requirements, conditions, procedures, specifications or other provisions applicable to the Project, established by reference to a manual or publication within a Contract Document or set of Contract Documents with the same order of priority, the standard, criterion, requirement, condition, procedure, specification or other provision offering the higher quality, manner or method of performing will apply unless City, in its good faith discretion, approves or directs otherwise in writing.

1.2.3.6 In the event of a conflict among the standards, criteria, requirements, conditions, procedures, specifications or other provisions of the Technical Requirements and those established by reference to a manual or publication, the Technical Requirements shall prevail.

1.2.3.7 In all other respects, in the event of a conflict, ambiguity or inconsistency within the Contract Documents, general rules concerning construction of contracts in the State shall be applicable.

1.2.4 This Section 1.2 (Contract Documents; Rules to Reconcile Conflicting Provisions) shall not apply to provisions in the Technical Requirements that are erroneous, create a potentially Unsafe Condition, or may be inconsistent with Good Industry Practice or applicable Law. Instead, such provisions shall be reconciled under Section 7.2.3.

1.2.5 Non-Profit Entity acknowledges and agrees that it had the opportunity and obligation to review the terms and conditions of this Agreement and to bring to the attention of City any conflicts, ambiguities or inconsistencies of which it is aware contained within this Agreement.

1.2.6 Incorporation into this Agreement of any part of the Implementation Proposal shall not (a) limit, modify, or alter City's right to review and approve any Submittal included in the Implementation Proposal, or submitted to City after the Implementation Proposal (including any Project Schedule), or (b) be deemed as acceptance or approval of any part of the Implementation Proposal by City that conflicts with this Agreement or the Technical Requirements.

1.2.7 If Non-Profit Entity becomes aware of any error or any conflict, ambiguity or inconsistency between or among the documents forming this Agreement, Non-Profit Entity shall promptly provide Notice to City, including the item Non-Profit Entity considers should apply based on the applicable rules in Section 1.1.2(p). Except as expressly stated in this Agreement, if (a) the conflict, ambiguity, inconsistency or error cannot be reconciled by applying the applicable rules or (b) the Parties disagree about (i) which rule applies and/or (ii) the results of the application of such applicable rule(s), then City will determine, in its reasonable discretion, which of the conflicting items is to apply under the Contract Documents and provide Notice to Non-Profit Entity before Non-Profit Entity proceeds with the applicable aspect of the Work. Notwithstanding the foregoing, the Project Implementation Agreement may be inconsistent with the Contract Documents to the limited extent that Non-Profit Entity has, in the Project Implementation Agreement, expressly reserved certain roles and responsibilities to itself under the Contract Documents and not passed those obligations on to Principal Project Company to perform.

1.3 Conflicts, Ambiguities or Inconsistency in Project Implementation Agreement and/or Non-Profit Entity's Management Plans

1.3.1 If Non-Profit Entity becomes aware of any error or any conflict, ambiguity or inconsistency between or among the Contract Documents and the Project Implementation Agreement, Non-Profit Entity shall promptly provide Notice to City. In the event of any conflict, inconsistency or ambiguity between or among the Contract Documents and the Project Implementation Agreement, the terms and conditions of the Contract Documents shall control and the Non-Profit Entity and Principal Project Company shall revise the Project Implementation Agreement, as applicable, to be consistent with the Contract Documents or cure the ambiguity or inconsistency in a manner satisfactory to City. Notwithstanding the foregoing, the Project Implementation Agreement may be inconsistent with the Contract Documents to the extent relating to the roles and responsibilities that have been expressly reserved for the Non-Profit Entity under the Project Implementation Agreement with respect to the Project Agreement (including to exercise rights and remedies and/or pursue relief under the Project Agreement) and/or to the timelines and other means under or by which obligations of the Non-Profit Entity under the Contract Documents have been passed down to the PPC. City shall not be bound by any such inconsistencies with the Project Agreement as they may relate to Non-Profit Entity's obligations, and City's rights and remedies, under the Project Agreement.

1.3.2 In the event of any conflict between or among the Non-Profit Entity's Project Management Plan and any of the Contract Documents, or if any provisions in Non-Profit Entity's Project Management Plan are in conflict, ambiguous or inconsistent, Non-Profit Entity shall

modify the Project Management Plan, as applicable, to be consistent with the Contract Documents or cure the ambiguity or inconsistency in a manner satisfactory to City.

1.4 Reference Documents

1.4.1 City has provided the Reference Documents to Non-Profit Entity for the purposes of disclosure and, in the case of general industry and general governmental manuals and publications, for guidance regarding Good Industry Practice. Reference Documents are for information only, and are not mandatory or binding on Non-Profit Entity, except to the extent that the Contract Documents incorporate specific provisions of the Reference Documents by reference.

1.4.2 Non-Profit Entity acknowledges and agrees that City does not give any warranty, representation or undertaking in respect of the Reference Documents including that the Reference Documents:

- (a) Are complete, accurate or fit for purpose;
- (b) Are in conformity with the requirements of the Contract Documents, Regulatory Approvals or Laws; or
- (c) Represent all of the information in City's possession or power relevant or material in connection with the Project; provided, however, that City represents and warrants that it has not affirmatively and intentionally provided a Reference Document that is knowingly (based solely on City's Actual Knowledge) and materially false with the intent to mislead Non-Profit Entity.

1.4.3 Non-Profit Entity acknowledges and agrees that, except as provided in this Agreement:

- (a) It has, before Commercial Close, conducted its own analysis and review of the Reference Documents upon which it places reliance;
- (b) Any use or reliance on such Reference Documents by Non-Profit Entity shall be solely at its own risk;
- (c) Except to the extent that the Contract Documents incorporate specific provisions of the Reference Documents by reference, no NPE-Related Entity is entitled to make any Claim, cause of action or Loss against City in connection with the Reference Documents, including on the grounds:
 - (i) of any misunderstanding or misapprehension in respect of the Reference Documents;
 - (ii) of any conclusions any NPE-Related Entity may draw from or any action or forbearance in reliance on the Reference Documents;
 - (iii) of any failure to disclose or make available to any NPE-Related Entity any information, documents or data or to review or update the Reference Documents; or

- (iv) that the Reference Documents were inaccurate, incomplete, or not fit for purpose; and
- (d) The Reference Documents may include interpretations, extrapolations, analyses, and recommendations about data, design solutions, technical issues and solutions, construction and installation means and methods, and maintenance means and methods. Such interpretations, extrapolations, analyses, and recommendations are (i) preliminary in nature and, in many cases, obsolete, (ii) not intended to express the views or preferences of City, or represent any statement of approval or acceptance thereof by City, and (iii) not intended to form the basis of Non-Profit Entity's design solutions, technical solutions or construction means and methods.

ARTICLE 2. NATURE OF AGREEMENT; TERM

2.1 Nature of Agreement; Predevelopment Agreement

2.1.1 City hereby grants to Non-Profit Entity the exclusive right, and Non-Profit Entity accepts the obligation and agrees, during the Term, to design, build and finance the Infrastructure Facility.

2.1.2 Non-Profit Entity acknowledges and agrees that the Predevelopment Agreement does not apply to this Agreement or the Parties' obligations hereunder, and that any deliverables provided by Lead Developer to City pursuant to the Predevelopment Agreement, or approvals obtained from City pursuant to the Predevelopment Agreement, do not apply to this Agreement unless any such deliverable, or approved plan or submittal, is expressly incorporated into the text of or otherwise attached to this Agreement. For the avoidance of doubt, the foregoing shall not apply to, release or waive any obligations of any party under the Predevelopment Agreement that survive the completion or termination thereof, as more particularly set forth in the Predevelopment Agreement.

2.2 Right of Entry; Condition of Site

2.2.1 Subject to Section 7.5 (Acquisition of Real Property) and except as set forth in Section 2.2.2, NPE-Related Entities shall have the right to enter onto the Project Site upon completion of the City Relocation Scope (which shall be at least 90 days after issuance of NTP 1) (the "**Access Date**") and throughout the Warranty Period to carry out Non-Profit Entity's obligations under this Agreement; provided, however, Non-Profit Entity may undertake construction activities related to the Project that are not located on or at the Project Site and are on property on which Non-Profit Entity has obtained legal access so long as such construction activities (i) avoid any impacts to City and SFMTA operations in any manner on, at or near the Project Site; (ii) avoid impacts to SFMTA relocation activities occurring on, at or near the Project Site, including completion of the City Relocation Scope and impacts to all existing OCS adjacent to the Project Site that must remain in place and fully functioning until completion of the City Relocation Scope; and (iii) are undertaken only after the conditions set forth in Exhibit 15B (Conditions to NTP 2 – Commencement of Construction Work) have been satisfied in connection with Offsite Utility Work being performed between NTP 1 and NTP 2 that is not located on or at the Project Site. After the Termination Date, NPE-Related Entities may enter onto the Project Site to perform post-termination obligations either based on the right of entry granted in Section 17.6.3 (Relinquishment and Possession of Project) or under a separate right of entry provided by City in writing. Without otherwise limiting the rights of the Non-Profit Entity to relief under this Agreement, Non-Profit Entity shall comply, and shall ensure that NPE-Related Entities comply, with all agreements, easements, rights of entry, covenants, conditions, restrictions and other instruments applicable to the Project Site.

2.2.2 City shall ensure that the Project Site is in the City Ready for Move Condition by the date that is 90 days after issuance of NTP 1. The City Relocation Scope may not commence until after the Project Site is in the City Ready for Move Condition. Non-Profit Entity may access the Project Site before the Access Date solely to implement the City Relocation Scope. Non-Profit Entity is responsible to obtain all required approvals prior to demolition. Additionally, if any power, water, and or other Utilities need to be maintained during demolition, such lines should be temporarily relocated as necessary and or protected by Non-Profit Entity. Should any furniture or portable equipment remain at the Project Site after City vacates the Project Site and

after Non-Profit Entity fully performs the City Relocation Scope, those items shall be removed and/or disposed of by Non-Profit Entity. Removal of any Hazardous Materials, Utility infrastructure, walls, fixtures, flooring, paint, tanks, and any other building features that currently exist and, upon vacation by the City of the Project Site, will not be removed by City, are deemed released to Non-Profit Entity and are the responsibility for Non-Profit Entity, at its sole cost, in connection with demolition and, except as set forth in this Agreement with respect to subsurface Hazardous Materials which are not Known or Suspected Hazardous Materials, Non-Profit Entity shall not be entitled to any additional compensation or time in connection therewith.

2.3 Term

This Agreement shall take effect on the Effective Date and shall remain in effect until 30 years after the Substantial Completion Deadline, subject to the right of the Parties to terminate this Agreement earlier in accordance with the terms of this Agreement.

2.4 Title

2.4.1 General

The Parties acknowledge and agree that:

- (a) Non-Profit Entity is not the legal or equitable owner or lessee of the Project Site or the Infrastructure Facility improvements for any purpose;
- (b) Non-Profit Entity's rights under this Agreement are derived solely from its status as an independent contractor under this Agreement, and not as tenant, lessee, easement holder, optionee, lienor, mortgagee, purchaser or owner of any other interest in real property; and
- (c) The payments to be received by Non-Profit Entity under this Agreement are for services to be performed by Non-Profit Entity, and are not payments in the nature of rent, fees with respect to real property, or purchase price of real property.

2.4.2 Possessory Interest Tax

2.4.2.1 City hereby informs Non-Profit Entity, in accordance with California Revenue and Taxation Code section 107.6, that, notwithstanding Section 2.4.1 (General), (i) this Agreement may create one or more possessory interests, (ii) any possessory interest created by this Agreement may be subject to property taxation, and (iii) Non-Profit Entity may be subject to payment of property taxes levied on such possessory interest. Accordingly, Non-Profit Entity agrees on behalf of itself and its permitted successors and assigns to timely report on behalf of City to the County Assessor the information required by San Francisco Administrative Code Section 23.39, as amended from time to time, and any successor provision. Non-Profit Entity further agrees to provide such other information as may requested by City to enable City to comply with any reporting requirements for possessory interests that are imposed by applicable Law.

2.4.2.2 If it is determined that a possessory interest is created by this Agreement and the County Assessor seeks to levy an assessment or tax on such possessory interest, then:

- (a) Non-Profit Entity shall (i) provide Notice to City not later than 3 Business Days after it becomes aware of the assessment or tax bill, and (ii) deliver copies of all documentation relating thereto no later than 3 Business Days following receipt;
- (b) Non-Profit Entity shall cooperate and consult regularly with City, and follow City's reasonable directions, concerning tax protest, litigation strategy, refund claims and appeals process in any such circumstance. At City's request or in absence of a direction from the City sent to Non-Profit Entity no later than 10 days prior to any filing deadline, Non-Profit Entity shall timely (i) contest the assessment, and (ii) file refund claims;
- (c) If the Board of Supervisor has specifically authorized and approved, by resolution, the City's assumption of the payment, in whole, of such possessory interest taxes under this Agreement, the City will make a payment of the tax liability on behalf of the Non-Profit Entity (including any penalties for late payment or nonpayment and interest imposed, to the extent such penalties or interest resulted from Non-Profit Entity's failure to comply or timely comply with Section 2.4.2.2(a) or (b)). To the extent that penalties and interest have been imposed as a result of Non-Profit Entity's failure to comply or timely comply with Section 2.4.2.2(a) or (b), Non-Profit Entity will reimburse City for any such payment of penalties and interest, including Recoverable Costs. If Non-Profit Entity receives any refund of the tax (including a refund of any penalties and interest) pursuant to a claim for refund or other appeal, Non-Profit Entity shall pay to City an amount equal to such refund within 15 days of receipt (but only to the extent of payments previously made by City pursuant to this Section 2.4.2.2(c));
- (d) Non-Profit Entity shall submit to City an invoice (in a format acceptable to City) on a monthly basis in arrears for all actual and reasonable costs and expenses incurred by Non-Profit Entity in opposing the imposition of any such possessory interest tax, together with detailed, supporting documentation evidencing same. If Non-Profit Entity is awarded attorneys' fees in connection with any related appeal or litigation, such costs will not also be reimbursed by the City to Non-Profit Entity. Within 30 Business Days of receipt of such invoice and supporting documentation, subject to Section 11.5 (Disputed Amounts), City will reimburse Non-Profit Entity for such invoiced amount; and
- (e) City reserves the right to direct Non-Profit Entity to assign to the City any appeals rights available under applicable Law in order for City to directly assume the property tax appeal or litigation. Any such assignment shall be effected through an agent's authorization or similar document acceptable to both Non-Profit Entity and the City.

Nothing in the foregoing constitutes a notification to Non-Profit Entity of whether a potential possessory interest could be created under any HCC Agreement, the Housing and Commercial Component, or any interest that Non-Profit Entity may acquire under Section 7.5.2 (Temporary Interests in Property).

2.4.2.3 Non-Profit Entity shall include in all Contracts or other agreements entered into by or on behalf of Non-Profit Entity with third parties that could reasonably be expected to result in the creation of a possessory interest under this Agreement, provisions substantially similar to those in this Section 2.4.2, including the obligation to report, contest, and pay any possessory interest taxes, and to cooperate with the City in accordance with this Section. Non-Profit Entity shall provide copies of such agreements to the City upon request.

2.4.3 Passage of Title

Title to all materials, equipment, tools and supplies furnished under the Contract Documents for incorporation into the Project shall pass to City, free and clear of all liens or other charges of any kind or nature, upon incorporation into the Project.

2.4.4 Intellectual Property

Except for NPE Intellectual Property and Third Party IP, title to any Intellectual Property to the extent made, conceived, prepared or reduced to practice as part of the Work, incorporated into the Project, including any improvements, modifications, enhancements or derivative works to or of the City IP shall vest in City at the earliest of creation, conception, preparation or reduction to practice.

2.4.5 Documents of Title

Non-Profit Entity shall furnish or execute all necessary documents of title within 90 days of receiving a written request from City.

2.4.6 Care, Custody and Control Responsibilities

Passage of title to City shall not affect Non-Profit Entity's care, custody and control responsibilities. Non-Profit Entity shall be responsible for care, custody and control of all components of the Project, including all materials, equipment, tools and supplies described in Section 2.4.3 (Passage of Title) until the Substantial Completion Date, except Non-Profit Entity shall (i) be responsible for care, custody and control of all elements of the Project that will be owned by Utility Owners or Authorities Having Jurisdiction until acceptance of such elements by the relevant Third Party and (ii) remain responsible for all warranty obligations under the Contract Documents to City and, as applicable, Utility Owners and Authorities Having Jurisdiction, following the Substantial Completion Date.

2.5 Limitation on Non-Profit Entity's Rights

Notwithstanding anything to the contrary in the Contract Documents, Non-Profit Entity has no power or authority to make any commitments on City's behalf or to execute agreements in the name of or on behalf of City. Non-Profit Entity shall not enter into any agreement with any Governmental Entity, Utility Owner, property owner or other Third Party having regulatory jurisdiction over any aspect of the Project or Work or having any property interest affected by the Project or the Work that in any way purports to obligate City, or states or implies that City has an obligation to carry out any installation, design, construction, maintenance, repair, operation, control, supervision, regulation or other activity during or after the end of the Term, unless City otherwise approves in writing.

ARTICLE 3. FINANCIAL CLOSE

3.1 Requirements for Financial Close

3.1.1 Obligation to Achieve Financial Close

Subject to the Parties' respective rights to terminate this Agreement before Financial Close pursuant to Sections 3.6 (No-Fault Termination) and 3.7 (Non-Profit Entity's Failure to Achieve Financial Close), Non-Profit Entity shall achieve Financial Close by no later than the Financial Close Deadline.

3.1.2 Date of Financial Close

Subject to Section 3.4.2(a), Non-Profit Entity shall determine the date of Financial Close (the "**Scheduled Financial Close Date**"), which shall be subject to a minimum 60 calendar days' prior Notice to City and no later than the Financial Close Deadline. After such determination, Non-Profit Entity shall have the right to modify the Scheduled Financial Close Date, provided that (i) Non-Profit Entity must provide City with prompt Notice of any such change; (ii) Non-Profit Entity shall not modify the Scheduled Financial Close Date within 14 days of such date without City's approval, in its reasonable discretion; (iii) the new date for the Scheduled Financial Close Date shall not be sooner than 10 days after delivery of Notice to City; and (iv) the modified Scheduled Financial Close Date shall be no later than the Financial Close Deadline.

3.2 Financial Close Requirements and Deliverables

3.2.1 Delivery of Financing Agreements and Other Documents

3.2.1.1 Not later than 60 days before the Scheduled Financial Close Date (or Delayed Financial Close Date, as applicable), Non-Profit Entity shall deliver to City, for City's review and comment, near final drafts of the Project Implementation Agreement. Such draft shall be sufficiently advanced such that all material terms are incorporated therein. In the event any material term included in the drafts of the Project Implementation Agreement provided to City under this Section 3.2.1.1 is amended prior to Financial Close, Non-Profit Entity shall deliver to City, for City's review, comment and approval, a copy of such proposed amendment(s), such submittal to be no later than 10 days before the Scheduled Financial Close Date. For purposes of this Section 3.2.1.1, a material amendment shall include the following: (i) a change that differs materially from any commitments or provisions set forth in the Finance Plan; (ii) a change which would alter the risk allocations in this Agreement, the Project Implementation Agreement or any other Key Contract; (iii) a change which could increase the liability of City for termination compensation in the event of a termination; (iv) a change that would result in an Affordability Event; (v) a change that would cause a Delayed Financial Close Date; (vi) a change in any of the Security Documents; and/or (vii) a change under any of the conditions precedent to Financial Close under the Financing Documents.

3.2.1.2 Not later than 30 days before the Scheduled Financial Close Date (or Delayed Financial Close Date, as applicable), Non-Profit Entity shall deliver or cause to be delivered to City, for City's review and comment, near final drafts of the Initial Financing Documents, Direct Agreement and D&C Contract. Such drafts shall be sufficiently advanced such that all material terms are incorporated into the applicable Principal Project Document or Financing Document. Non-Profit Entity shall also deliver to City, for City's review and comment, a list of other Key

Contracts, and a draft of the model audit report related to the proposed Financial Model Update in accordance with Section 4.7.4 (Financial Model Audits). City will review the list of other Key Contracts and may request, and Non-Profit Entity shall promptly provide to City, substantially final drafts of the Key Contracts. In the event any material term included in the drafts of the Principal Project Documents or Financing Documents provided to City under this Section 3.2.1.2 is amended prior to Financial Close, Non-Profit Entity shall deliver to City, for City's review, comment and approval, a copy of such proposed amendment(s), such submittal to be no later than 10 days before the Scheduled Financial Close Date. For purposes of this Section 3.2.1.2, a material amendment shall include the following: (i) a change that differs materially from any commitments or provisions set forth in the Finance Plan; (ii) a change which would alter the risk allocations in this Agreement, the Project Implementation Agreement or any other Key Contract; (iii) a change which could increase the liability of City for termination compensation in the event of a termination; (iv) a change that would result in an Affordability Event; (v) a change that would cause a Delayed Financial Close Date; (vi) a change in any of the Security Documents; and/or (vii) a change under any of the conditions precedent to Financial Close under the Financing Documents.

3.2.1.3 City will provide its comments on any initial submission of these documents no later than 10 Business Days after their submission and on any amendments to such documents no later than 5 Business Days after their submission, with such comments, in each case, being limited to addressing (i) changes in these documents from those approved by City during the PDA Term; (ii) changes in this Agreement or the commercial or legal structure of the Project; (iii) changes arising out of changed circumstances, new events or occurrences or additional information after the date of approval by City during the PDA Term; (iv) clarifications, errors, ambiguities or conflicts in such documents; (v) the relationship and interface of the Infrastructure Facility and the HCC; (vi) the impacts and implications of any decision by Non-Profit Entity to bifurcate the Financial Close for the Infrastructure Facility and the HCC; (vii) changes in applicable Law or Standards and Specifications; (viii) any change to a material term, as set forth in Section 3.2.1.1 or Section 3.2.1.2, as applicable; and (ix) inconsistencies between such documents and the terms of this Agreement (including the risk allocations).

3.2.2 City Deliverables

To support the Non-Profit Entity's achievement of Financial Close, City shall:

- (a) on or before 30 days before the Scheduled Financial Close Date and in connection with the issuance of any bonds:
 - (i) provide and authorize Non-Profit Entity to include, in the preliminary and final official statement for the Tax-Exempt Bonds or any other capital markets issuance with respect to the Project, SFMTA's most recent audited financial statements together with economic information with respect to SFMTA, and provide such documents and information as required to comply with disclosure requirements under applicable Laws, provided that Non-Profit Entity has provided City with a list of required documents and information at least 15 Business Days before such documents and information are required;
 - (ii) agree to customary continuing disclosure as reasonably acceptable to City and the underwriter of any Project Debt; and

- (iii) provide customary certificates as reasonably requested by Non-Profit Entity and as reasonably acceptable to City;
- (b) on or before three Business Days prior to the Scheduled Financial Close Date, deliver each of the following items to Non-Profit Entity subject to customary escrow terms and to City's approval to release from escrow:
 - (i) an executed legal opinion of the City's Attorney's Office substantially in the form attached hereto as Exhibit 5D (Form of Opinion from City's Legal Counsel);
 - (ii) an executed certificate updating, as of the date of Financial Close, City's representations and warranties set forth in Section 19.2 (City Representations and Warranties); and
 - (iii) a counterpart signature page for the Direct Agreement executed on behalf of City;
- (c) take any reasonably required authorizing actions in a reasonably timely manner; and
- (d) provide customary documents, certificates or undertakings (or, as applicable, a copy of the same certified by City as true, complete and accurate) that Non-Profit Entity may reasonably request from City as necessary to comply with (i) disclosure requirements under applicable Laws, or (ii) customary underwriter requirements, in each case in connection with issuance of bonds or any other capital markets issuance; provided, however, that none of the documents supplied in accordance with this Section 3.2.2(d) shall be construed as providing a legal opinion binding on City.

3.2.3 Base Interest Rate Fluctuation

3.2.3.1 City will adjust the APC to offset 100% of the impact of fluctuations (increases and decreases) in the Base Interest Rates used in the Finance Plan that have occurred during the Bank Debt Rate Protection Period and/or the Bond Rate Protection Period, as applicable.

3.2.3.2 City will adjust the APC to offset the impact of fluctuations (increases and decreases) in the credit spreads for any Bond Financing proposed in the Finance Plan that have occurred during the Bond Rate Protection Period. City shall assume 100% of the credit spread fluctuation risk (relative to the Baseline Credit Spreads). City shall not accept increases in credit spreads in respect of bonds which are part of Non-Profit Entity's financing resulting from the final credit rating of such bonds being lower than the indicative investment grade rating(s) of such bonds provided in the Finance Plan.

3.2.3.3 Adjustments to the APC related to Base Interest Rates fluctuations shall be implemented in accordance with Exhibit 5F (APC Adjustment for Base Interest Rate and Credit Spread Fluctuation).

3.2.4 Conditions Precedent to Financial Close

3.2.4.1 Financial Close will occur upon Non-Profit Entity's satisfaction of each of the following conditions:

- (a) Non-Profit Entity has delivered or caused to be delivered to City, in form and substance similar to the drafts submitted to City pursuant to Section 3.2.1.1 and including any changes made pursuant to City's comments under Section 3.2.1.3, fully executed versions of:
 - (i) Initial Financing Documents;
 - (ii) Direct Agreement(s); and
 - (iii) Key Contracts, together with an updated list of Key Contracts;
- (b) Non-Profit Entity has delivered a certification signed by its chief financial officer or equivalent officer, certifying to the following:
 - (i) Non-Profit Entity has satisfied (or upon Financial Close, will satisfy) all conditions precedent to the effectiveness of commitments of the Lenders under the Initial Financing Documents or such conditions have been waived if not satisfied, as applicable;
 - (ii) each of the documents delivered by Non-Profit Entity to City pursuant to Section 3.2.4.1(a) is a true, complete and accurate copy of the original;
 - (iii) all representations and warranties of Non-Profit Entity under the Contract Documents remain true as of the Financial Close Date, except for any representation or warranty made as of a specified date, in which case such representation or warranty shall be true as of the specified date and Non-Profit Entity shall provide Notice to City if any such representation is not true and correct as of the Financial Close Date; and
 - (iv) Non-Profit Entity has performed and complied with all covenants and obligations of Non-Profit Entity under the Contract Documents to have been performed or complied with as of the Financial Close Date;
- (c) Non-Profit Entity has delivered to City, on or before one Business Day prior to the date of Financial Close, an interim Financial Model Update consistent with Section 4.7 (Financial Model and Financial Model Updates) that incorporates any proposed amendments to the Base Case Financial Model agreed to by the Parties on or before such date, including those agreed to pursuant to any preliminary calculations under Section 3.2.3 (Base Interest Rate Fluctuation), together with the related Financial Modeling Data;
- (d) Non-Profit Entity has delivered to City (i) one or more legal opinion(s) of Non-Profit Entity's in-house or external counsel substantially in the form attached

hereto as Exhibit 5E (Form of Opinion from Non-Profit Entity's Legal Counsel) and with customary qualifications and assumptions reasonably acceptable to City;

- (e) A Financial Model in accordance with Section 4.7 (Financial Model and Financial Model Updates) which reflects, to City's reasonable satisfaction;
- (f) Certificate from an insurer that meets the requirements in Section 10.1.2.1 (Insurers), certifying that all Insurance Policies required to be effected and maintained in accordance with this Agreement in connection with the Work to be performed during the D&C Period (whether City is required to be an insured or not) are in force and effect (or will be in full force and effect following receipt of the insurance premium payable from the proceeds of Financial Close), and such evidence as is necessary to demonstrate the compliance of each such policy with the requirements of this Agreement;
- (g) Each Payment Bond and Performance Bond required under Section 10.2 (Performance Security) has been obtained, meets the requirements of Section 10.2 (Performance Security) and is in full force and effect, and Non-Profit Entity has delivered to City originals or copies, as required, of each Payment Bond and Performance Bond; and
- (h) Principal Project Company has delivered to City (i) one or more legal opinion(s) of Principal Project Company's in-house or external counsel substantially in the form attached hereto as Exhibit 5G (Form of Opinion from Principal Project Company's Legal Counsel) and with customary qualifications and assumptions reasonably acceptable to City.

3.2.5 Waiver of Conditions Precedent to Financial Close

3.2.5.1 A condition precedent is only waived if the Party for whom the benefit of the condition precedent is provided gives Notice to the other Party of the waiver prior to the Financial Close Deadline.

3.2.5.2 When all of the Non-Profit Entity conditions precedent to Financial Close have been satisfied by Non-Profit Entity or waived by City, City shall provide Notice to Non-Profit Entity confirming that all of the Non-Profit Entity conditions precedent have been satisfied or waived and the date upon which the last of the conditions precedent was satisfied or waived.

3.2.5.3 When all of the City conditions precedent to Financial Close have been satisfied by City or waived by Non-Profit Entity, Non-Profit Entity shall provide Notice to City confirming that

all of the City conditions precedent have been satisfied or waived and the date upon which the last of the City conditions precedent was satisfied or waived.

3.2.5.4 Upon satisfaction of all conditions precedent to Financial Close, City will provide Notice to Non-Profit Entity confirming the date upon which Financial Close was achieved.

3.2.6 Mandatory Terms of Project Debt, Financing Agreements and Other Documents

The Project Debt and Financing Documents (including the Initial Financing Documents) shall comply with the Financing Document Terms.

3.2.7 Disbursement to City at Financial Close

The Project Debt and Financing Documents (including the Initial Financing Documents) shall provide for a disbursement to City at Financial Close of \$5,000,000. City currently intends to utilize such amount to pay the Substantial Completion Development Fee if and when earned by Non-Profit Entity, subject to Section 11.6.1 and Section 11.6.3. Non-Profit Entity shall cause Collateral Agent to make such disbursement to City as part of Financial Close.

3.3 Post-Financial Close Requirements and Deliverables

3.3.1 Non-Profit Entity shall deliver or cause to be delivered to City, on or before two Business Days following Financial Close, each of the items required under Section 4.7.3 (Replacement of Financial Model) replacing the Base Case Financial Model with a Financial Model Update that reflects all changes agreed by the Parties as of the date of Financial Close, as well as:

- (a) a Financial Model Update that includes any final revisions to the interim Financial Model Update delivered under Section 3.2.4.1(c) to incorporate the Base Interest Rates and credit spreads applicable on the date of Financial Close under the Initial Financing Agreements and any other agreed upon revisions;
- (b) a model audit report related to the proposed Financial Model Update in accordance with Section 4.7.4 (Financial Model Audits); and
- (c) a form of written amendment that (i) effects the replacement of the Financial Model in effect with the proposed Financial Model Update, and (ii) addresses all other related amendments to this Agreement required as a result of the amended Financial Model, including any amendments to the definitions of APC, API and Key Ratios, as applicable.

3.3.2 Upon the satisfaction of each of the conditions precedent to Financial Close set forth in Section 3.2.4 (Conditions Precedent to Financial Close), and the delivery and mutual approval of the Financial Model Update and documents required by Section 3.3.1, City and Non-Profit Entity shall enter into the amendment.

3.3.3 City shall return to or to the order of Non-Profit Entity the Financial Close Security within five Business Days after reaching Financial Close, provided that Non-Profit Entity has

delivered or caused to be delivered the items required under this Section 3.3 (Post-Financial Close Requirements and Deliverables).

3.4 Potential Adverse Events and Mitigation

3.4.1 The Parties acknowledge that any one or more Adverse Events may occur during the period between the Effective Date and the Scheduled Financial Close Date. If any such Adverse Event is the sole cause for Non-Profit Entity's failure or inability to satisfy any of its obligations under Section 3.2.4 (Conditions Precedent to Financial Close) by the Financial Close Deadline or Delayed Financial Close Date, as applicable, then Section 3.4.2 shall apply.

3.4.2 Each Party will promptly provide Notice to the other Party if an Adverse Event has occurred ("**Adverse Event Notice**"). The Party provide an Adverse Event Notice may indicate in the notice the potential impact of the event on the schedule for Financial Close. City may elect, in its sole discretion, to consult and work with Non-Profit Entity to mitigate the actual or anticipated impacts of the occurrence of such event(s). City will provide Notice to Non-Profit Entity of City's decision to either take mitigation actions, or to not take mitigation actions, within 15 days of the Adverse Event Notice. If City elects mitigation, the Parties will negotiate in good faith to mutually agree on the actual mitigation actions to be undertaken by each Party. City anticipates that the Parties may take one or more of the following actions to mitigate the impacts and for Non-Profit Entity to be able to achieve Financial Close:

- (a) City may agree to delay Financial Close to a date not later than 120 days after the Scheduled Financial Close Date (the "**Delayed Financial Close Date**"), in which case, if the Delayed Financial Close Date is after the last day of the original Finance Plan Validity Period, then:
 - (i) Non-Profit Entity shall extend the validity of the Financial Close Security to a date no earlier than 15 days later than the Delayed Financial Close Date;
 - (ii) If the Adverse Event was an Adverse Event set forth in clauses (a)-(h) of the definition of "Adverse Event", City shall compensate Non-Profit Entity for the actual cost of extending the validity of the Financial Close Security to the Delayed Financial Close Date within 45 days after receiving Non-Profit Entity's request and supporting documentation for such payment;
 - (iii) If the Adverse Event was an Adverse Event set forth in clauses (a)-(h) of the definition of "Adverse Event", Non-Profit Entity shall be entitled to escalate its D&C Contract Amount to adjust for escalation of labor, materials and equipment costs, if any, based on the change in: (1) the average of the BCI published each calendar month during the 12 calendar months preceding the Scheduled Financial Close Date; and (2) the average of the BCI published each calendar month during the 12 calendar month period preceding the Financial Close Date; and
 - (iv) Non-Profit Entity shall prepare a Financial Model Update in accordance with Section 4.7.2 (Updates to the Financial Model);

- (b) City may change the amount or timing of either Milestone Payment, provided that Non-Profit Entity shall be entitled to recover from City the reasonably incurred costs associated with such process which, in the case of Milestone Payment 2, shall be subject to the conditions set out in Section 2 of Exhibit 4 (Payment Mechanism);
- (c) City may increase the APC and/or API by an amount required to mitigate the relevant Adverse Event, including by an amount greater than 10% of the aggregate of the APC and API;
- (d) Non-Profit Entity may:
 - (i) conduct negotiations for at least 30 days with any or all of Non-Profit Entity's existing Lenders to increase, renew or extend their commitments, as applicable, provided that, any material deviations from the terms and conditions of the original commitments in Non-Profit Entity's Financial Proposal may be accepted by Non-Profit Entity only with City's approval; or
 - (ii) conduct a timely, competitive process to obtain new financing commitments (a "**Project Debt Competition**") to supplement or replace any of the original financing commitments in Non-Profit Entity's Financial Proposal; in which case, any such negotiations or Project Debt Competition (A) shall be transparent and open to City and its advisors, and (B) shall have the key objective of obtaining debt financing for the Project at the lowest-cost commercially available (given the terms and conditions of the Contract Document) and on terms and conditions otherwise reasonably acceptable to Non-Profit Entity and City;
- (e) upon the occurrence of an Affordability Event, Non-Profit Entity may elect to assume the cost and expense of that portion of the increase in the aggregate of the APC and API that exceeds 10%; and/or
- (f) either Party may take any other action mutually agreed upon by City and Non-Profit Entity.

3.4.3 The Parties acknowledge that the objective of the mitigation actions described in Section 3.4.2, and any others mutually agreed upon by the Parties, is to create circumstances allowing Financial Close to be achieved on terms that at a minimum will allow Non-Profit Entity to satisfy its obligation to obtain all financing required for the Project on terms and conditions substantially similar to those in the Financial Proposal. The Parties further acknowledge that if an Adverse Event set forth in clauses (i)-(j) of the definition of "Adverse Event" occurs, the objective of the time extension and mitigation actions described in Section 3.4.2 and any others mutually agreed upon by the Parties is for Non-Profit Entity to have an opportunity to address the impacts of such Adverse Event with its Lenders in order for Non-Profit Entity to comply with its obligations to achieve Financial Close by the Delayed Financial Close Date.

3.4.4 The Parties further acknowledge that the Non-Profit Entity shall not be required to take any action which is contrary to the interest of fulfilling its charitable mission or the charitable

purposes of the Non-Profit Parent, each as determined by the Non-Profit Entity, in its reasonable discretion, and the Non-Profit Entity shall not be required to undertake any mitigation measure that might be available arising out of its status as a wholly-owned disregarded entity of a not-for-profit corporation, but which measure would not normally be available to a private commercial party. For certainty, it shall be reasonable for Non-Profit Entity to refuse to take such action described above if (i) Non-Profit Entity shall have received an opinion of counsel that it is reasonably likely that such action will have the effect set forth above or (ii) Non-Profit Parent or Non-Profit Entity has received notice from the Internal Revenue Service that an effect described above is imminent. Notwithstanding the foregoing, Non-Profit Entity represents and warrants that it has reviewed the Contract Documents and, as of the Effective Date, it is not aware of (y) any such action or mitigation measure described in the Contract Documents that would be contrary to its charitable mission, to the charitable purposes of Non-Profit Parent or to Non-Profit Entity's status as a not-for-profit corporation or (z) any circumstance falling within the limitations of this Section 3.4.4 that would deprive the City of the material benefits of the Project, the Work or the terms of the Contract Documents.

3.4.5 Non-Profit Entity shall not take any action at any time under the Contract Documents, the Project Implementation Agreement or otherwise (including in connection with matters unrelated to the Project) that will adversely impact its charitable purpose, the charitable purpose of Non-Profit Parent, the disregarded entity status of Non-Profit Entity or Non-Profit Parent's status as a 501(c)(3) entity or the tax exempt status of the Tax-Exempt Bonds.

3.5 Permitted Excuses from Achieving Financial Close

3.5.1 With respect to an Adverse Event set forth in clauses (a)-(h) of the definition of "Adverse Event", Non-Profit Entity's obligation to achieve Financial Close by the Financial Close Deadline shall be excused if one or more events described in Section 3.4.1 has occurred, provided that:

- (a) City notifies Non-Profit Entity that it will not take any action described under Section 3.4.2;
- (b) City fails to provide Notice to Non-Profit Entity within 15 days of receipt of the Adverse Event Notice from Non-Profit Entity of City's decision to either take mitigation actions, or to not take mitigation actions;
- (c) the Parties undertake one or more actions under Section 3.4.2, but the effect of such actions does not allow Non-Profit Entity to satisfy its obligation to obtain all financing required for the Project on terms and conditions substantially similar to those in the Financial Proposal;
- (d) Non-Profit Entity has made good faith efforts to take the action described under Section 3.4.2(d) and Non-Profit Entity has diligently and timely conducted negotiations with existing Lenders and/or the Project Debt Competition but was unable to obtain sufficient financing to satisfy its obligations under this Agreement on terms and with conditions reasonably acceptable to the Parties; or

- (e) Non-Profit Entity has negotiated in good faith with City to mutually agree on mitigation actions, but the Parties fail to agree on any action under Section 3.4.2.

3.5.2 With respect to an Adverse Event set forth in clauses (i)-(j) of the definition of “Adverse Event”, Non-Profit Entity’s obligation to achieve Financial Close by the Financial Close Deadline shall be excused if, following the occurrence of such Adverse Event until the Delayed Financial Close Date, a new Adverse Event set forth in clauses (a)-(h) occurs (in which case, the provisions of Section 3.5.1 shall apply to such new Adverse Event (but not with respect to the original Adverse Event set forth in clauses (i)-(j) of the definition of “Adverse Event”).

3.5.3 With respect to an Adverse Event set forth in clauses (a)-(h) of the definition of “Adverse Event”, Non-Profit Entity has no obligation to reach Financial Close during the period between delivery of an Adverse Event Notice and agreement of the Parties on the mitigation actions to be undertaken by each Party to achieve Financial Close. With respect to an Adverse Event set forth in clauses (i)-(j), Non-Profit Entity has no obligation to reach Financial Close during the period between delivery of an Adverse Event Notice and up to 120 days after such delivery, but otherwise shall remain obligated to reach Financial Close unless excused pursuant to Section 3.5.2.

3.6 No-Fault Termination

3.6.1 City may, by delivering to Non-Profit Entity a Notice specifying City’s election to terminate and its effective date, terminate this Agreement prior to Financial Close if City determines, in its sole discretion, that termination is in City’s best interest.

3.6.2 Either Party may terminate this Agreement, without fault or penalty, upon 15 days prior Notice to the other Party, if Financial Close is not achieved by the Financial Close Deadline or Delayed Financial Close Date, as applicable, and such failure is excused pursuant to Section 3.5 (Permitted Excuses from Achieving Financial Close).

3.6.3 With respect to a termination under Section 3.6.1 or Section 3.6.2:

- (a) City shall return the Financial Close Security within five Business Days after termination; and
- (b) Non-Profit Entity shall be entitled to Termination Compensation in an amount not to exceed \$15,556,566 based on commercially reasonable evidence of Principal Project Company’s costs incurred during (i) the PDA Term, and (ii) from the period commencing on the Effective Date and ending on the Early Termination Date, as indicated in City’s Notice delivered pursuant to Section 3.6.1. Such payment shall be the exclusive compensation payable by City to Non-Profit Entity under this Agreement and the Principal Project Company for a termination under Section 3.6.1 or Section 3.6.2.

3.6.4 Payment of Termination Compensation in accordance with Section 3.6.3(b) is conditioned upon City’s receipt from Non-Profit Entity, within 30 days of termination of this Agreement under Section 3.6.1 or Section 3.6.2, of (i) a complete and compliant invoice requesting payment in the form set forth in Exhibit 17 (Section 3.6 Invoice); and (ii) all work

product set forth in Section 3.6.5. Such Termination Compensation shall be due and payable no later than 30 Business Days following City's receipt of such invoice.

3.6.5 Payment of Termination Compensation in accordance with Section 3.6.3(b) is in consideration for ownership and title to all work product (including, subject to the terms of Section 21.4 (Intellectual Property), any Developed IP) produced by Non-Profit Entity related to the Project along with all IP Materials generated as of the date of Notice provided pursuant to Section 3.6.1 or Section 3.6.2, including (a) all written and electronic correspondence, exhibits, photographs, reports, printed material, tapes, disks, designs, concepts, ideas, technology, techniques, methods, processes, drawings, plans, specifications and other graphic and visual aids generated or developed by or on behalf of Non-Profit Entity during the Project procurement process and during the PDA Term, including aesthetic design concepts, interim design submittals, and other items delivered or submitted in any medium, media or format by or on behalf of Non-Profit Entity to City during the Project procurement process, during the PDA Term, or in connection with the Technical Proposal, and (b) all design, planning, materials, equipment, tools, supplies and other Work developed in connection with the Contract Documents.

3.7 Non-Profit Entity's Failure to Achieve Financial Close

3.7.1 If Financial Close is not achieved by the Financial Close Deadline or Delayed Financial Close Date, as applicable, then, unless such failure is excused under Section 3.5 (Permitted Excuses from Achieving Financial Close), City shall have the right to:

- (a) terminate this Agreement in its entirety by written Notice to Non-Profit Entity with immediate effect; and/or
- (b) draw and retain the full amount of the Financial Close Security, as City's sole remedy against Non-Profit Entity under this Agreement for Non-Profit Entity's failure to achieve Financial Close; provided, however, that, nothing herein shall prejudice any rights or remedies City may have for actions or breaches, other than failure to achieve Financial Close, caused by Non-Profit Entity under this Agreement or the Early Works Agreement, if any.

3.7.1.2 Exercising either remedy under this Section 3.7.1 will not prejudice any rights or remedies the City may have for other actions or breaches Non-Profit Entity causes under this Agreement or, if applicable, any Early Works Agreement, subject to the limitations of liability on Non-Profit Parent as contained in this Agreement.

3.7.2 City's right to draw upon the Financial Close Security is not intended to constitute a penalty, but is intended to be, and shall constitute, liquidated damages to compensate City for the cost of foregoing alternative opportunities and for other costs incurred by City in reliance upon Non-Profit Entity's agreement to enter into the transactions contemplated hereby.

3.8 Interaction with Principal Project Company and Project Implementation Agreement.

3.8.1 City acknowledges and agrees that the Non-Profit Entity will carry out certain aspects of the Work by contracting various obligations to the Principal Project Company pursuant to the Project Implementation Agreement and that the Principal Project Company will, in turn, contract

part of its obligations under the Project Implementation Agreement to the D&C Contractor and other Contractors.

3.8.2 The Parties hereby acknowledge and agree that (a) the Principal Project Company has been afforded certain rights under the Project Implementation Agreement to coordinate directly with City in the performance of the Work on behalf of the Non-Profit Entity and City will accept the performance by the Principal Project Company as if performed by the Non-Profit Entity hereunder; and (b) any act by or behalf of the Principal Project Company under the Project Implementation Agreement may, to the extent performed as required under this Agreement, satisfy any obligation or requirement of the Non-Profit Entity. City shall use reasonable efforts deliver to the Principal Project Company a copy of any notice, demand, consent, response or other material communication delivered to the Non-Profit Entity pursuant to this Agreement but the foregoing shall not be a condition to the exercise by City of any rights and remedies under this Agreement against Non-Profit Entity, it being the express understanding that it is Non-Profit Entity's obligation to deliver notices and communications to Principal Project Company. Non-Profit Entity shall concurrently deliver to City any notice, demand, consent, response or other material communication delivered to Principal Project Company under the Project Implementation Agreement.

3.8.3 The Parties acknowledge that the Non-Profit Entity will, on a back-to-back basis, share with the Principal Project Company, who will, in turn, share with the other Contractors, certain benefits to the Non-Profit Entity derived from the rights, entitlements, and relief afforded to the Non-Profit Entity under, and subject to the obligations and limitations under, this Agreement (collectively "**NPE Project Relief**"). City acknowledges and agrees that any circumstance or event impacting the Principal Project Company or any other Contractor, which, if such same event or circumstance impacted the Non-Profit Entity, would serve as the basis for NPE Project Relief, will be deemed a circumstance affecting the Non-Profit Entity for purposes of seeking NPE Project Relief, and, in each case, the Non-Profit Entity or the Principal Project Company, on the Non-Profit Entity's behalf, may claim relief, damages, costs or expenses under and subject to the terms of this Agreement. The Principal Project Company may only bring claims directly on behalf of the Non-Profit Entity under this Agreement in accordance with the terms and limitations of this Agreement and the Project Implementation Agreement.

3.8.4 City and Principal Project Company, for itself and on behalf of the Non-Profit Entity, shall directly interface with each other as needed to perform the D&C Work.

3.8.5 Notwithstanding anything to the contrary in this Agreement, to the extent the Non-Profit Entity delegates any of its obligations under this Agreement to Principal Project Company (pursuant to the Project Implementation Agreement or otherwise), the Non-Profit Entity shall cause Principal Project Company to comply with such delegated obligations under this Agreement.

3.8.6 In the event Principal Project Company exercises its rights under Section 1.12 of the Project Implementation Agreement as a result of a Non-Profit Entity Default or any other breach by the Non-Profit Entity of its obligations under this Agreement, in addition and without duplication to any and all rights and remedies of City under this Agreement, City may seek to recover from the Non-Profit Entity its Losses arising from such exercise of Principal Project Company's rights under Section 1.12 of the Project Implementation Agreement.

3.8.7 Notwithstanding anything to the contrary contained herein or in the Project Implementation Agreement, the liability of Non-Profit Entity under this Agreement and the Project Implementation Agreement, and each obligation of Non-Profit Entity hereunder and thereunder (including its indemnity obligations) shall be “limited recourse obligations” and, accordingly, the sole source of satisfaction of or recourse against such obligations shall be limited to Non-Profit Entity’s interest in (a) this Agreement and the Project Implementation Agreement, (b) the Project, (c) the Milestone Payments and Substantial Completion Development Fee, (d) Non-Profit Entity’s other assets, and (e) any guaranties. None of the assets or properties of Non-Profit Parent shall be subject to recourse, judgment, foreclosure, enforcement, security or seizure by City or by Principal Project Company, Non-Profit Parent shall have no obligation to loan, advance or contribute funds to Non-Profit Entity to enable it to pay or perform its obligations under this Agreement or the Project Implementation Agreement, and neither City or Principal Project Company may seek to force Non-Profit Parent to do so. Neither City nor Principal Project Company shall seek to obtain payment or performance against Non-Profit Parent or against the members, officers, directors, or trustees of Non-Profit Entity or Non-Profit Parent, recourse being limited solely to the assets described above.

**ARTICLE 4. NON-PROFIT ENTITY FINANCING; LENDERS' RIGHTS;
REFINANCING; PRIVATE CAPITAL INVESTMENTS; FINANCIAL MODEL**

4.1 Non-Profit Entity Right and Responsibility to Finance

4.1.1 Non-Profit Entity is solely responsible for obtaining and repaying, at its own cost and risk and without recourse to the City or SFMTA, all financing necessary for the Work that is the Non-Profit Entity's responsibility under the Contract Documents. Non-Profit Entity shall take all appropriate action to obtain the Project Debt as described in the Financial Proposal on or before the Financial Close Deadline. If the Finance Plan includes any other tax-exempt financing, Non-Profit Entity bears all risks relating to securing a Conduit Issuer, receiving the necessary approvals and compliance with applicable federal requirements.

4.1.2 Non-Profit Entity may grant security interests in or assign the entire NPE's Interest (but not a portion of such interest) to Lenders for purposes of securing the Project Debt, subject to the terms of the Contract Documents. Non-Profit Entity shall not pledge or encumber the NPE's Interest, or any portion of such interest, to secure any indebtedness of any Person other than (a) Non-Profit Entity, (b) any special purpose entity that owns Non-Profit Entity but no other assets and has purposes and powers limited to the Project and Work, (c) a special purpose entity subsidiary owned by either Non-Profit Entity or an entity described in clause (b) of this Section 4.1.2, or (d) a Conduit Issuer.

4.1.3 Except as otherwise provided in Section 3.2.3 (Base Interest Rate Fluctuation), Non-Profit Entity bears all risk of any changes in the interest rate, payment provisions, collateral requirements, financing charges, make whole amounts, hedge agreements, prepayment premiums, breakage charges or the other terms of Project Debt.

4.1.4 Notwithstanding the foreclosure or other enforcement of any security interest created by a Security Document, Non-Profit Entity shall remain liable to City for the payment of all sums owing to City under this Agreement and the performance and observance of all of Non-Profit Entity's covenants and obligations under the Contract Documents.

4.2 No City or City Responsibility for Project Debt

4.2.1 All Project Debt or other obligations issued or incurred by a NPE-Related Entity in connection with this Agreement or the Project shall be issued or incurred only in the name of a NPE-Related Entity or a Conduit Issuer or other entity acting on behalf of a NPE-Related Entity as the ultimate obligor. Except as otherwise expressly provided in this Agreement, the City shall have no obligation to pay debt service on any Project Debt or any other debt issued or incurred by a NPE-Related Entity. The City shall have no obligation to join in, execute or guarantee any note or other evidence of indebtedness of a NPE-Related Entity, any other Financing Agreement or any Security Document (other than the Direct Agreement). Project Debt or other obligations issued or incurred by a NPE-Related Entity in connection with this Agreement or the Project do not constitute indebtedness, or a pledge of the faith and credit, of City or any department of the City. The Lenders, individually or collectively, have no right to have taxes levied or compel appropriations by City, including the Board of Supervisors, for the payment of any or all of the amount of such principal of, premium, if any, and interest on Project Debt or other obligations issued or incurred by a NPE-Related Entity in connection with this Agreement or the Project.

4.2.2 Except for a violation by City of its express obligations to Lenders in any Direct Agreement, no Lender is entitled to pursue any remedy against City, including any right to seek any damages or other amounts from the City, whether for Project Debt or any other amount.

4.2.3 Section 4.2.2 does not affect City's liability to Non-Profit Entity under Article 17 (Termination) for Termination Compensation that is measured in whole or in part by reference to outstanding Project Debt.

4.2.4 City shall have no obligation to any Lender under the Contract Documents, except to the extent of any express obligations of City to Lenders under any Direct Agreement or in any other instrument or agreement signed by City in favor of such Lender or Collateral Agent. This Section 4.2.4 does not preclude Lender enforcement of this Agreement against City where the Lender has succeeded to the NPE's Interest, whether by way of assignment or subrogation.

4.3 Lenders' Rights

4.3.1 This Agreement is exclusively for the benefit of City and Non-Profit Entity, and shall not provide any Lender with any remedy, claim, liability, reimbursement, cause of action or other right, except for the rights of any Lender as provided in any Direct Agreement.

4.3.2 The rights of City under Article 16 (Default; Remedies) and Article 17 (Termination) are subject to the terms of any Direct Agreement.

4.4 Refinancing

4.4.1 Right of Refinancing

4.4.1.1 Other than Exempt Refinancings and Rescue Refinancings. City shall have the unilateral right to cause the Non-Profit Entity to commence a Refinancing to the extent permitted under the Financing Documents, all cost and expenses of which shall be borne by City. Both Parties shall cooperate in connection with the closing of any Refinancing, including providing customary legal opinions and instruments and other documents, all at City's cost and expense. If the Refinancing is with a new Lender, the new Lender may be added to an existing Direct Agreement or City shall enter into a new Direct Agreement with the new Lender, if such Lender so elects. City acknowledges and agrees that in connection with any Refinancing initiated at the request or direction of the City, Non-Profit Entity shall be entitled to engage Principal Project Company or an Affiliate to perform financial modelling and structuring services and, other than in connection with a Rescue Refinancing, shall be entitled to pay such Person a reasonable fee for such services consistent with market rates for such a fee. Any such fee shall be a cost of the Refinancing.

4.4.2 Notice of Refinancing

4.4.2.1 At least 60 days before the proposed date for closing any proposed Refinancing, whether initiated by the Non-Profit Entity or City (except an Exempt Refinancing under clause (b), (c) or (d) of the definition of Exempt Refinancing), Non-Profit Entity shall submit to City a summary of the proposed Refinancing, together with a schedule setting forth the various activities, each with schedule durations, to be accomplished from commencement through the close of the proposed Refinancing.

4.4.2.2 Non-Profit Entity shall provide at least 30 days' advance Notice to City of any intended Exempt Refinancing under clause (b), (c) or (d) of the definition thereof, including facts and documents of such Exempt Refinancing which shall include, at a minimum, the documents described in Section 4.4.2.4 and the reason Non-Profit Entity considers it to be an Exempt Refinancing.

4.4.2.3 Within 20 days after receipt of the materials required under Section 4.4.2.2, City will review and provide Notice to Non-Profit Entity as to whether, in its opinion, the proposed Refinancing is an Exempt Refinancing.

4.4.2.4 At least 45 days before the proposed date for closing any Refinancing (except an Exempt Refinancing under clause (b), (c) or (d) of the definition of Exempt Refinancing), Non-Profit Entity shall:

- (a) provide draft proposed Financing Agreements and Security Documents (or term sheets therefor, if drafts are not then available), available Refinancing Data, and any other submittals reasonably required by City to calculate City's Refinancing Gain; and
- (b) if applicable, provide Notice to City setting out the facts to support the basis for characterization of the transaction as an Exempt Refinancing or Rescue Refinancing.

4.4.2.5 Within 15 days after receipt of the materials required under Section 4.4.2.4, City will provide Notice to Non-Profit Entity of City's determinations regarding the following:

- (a) whether the proposed Refinancing is an Exempt Refinancing or Rescue Refinancing;
- (b) if the proposed Refinancing is neither an Exempt Refinancing or Rescue Refinancing, whether to approve or disapprove the proposed Refinancing; and
- (c) if City will approve the proposed Refinancing, whether the Refinancing Gain requirements apply.

4.4.2.6 City's failure to deliver to Non-Profit Entity Notice of the determinations and selection within the time period set forth in Section 4.4.2.5 shall not prejudice City's right to disapprove the proposed Refinancing, to receive any portion of Refinancing Gain, or its selection of the means for payment of such portion.

4.4.2.7 At least 10 days before the proposed date for closing the Refinancing, Non-Profit Entity shall deliver to City substantially final drafts of the proposed Financing Agreements and Security Documents, together with updated versions of the Refinancing Data.

4.4.2.8 Within five Business Days after close of the Refinancing, Non-Profit Entity shall deliver to City copies of all signed Financing Agreements and Security Documents in connection with the Refinancing, and the final Refinancing Data.

4.4.2.9 Within 10 Business Days after close of the Refinancing, City and Non-Profit Entity shall meet and confer to agree upon the final calculation of the Refinancing Gain in accordance with Section 4.5 (Refinancing Gain). Once the final calculation is made, Non-Profit Entity shall

pay City 100% of the Refinancing Gain in accordance with City's selected method of payment. If there is any dispute regarding the amount owing, Non-Profit Entity shall pay the undisputed amount to City and the amount in dispute shall be subject to resolution under the Contract Dispute Procedures.

4.4.3 Refinancing Limitations, Requirements and Conditions

4.4.3.1 If City renders any assistance or performs any requested activity in connection with a Refinancing apart from delivering a consent and estoppel certificate under any Direct Agreement, then concurrently with close of the Refinancing, and as a condition precedent to Non-Profit Entity's right to close the Refinancing, Non-Profit Entity shall reimburse City for Recoverable Costs incurred in connection with the Refinancing. City will deliver to Non-Profit Entity a written invoice and demand before the scheduled date of closing. If as a result of any NPE Fault, the Refinancing does not close, Non-Profit Entity shall reimburse City for Recoverable Costs incurred in connection with the proposed Refinancing within 10 days after City delivers to Non-Profit Entity a written invoice and demand for such costs.

4.4.3.2 Where the Non-Profit Entity, acting with the consent of the Principal Project Company, elects to undertake a Refinancing, or the refinancing is an Exempt Refinancing, the Non-Profit Entity shall bear all risks for any Refinancing that negatively affects its Key Ratios or financial performance.

4.4.3.3 In no event shall the Availability Payments be increased as a result of, or arising out of, a Refinancing pursuant to clause (f) of the definition of "Exempt Refinancing" except to the extent that such Refinancing was required solely due to or in connection with any City Fault.

4.5 Refinancing Gain

4.5.1 City shall be entitled to receive 100% of any Refinancing Gain attributable to any Refinancing.

4.5.2 Commencing at least 40 days before the proposed date for closing any Refinancing (except an Exempt Refinancing under clause (b), (c) or (d) of the definition of Exempt Refinancing), the Parties will negotiate in good faith to determine the method by which City will receive the Refinancing Gain, which includes one or a combination of the following methods:

- (a) a single payment on or about the date of the Refinancing;
- (b) a credit or payment by Non-Profit Entity to City that effectively reduces the Availability Payments over the remainder of the Term; or
- (c) a combination of clauses (a)-(b).

4.6 Intentionally Omitted

4.7 Financial Model and Financial Model Updates

4.7.1 Model Update Event

4.7.1.1 Model Update Event means any of the following events:

- (a) the implementation at Financial Close of the Base Interest Rate and Credit Spread fluctuation process pursuant to Section 3.2.3 (Base Interest Rate Fluctuation);
- (b) the implementation of any mitigation actions set forth in Section 3.4.2;
- (c) a Delay Event for which City owes Non-Profit Entity compensation pursuant to Sections 14.1.4 (Costs Payable for Compensable Delay Events), Section 14.1.6 (Costs Payable for Force Majeure Events During the D&C Period) or Section 14.1.7 (Costs Payable for Unavoidable Delay Events During the D&C Period), respectively, which City has elected to pay as an adjustment to the Availability Payments over the Term;
- (d) an event for which City is entitled to compensation from Non-Profit Entity pursuant to Section 16.2 (City Remedies for NPE Default);
- (e) a Refinancing resulting in a Refinancing Gain to which City is entitled to a 100% share pursuant to Section 4.5 (Refinancing Gain); and
- (f) any amendments to the Contract Documents that the Parties agree has a material effect on the Financial Model, including any amendments agreed to by the Parties between the Finance Plan Due Date and Financial Close.

4.7.1.2 Whenever a Model Update Event occurs (except as otherwise provided in this Agreement or where the Parties mutually agree otherwise), the financial consequence shall be determined in accordance with this Section 4.7 (Financial Model and Financial Model Updates).

4.7.2 Updates to the Financial Model

4.7.2.1 In connection with any Model Update Event that entitles either Party to the payment of any amount, Non-Profit Entity may, in consultation with City, prepare an updated Financial Model in accordance with this Section 4.7.2 (Updates to the Financial Model) (each, a “**Financial Model Update**”) to reflect the financial impacts of such Model Update Event and calculate the amount due to either Party as a result of the Model Update Event. Non-Profit Entity may address more than one Model Update Event within a single Financial Model Update, provided that City may request interim versions of a Financial Model Update that address the impact of only a single Model Update Event. No Financial Model Update shall have any effect on the rights and obligations of the Parties under this Agreement until both Parties have agreed in writing to accept it as an amendment to this Agreement pursuant to Section 4.7.3 (Replacement of Financial Model).

4.7.2.2 Non-Profit Entity shall propose the Financial Model Update by Notice to City giving the proposed revised Financial Model together with full and complete details and explanation of the assumptions and calculations used to reflect the financial impacts of the Model Update Event which may only include changes to Non-Profit Entity’s cash revenues and expenses that arise directly from the Model Update Event and consequential changes to the Project Debt draw down schedule, funding and release of reserves, financing costs, debt service schedule and amounts or any other impacts or consequential changes mutually agreed by the Parties.

4.7.2.3 A Financial Model Update:

- (a) may incorporate only the following revisions:
 - (i) changes to Non-Profit Entity's cash revenues and expenses that arise directly from the Model Update Event; and
 - (ii) consequential changes to the Project Debt draw down schedule, funding and release of reserves, financing costs and debt service schedule and amounts; and
- (b) may not:
 - (i) incorporate other information or assumptions based on Non-Profit Entity's actual Project Financial Performance; or
 - (ii) generally update projections through the end of the Term based on current market conditions.

4.7.2.4 Non-Profit Entity may amend the logic or formulae incorporated in a Financial Model Update to the extent necessary to permit adjustments to the Financial Model in accordance with this Section 4.7 (Financial Model and Financial Model Updates). However, if any amendment is to be made to the logic or formulae in a Financial Model Update, the Key Ratios in the Financial Model Update must be maintained at levels that are neither lower nor higher than the Key Ratios existing in the Financial Model then in effect.

4.7.2.5 Non-Profit Entity shall provide City with access, on an Open Book Basis, to the set of updated and revised assumptions and other data that comprise or are included in any Financial Model Update. Non-Profit Entity shall also provide a reconciliation and explanation of all the adjustments applied in the Financial Model Update. City may challenge the validity, accuracy or reasonableness of any Financial Model Update or any portion thereof and may require Non-Profit Entity to correct any detected errors in the Financial Model Update or Financial Model, as applicable.

4.7.3 Replacement of Financial Model

4.7.3.1 Following mutual agreement by Non-Profit Entity and City on interim versions of a Financial Model Update, Non-Profit Entity shall deliver to City, in form and substance reasonably acceptable to City:

- (a) the final version of the Financial Model Update and the related amended Financial Modeling Data, in the same form as the versions delivered pursuant to Section 3.3 (Post-Financial Close Requirements and Deliverables) or in such other form as may be agreed upon by the Parties;
- (b) an updated model audit report related to such Financial Model Update in accordance with Section 4.7.4 (Financial Model Audits); and
- (c) a form of written amendment that (i) effects the replacement of the then current Financial Model then in effect with the proposed Financial Model Update, and (ii) addresses all other amendments to this Agreement that may be required as a result of the Model Update Event and the amended Financial

Model, including any required amendments to the definitions of APC, API, and Key Ratios.

4.7.3.2 Upon approval by City of the materials provided under Section 4.7.4.1 and execution of the written amendment by the Parties, the Financial Model Update shall become the Financial Model for the purposes of this Agreement until further amended, as applicable. Each Financial Model in effect under this Agreement shall be assigned an exclusive identification number, using chronological sequencing, and shall be clearly marked with Non-Profit Entity's name, date of submittal, contract number and the words, "Financial Model for Escrow".

4.7.3.3 City reserves the right to approve any material changes in the debt structure (e.g., fixed or variable rate, bank financing or bond financing, call provisions) before Financial Close that constitute a deviation from the assumptions in Exhibit 3A (Financial Proposal). Material changes, as used in this Section 4.7.3.3, include (i) a change that differs materially from any commitments or provisions set forth in the Finance Plan; (ii) a change which would alter the risk allocations in this Agreement, the Project Implementation Agreement or any other Key Contract; (iii) a change which could increase the liability of City for termination compensation in the event of a termination; (iv) a change that would result in an Affordability Event; (v) a change that would cause a Delayed Financial Close Date; (vi) a change in any of the Security Documents; and/or (vii) a change under any of the conditions precedent to Financial Close under the Financing Documents.

4.7.3.4 In the event of a Contract Dispute about the Financial Model, the Financial Model or the immediately preceding Financial Model Update (as applicable) that is not being disputed (or, if there has been no undisputed Financial Model Update, the Financial Model) will remain in effect until such Contract Dispute is resolved or a new Financial Model Update is issued and not disputed. If a proposed Financial Model or Financial Model Update (as applicable) has not been disputed, or if any such Contract Dispute has been so resolved, the proposed Financial Model or Financial Model Update (as applicable) will serve as the Financial Model or the current Financial Model Update (as applicable).

4.7.4 Financial Model Audits

4.7.4.1 Any model audit report delivered to City pursuant to Sections 3.3 (Post-Financial Close Requirements and Deliverables) and 4.7 (Financial Model and Financial Model Updates) shall be prepared by an independent audit firm with a nationally recognized reputation. The cost of a model audit report shall be paid solely by City (and may be included as a cost to be financed as a closing expense) if it is prepared in connection with a Financial Model Update related to a Model Update Event described in Section 4.7.1.1(c), Section 4.7.1.1(e), or 4.7.1.1(f) when an amendment is proposed only by City. The cost of any other model audit report required hereunder shall be paid solely by Non-Profit Entity.

4.7.4.2 Non-Profit Entity shall bear the entire risk of any errors or omissions contained in the Financial Model and shall not be entitled to any compensation or other relief from City in relation to any loss or damage that it suffers as a result of such error or omission.

4.8 Escrow of Financial Model and Cost and Pricing Data

4.8.1 City and Non-Profit Entity shall, within 10 days after the Effective Date, jointly deposit the Base Case Financial Model in a locked cabinet at SFMTA or another location approved by City, with both Parties having a key to the cabinet. Replacement Financial Models shall be

deposited within 10 days after the Parties have executed and delivered the amendment in accordance with Section 4.7.3 (Replacement of Financial Model).

4.8.2 The Parties acknowledge that the Cost and Pricing Data has been placed into escrow as provided in Section 4.8.1. Concurrently with approval of each Change Order or other amendment to the Contract Documents, Non-Profit Entity shall deposit in the Cost and Pricing Data escrow one copy of all documentary information used by Non-Profit Entity in connection with pricing for the Change Order or other amendment, including quotations from Contractors.

4.8.3 Non-Profit Entity represents and warrants that:

- (a) the material initially delivered into escrow constitutes the Base Case Financial Model and Cost and Pricing Data provided in connection with the Financial Proposal and an authorized officer of Non-Profit Entity or Principal Project Company has personally examined the contents of the electronic file and/or electronic storage media, as applicable, and they are complete; and
- (b) the Cost and Pricing Data constitutes all of the information used by Non-Profit Entity in determining the cost of the D&C Work in preparation of the Implementation Proposal and, unless City agrees or directs otherwise, Non-Profit Entity shall not use any other Implementation Proposal preparation information in the negotiation of Change Orders or in connection with the potential resolution or settlement of Claims or Contract Disputes.

4.8.4 Whenever Non-Profit Entity makes an additional deposit of any replacement Financial Models or Cost and Pricing Data into escrow, Non-Profit Entity shall certify, or cause Principal Project Company to certify, to City in writing at the time of deposit that: (a) the material deposited into escrow constitutes the true replacement Financial Models or Cost and Pricing Data, as applicable; (b) an authorized officer of Non-Profit Entity or Principal Project Company has personally examined the contents of the deposit; and (c) the deposit is complete.

4.8.5 City may conduct a review of the Cost and Pricing Data in accordance with the procedure set forth in Section 4.8.6 to determine whether it is complete. In the event City determines that any Cost and Pricing Data is missing, City may request that Non-Profit Entity submit the missing data and Non-Profit Entity shall provide such Cost and Pricing Data within three Business Days of the request, and at that time it will be date stamped, labeled to identify it as supplementary information, and added to the escrowed Cost and Pricing Data. Non-Profit Entity shall have no right to add documents to the Cost and Pricing Data except as otherwise provided in this Section 4.8 (Escrow of Financial Model and Cost and Pricing Data).

4.8.6 Each of City and Non-Profit Entity shall have the right to examine, through one or more designated representatives, any and all components of the Financial Model and Cost and Pricing Data during the SFMTA's normal business hours. The Party undertaking an examination need not have or state a specific reason to examine such material. Without limiting the foregoing, the Parties recognize that examination of the escrowed material may assist in the negotiation of Change Orders, or may assist in the potential resolution or settlement of Claims or Contract Disputes.

4.8.7 City will provide Notice to Non-Profit Entity in writing at least two Business Days in advance of City's examination of escrowed material, and shall allow Non-Profit Entity to be present at the examination. City may make or retain copies of escrowed material, subject to

terms reasonably necessary to protect the confidentiality and proprietary nature of the contents, as may be agreed upon by the Parties and subject to applicable Laws.

4.8.8 Subject to applicable Laws, the escrowed material is, and shall remain, the property of Non-Profit Entity or its Contractors.

4.8.9 Non-Profit Entity agrees that the Cost and Pricing Data is not part of the Contract Documents and that nothing in the Cost and Pricing Data shall change or modify the Contract Documents.

4.8.10 Either Party may introduce escrowed material into evidence in accordance with the Contract Dispute Procedures. The Parties shall promptly abide by any request from the court or other dispute resolver to receive, review and utilize the Financial Model and Cost and Pricing Data to assist the dispute resolver in its deliberations.

4.8.11 The escrow shall remain in effect throughout the Term and thereafter until final resolution of all Contract Disputes, subject to any mutual agreement of the Parties to retrieve and/or discard materials therein from time to time.

4.8.12 Non-Profit Entity shall not be entitled to any additional payment for compilation of materials to be deposited into escrow or any other Non-Profit Entity expenses for complying with this Section 4.8 (Escrow of Financial Model and Cost and Pricing Data).

ARTICLE 5. SUBMITTALS; MANAGEMENT SYSTEMS AND OVERSIGHT

5.1 Submittal Review Terms and Procedures

5.1.1 Terms and Procedures

Non-Profit Entity shall comply with the terms and procedures for Submittals review set forth in Exhibit 11 (Submittals Review Process). Except as set forth in this Agreement, including Exhibit 11 (Submittals Review Process), the standard for review and approval of design and construction Submittals that comply with the Technical Requirements shall be reasonable discretion; provided, however, that decisions regarding waivers, releases, consents, acceptance of Nonconforming Work, Deviations, NPE Change Requests and other matters that are not consistent with or comply with the Contract Documents shall be within City's sole discretion.

5.1.2 Conflicting Provisions

Exhibit 11 (Submittals Review Process) sets forth uniform terms and procedures for Submittals. In the event of any conflict between the provisions of Exhibit 11 (Submittals Review Process) and any other provisions of the Contract Documents or with the Project Management Plan concerning procedures with respect to submission, review, comment, approval, consent, determination, decision or other actions with respect to Submittals, Exhibit 11 (Submittals Review Process) shall exclusively govern and control the procedures, except to the extent that the conflicting provision expressly states that it supersedes Exhibit 11 (Submittals Review Process).

5.1.3 Limitations on Non-Profit Entity's Right to Rely

5.1.3.1 No action or failure to take action by or on behalf of City relating to Oversight (including review and approval of the Project Management Plan) or other act or omission of City shall:

- (a) constitute an approval or acceptance by City of Non-Profit Entity's performance of its obligations in accordance with the Contract Documents;
- (b) alter, waive, diminish, release or otherwise prejudice any rights, remedies or powers that City has under the Contract Documents or otherwise;
- (c) limit Non-Profit Entity's obligation to perform the Work in accordance with the Contract Documents; or
- (d) affect Non-Profit Entity's liabilities and obligations to fulfill the requirements of the Contract Documents (including its indemnity obligations).

5.1.3.2 Non-Profit Entity acknowledges and agrees that Oversight, including review, comment, exception, objection, rejection, approval, disapproval, acceptance, concurrence, certification or failure to conduct any such activity by City:

- (a) is solely for the benefit and protection of City;

- (b) does not relieve Non-Profit Entity of its responsibility for the selection and the competent performance of all NPE-Related Entities;
- (c) does not relieve Non-Profit Entity from compliance with the requirements of the Contract Documents or create or impose upon City any liability, duty or obligation toward Non-Profit Entity to cause it to fulfill the requirements of the Contract Documents;
- (d) shall not be deemed or construed as any kind of warranty, express or implied, by City;
- (e) may not be relied upon by Non-Profit Entity or used as evidence in determining whether Non-Profit Entity has fulfilled the requirements of the Contract Documents;
- (f) shall not relieve Non-Profit Entity from liability for, and responsibility to replace, Nonconforming Work (including Work based on Design Documents to the extent that they include a change, deviation, modification, alteration or exception from the Technical Requirements not approved as a Deviation) and to cure NPE Defaults;
- (g) shall not be deemed or construed as any assumption of risk by City as to design, construction, equipping, supply, performance or quality of the Project or performance of the Work; and
- (h) may not be asserted by Non-Profit Entity against City as a legal or equitable defense to, or as a waiver of or relief from, Non-Profit Entity's obligation to fulfill the requirements of the Contract Documents.

5.1.3.3 Notwithstanding the provisions of Sections 5.1.3.1 and 5.1.3.2, Non-Profit Entity may rely on Notices that City gives under this Agreement for purposes of confirming City's approval or consent to an event or matter, but without prejudice to any of City's other rights and remedies under this Agreement, including regarding compliance by Non-Profit Entity with the requirements of the Contract Documents.

5.1.3.4 Notwithstanding the provisions of Sections 5.1.3.1 and 5.1.3.2, Non-Profit Entity shall be entitled to rely on City's written approval of specific Deviations.

5.1.3.5 City's approval of Release for Construction Documents shall constitute approval of the design by City for purposes of Government Code section 830.6, but shall not be deemed to relieve Non-Profit Entity of liability for the design.

5.2 Project Management Plan

5.2.1 Non-Profit Entity shall comply with the Project Management Plan and its component parts, plans and other provisions and Good Industry Practice, including those requirements applicable to Quality Assurance and Quality Control.

5.2.2 Non-Profit Entity shall submit to City, in accordance with the procedures and timeline described in the Technical Requirements, any proposed changes or additions to or revisions of the Project Management Plan and its component parts.

5.2.3 Non-Profit Entity shall not commence any aspect of Construction Work before approval of the D&C Management Plan applicable to such Construction Work.

5.2.4 If any part, plan or other documentation of the Project Management Plan refers to, relies on or incorporates any manual, plan, procedure or like document, then all such referenced or incorporated materials shall be submitted to City for review, marked to identify relevant provisions.

5.2.5 Non-Profit Entity shall monitor the Work and prescribe times for internal audits of the Project Management Plan, and shall carry out such internal audits at the times prescribed and shall promptly remedy all findings to City's satisfaction.

5.2.6 Non-Profit Entity shall comply with and cause all Contractors to comply with applicable requirements of the Project Management Plan.

5.2.7 Non-Profit Entity shall update the Project Management Plan in accordance with the Technical Requirements.

5.3 Quality Assurance, Quality Control, Generally

Non-Profit Entity is primarily responsible for all Quality Assurance and Quality Control activities (including self-monitoring activities) necessary to manage the Project. Non-Profit Entity shall undertake the primary aspects of Quality Assurance and Quality Control for the Project and the Work in accordance with the Project Management Plan, the Technical Requirements (including Section 1.4 of Division 1 of the Technical Requirements), other applicable provisions of the Contract Documents, Good Industry Practice and applicable Law. The foregoing shall not limit City's Oversight rights and quality assurance/quality control verification, all as set forth in this Agreement.

5.4 Oversight, Inspection and Testing

5.4.1 City shall have the right at all times to conduct Oversight as provided in this Section 5.4 (Oversight, Inspection, and Testing) and Division 6 of the Technical Requirements. Such Oversight may include assessments regarding compliance with the Contract Documents, Project Management Plan, and requirements of applicable Governmental Entities and applicable Law. City may designate any Person or Persons to carry out any Oversight on City's behalf.

5.4.2 City's Oversight rights include, at City's sole option, the following:

- (a) monitoring and auditing Non-Profit Entity and its Books and Records to determine compliance with requirements of the Contract Documents and the Project Management Plan, including (i) audit review of compliance with quality procedures and processes under NPE's Design Quality Plan and NPE's Construction Quality Plan, and (ii) audit review of Design Documents,

Construction Documents, field work plans, land surveys, mapping, other data collection tasks, other Submittals and other Books and Records;

- (b) conducting audits of all design and pre-design activities for the Project as needed to ascertain and evaluate Non-Profit Entity's design quality and safety control processes, including (i) review of engineering calculations, engineering reports, and findings, (ii) review of the work of Non-Profit Entity's environmental compliance personnel with the Environmental Compliance Plan, and (iii) review of certifications that Non-Profit Entity's Quality Control checks of final Construction Documents have been performed and documented, and that the Construction Documents conform to the requirements of the Contract Documents;
- (c) conducting audits of all construction-related activities for the Project as needed to audit Non-Profit Entity's construction quality and safety control processes, including (i) auditing the services of Non-Profit Entity's accredited laboratories and associated testing devices and equipment, (ii) reviewing Non-Profit Entity's construction quality procedures, including conducting field monitoring and inspections as needed for audit purposes of construction activities, materials, and system components, as indicated in the Contract Documents, (iii) auditing Non-Profit Entity's records of materials, materials tests, materials certifications, and performance tests for Project systems, (iv) reviewing and investigating Project progress, Project quality, Deviations, Defects, and repair and replacement of Nonconforming Work, and (v) conducting field monitoring and inspections;
- (d) conducting inspection and testing of materials or software, including witnessing factory tests, off-site lab tests, and first article inspection of manufactured items to verify Non-Profit Entity's compliance with testing frequencies and requirements, including (i) performance and acceptance testing, in the Contract Documents, and the Project Management Plan, (ii) the accuracy of the tests, inspections and audits performed in accordance with NPE's Design Quality Plan and NPE's Construction Quality Plan, and (iii) compliance of materials incorporated into the Project with the applicable requirements, conditions and standards of the Contract Documents, Regulatory Approvals, the Project Management Plan and applicable Law;
- (e) accompanying Non-Profit Entity on physical inspections associated with Non-Profit Entity's Performance Monitoring Report, conducting its own performance inspections, and assessing and rating the condition of elements;
- (f) attending and witnessing Non-Profit Entity's other on-site and off-site tests and inspections, including system start-up and acceptance tests and inspections, subject to the obligation to observe all applicable Safety Standards and requirements;
- (g) reviewing Non-Profit Entity's certification of Record Documents and surveys;
- (h) investigating, analyzing and reporting on Safety Compliance and performance of Safety Compliance Orders; and

- (i) monitoring and auditing Non-Profit Entity's detection, reporting, response times and time to respond to and rectify breaches and failures for which D&C Noncompliance Points may be assessed in accordance with Article 15 (D&C Period Deductions and D&C Noncompliance Points) and Exhibit 4A (Milestone Payment Mechanism).

5.4.3 City also has the right, but not the obligation, to conduct "over-the-shoulder" reviews of Design Documents and other Submittals. All such "over-the-shoulder" reviews conducted are for City's sole benefit.

5.4.4 Nothing in the Contract Documents shall preclude, and Non-Profit Entity shall not interfere with, any review, inspection or oversight of Submittals or of Work that any Authority Having Jurisdiction may desire to conduct in accordance with its agreements with City or applicable Law.

5.5 Testing and Test Results

5.5.1 All tests shall be carried out in accordance with Division 6 of the Technical Requirements, this Section 5.5 (Testing and Test Results) and all other applicable provisions of and the Contract Documents.

5.5.2 Non-Profit Entity shall develop a test recording system that permits ready retrieval of all test readings and shall provide information relating to tests proposed, test methodology and Test Reports to City on request.

5.5.3 City may attend and witness any tests and verifications to be conducted with respect to the Project. Non-Profit Entity shall provide to City all test results and reports (which shall be provided in electronic format in accordance with the Technical Requirements) within 10 Business Days after Non-Profit Entity or its Contractor receives them. With respect to continuous testing operations (such as concrete quality, structural concrete strengths, aggregate quality, compaction tests and material quality), Non-Profit Entity shall provide to City at regular intervals (at least weekly unless otherwise agreed) test summary sheets and statistical analyses indicating strength and quality trends.

5.5.4 For the purposes of the City's rights under Section 5.5, Non-Profit Entity shall provide the City, as part of its Three-week Look-Ahead Report pursuant to Section 1.2.1.8 of Division 1 of the Technical Requirements with a three-week look-ahead schedule, of the date, time, subject matter and specific location of such tests. In the event Non-Profit Entity wishes to modify the testing schedule set forth in such Three-week Look-Ahead Report, Non-Profit Entity shall give City advance Notice of such change. In addition, in advance of such tests, Non-Profit Entity shall respond to written requests by City to confirm the date and specific location within one Business Day.

5.5.5 City's Authorized Representative and any other designee may attend any test and will give advance Notice (not less than one Business Day) of their intent to attend the test. Any materials or plant that fail(s) such tests shall be rejected.

5.5.6 Non-Profit Entity acknowledges that, where Non-Profit Entity's Work impacts a Utility or an element subject to the jurisdiction of an Authority Having Jurisdiction, then the affected Utility Owner or Authority Having Jurisdiction, as applicable, will have the same rights as City

under this Section 5.5 (Testing and Test Results), subject to the same obligations that apply to City under Section 6.7.3.

5.6 Meetings

5.6.1 Non-Profit Entity shall conduct coordination and progress meetings with City, in accordance with Section 1.1.3 of Division 1 of the Technical Requirements during the course of design and construction. At City's request, Non-Profit Entity shall require the Engineer of Record and Contractors responsible for or affected by such Work to attend the progress meetings. City and its designated representatives are authorized to attend all such meetings and are permitted to raise any questions, concerns or opinions without restriction.

5.6.2 The Parties shall hold any other meetings, at such times, frequency and locations, as applicable, as stated in the Technical Requirements.

5.6.3 During the progress of the Work, if Non-Profit Entity encounters any Hazardous Materials or other Project Site conditions that may entitle Non-Profit Entity to claim that a Delay Event has occurred, then Non-Profit Entity shall provide Notice to City of the specific condition promptly before it is disturbed, or as soon as practicable afterwards, and before the affected Work continues. City shall promptly investigate such conditions.

5.6.4 City and Non-Profit Entity, through their respective Authorized Representatives, shall meet from time to time at the other Party's request to discuss and resolve issues relating to the Work.

5.6.5 Non-Profit Entity shall schedule all meetings with City at a date, time and place reasonably convenient to both Parties.

5.7 Reporting

5.7.1 Relating to the Work

5.7.1.1 Non-Profit Entity shall submit all reports relating to the Work in the form, with the content and within the time required under the Contract Documents.

5.7.1.2 Non-Profit Entity shall make available to City information relating to the status of the Work, including non-proprietary information relating to the design, engineering and construction, estoppel certificates, and such other matters as City may reasonably request in accordance with the Technical Requirements.

5.7.2 Financial Reporting

5.7.2.1 On the first anniversary of the Effective Date and on every subsequent anniversary thereof during the Term, Non-Profit Entity shall deliver to City certified copies of (a) Non-Profit Entity's most recent annual audited financial statements and (b) any other reporting and notifications provided to Lenders regarding material events (including any draws on Non-Profit Entity's debt service reserve account) under the Financing Documents.

5.7.2.2 From the Effective Date until the Final Acceptance Date, Non-Profit Entity shall deliver to City, on a monthly basis, certified copies of (a) Non-Profit Entity's draw requests to

Lenders (including corresponding payment applications by Key Contractors to Non-Profit Entity), and (b) the LTA's reports, which shall clearly state the D&C Percentage as of the date of the report, and the invoices approved by the LTA in connection with the foregoing, in each case, within two Business Days following delivery or receipt, as applicable, by Non-Profit Entity of the relevant documentation.

ARTICLE 6. GENERAL NON-PROFIT ENTITY OBLIGATIONS

6.1 Planning and Engineering Activities

Non-Profit Entity, through appropriately qualified and licensed design professionals, as identified in the Project Management Plan, shall furnish or cause to be furnished all planning and engineering activities appropriate for design and development of the Project in accordance with the Contract Documents and Good Industry Practice.

6.2 Project Site Conditions

6.2.1 Non-Profit Entity acknowledges and agrees that:

- (a) it has investigated and satisfied itself as to the conditions affecting the D&C Work as and to the extent set forth in this Agreement, including those bearing upon transportation, disposal, handling and storage of materials, availability of labor, supplies, materials, equipment, water, electric power, roads and uncertainties of weather or similar physical conditions at the Project Site, the conformation and conditions of the ground, and the character of equipment and facilities needed in connection with the D&C Work;
- (b) subject to Non-Profit Entity's rights under Section 13 and Section 14, it has satisfied itself as to the character, quality and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from (i) the results of exploratory work (including investigations undertaken pursuant to the PDA); (ii) with respect to Hazardous Materials and geotechnical conditions, in addition to clause (i), information, documents and materials provided to Non-Profit Entity by City; and (iii) an inspection of the Project Site and the review of other information publicly available, undertaken in a manner consistent with Good Industry Practice; and
- (c) any failure by Non-Profit Entity to acquaint itself with such information relating to the conditions affecting the D&C Work will not relieve Non-Profit Entity from responsibility for estimating properly the difficulty or cost of successfully performing the D&C Work and shall not be the basis of a Delay Event claim.

6.3 Regulatory Approvals

6.3.1 CEQA Approval and NEPA Approval

6.3.1.1 The Parties acknowledge that City has obtained the CEQA Approval and NEPA Approval and Non-Profit Entity acknowledges receipt of a copy of the CEQA Approval and NEPA Approval. City is responsible for maintaining the CEQA Approval and the NEPA Approval. City is responsible for costs of litigation relating to the CEQA Approval and the NEPA Approval, subject to the exceptions provided in Section 6.3.4.2(d).

6.3.1.2 Non-Profit Entity shall provide support to City and undertake additional efforts as specified in Section 6.3.6.1 with respect to any modifications, renewals and extensions of the

CEQA Approval and NEPA Approval, including those required as the result of Non-Profit Entity's design and Delay Events.

6.3.2 Regulatory Approvals other than the CEQA Approval and the NEPA Approval

6.3.2.1 Non-Profit Entity shall obtain and maintain all Regulatory Approvals required for the Project and the Work, other than the CEQA Approval and the NEPA Approval, and shall bear the risk of obtaining such approvals and any delay in obtaining such approvals, except as provided in the Contract, as well as the risk of conditions imposed on performance of the Work by such approvals. Non-Profit Entity shall conduct all necessary environmental studies and prepare all necessary environmental documents in compliance with applicable Environmental Laws as needed to obtain Regulatory Approvals other than the CEQA Approval and the NEPA Approval, and shall obtain all necessary modifications, renewals and extensions thereof.

6.3.2.2 Subject to Section 6.3.4.1, Non-Profit Entity shall pay all costs associated with obtaining Regulatory Approvals, other than the CEQA Approval and the NEPA Approval.

6.3.3 Copies to City

Within 10 days of submitting any application for a Regulatory Approval to a Governmental Entity (or any proposed modification, renewal, extension or waiver of a Regulatory Approval or provision thereof), Non-Profit Entity shall submit an electronic copy of same, together with any supporting studies, analyses and data, to City. Non-Profit Entity shall deliver to City true and complete copies of all new or amended Regulatory Approvals, other than the CEQA Approval and the NEPA Approval.

6.3.4 Certain Risks Relating to Regulatory Approvals

6.3.4.1 Except to the extent required as a direct result of (a) a City Change, (b) a City Fault, or (c) Major Approval Delay, Non-Profit Entity shall not be entitled to any Extra Work Costs, Financing Delay Costs, Delay Costs, time extensions or any other relief associated with securing Regulatory Approvals.

6.3.4.2 As between City and Non-Profit Entity, Non-Profit Entity shall bear all risk arising out of, relating to or resulting from:

- (a) any differences between Non-Profit Entity's design for any portion of the Project and the design that served as the basis for the application for a Regulatory Approval, except to the extent required as a direct result of a City Change;
- (b) any differences between the means and methods (including temporary works) Non-Profit Entity chooses for performance of the Work and those stated in, referred to or expressly contemplated in the CEQA Approval and/or the NEPA Approval;
- (c) any change in the Project due to Non-Profit Entity's design, except to the extent that the change was directly attributable to a Delay Event; and

- (d) cost of litigation associated with Regulatory Approvals, including the CEQA Approval and the NEPA Approval, to the extent that the litigation arises due to Non-Profit Entity's failure to comply with the requirements of the Regulatory Approval.

6.3.5 Changes to Regulatory Approvals

If Non-Profit Entity wishes to obtain, modify, renew or extend any Regulatory Approvals, Non-Profit Entity shall first comply with, and obtain any consent or waiver required in accordance with, then-existing agreements between City and other Governmental Entities.

6.3.6 City Assistance with Regulatory Approvals.

6.3.6.1 Non-Profit Entity may, by Notice to City, request City's reasonable assistance and cooperation in obtaining modifying, renewing or extending any Regulatory Approvals (including any modification, renewal or extension of an existing Regulatory Approval required as the result of Non-Profit Entity's design or construction methods). Upon receipt of such a Notice and agreement of the Parties regarding the scope of, and budget for, assistance to be provided as described in Section 6.3.6.2, City will reasonably assist and cooperate with Non-Profit Entity in seeking to obtain the Regulatory Approvals, including joining in conferences and meetings with the Governmental Entities with jurisdiction, and providing Non-Profit Entity data, information and documents available to City and relevant to the application for the Regulatory Approvals

6.3.6.2 City and Non-Profit Entity shall work jointly to establish a scope of work and budget for City's Recoverable Costs (which shall be limited to reasonable out-of-pocket costs) incurred in connection with the assistance and cooperation that City agrees to provide in connection with modifications to Regulatory Approvals under Section 6.3.6.1. Subject to an agreed upon scope of work and budget and to any rights of Non-Profit Entity in the case of a Delay Event, Non-Profit Entity shall fully reimburse City for such Recoverable Costs incurred in providing such assistance and cooperation, including those incurred to conduct further or supplemental environmental studies.

6.3.6.3 Assistance provided by City under Section 6.3.6.1 shall not include any obligation to:

- (a) coordinate and work with elected and other public officials as necessary and appropriate;
- (b) act as the lead agency and directly coordinate with such Governmental Entities;
- (c) take a position which City believes to be inconsistent with the Contract Documents, the Project Management Plan, applicable Law, Regulatory Approval(s), the requirements of Good Industry Practice, or City policy;
- (d) take a position that is not usual and customary for City to take in addressing similar circumstances affecting its own projects (except for usual and customary arrangements that are incompatible with the Project's public-private contracting methodology);
- (e) take a position that increases the risk, obligations or liabilities of City; or

- (f) refrain from concurring with a position taken by a Governmental Entity if City believes that position to be proper.

6.3.6.4 Notwithstanding any assistance provided by City in accordance with Section 6.3.6.1, Non-Profit Entity shall remain responsible for, and bear all risks and costs associated with, obtaining all Regulatory Approvals, except as otherwise expressly provided in the Contract Documents.

6.3.7 Regulatory Approvals in City's Name

6.3.7.1 Certain Regulatory Approvals are required to be applied for or issued in City's name and/or require City to directly coordinate with such Governmental Entities in connection with obtaining Regulatory Approvals. With respect to such approvals, City will assist and cooperate with Non-Profit Entity following receipt of a request under Section 6.3.6.1, and the Parties shall proceed in accordance with Section 6.3.6.2. Non-Profit Entity shall lead all actions and efforts to apply for and obtain the Regulatory Approval including: (a) conducting necessary field investigations, (b) preparing mitigation analyses and studies and plans, (c) preparing surveys and required reports, applications and other documents in form approved by City, and (d) joint coordination and joint discussions and attendance at meetings with the applicable Governmental Entity.

6.3.7.2 Non-Profit Entity shall be solely responsible for obtaining all Regulatory Approvals required in connection with, and for compliance with applicable Laws with respect to, Temporary Areas.

6.3.8 Major Approval Delay

6.3.8.1 Non-Profit Entity shall make diligent efforts to obtain the cooperation of DBI as necessary for the issuance of any Major Approval. Non-Profit Entity is responsible for verifying the progress of DBI's review and progress towards granting such Major Approval. Non-Profit Entity shall provide Notice to City within five days after the occurrence of any of the following: (a) Non-Profit Entity reasonably believes for any reason that DBI will not issue a Major Approval in a manner consistent with the timely completion of the Project, the Project Schedule or the Major Approval Deadline or in accordance with Law, the Regulatory Approvals or the Contract Documents, (b) Non-Profit Entity becomes aware that DBI is not cooperating in a timely manner to issue the Major Approval in accordance with the Contract Documents, or (c) any other dispute arises between Non-Profit Entity and DBI with respect to the Major Approval, despite Non-Profit Entity's diligent efforts to obtain DBI's cooperation or otherwise resolve such dispute. Such Notice may include a request that City assist in resolving the dispute or in otherwise obtaining DBI's timely cooperation. Non-Profit Entity shall provide City with such information as City reasonably requests regarding DBI's failure to cooperate and the effect of any resulting delay on the Project Schedule. After delivering Notice to City, Non-Profit Entity shall continue to use diligent efforts to pursue DBI's cooperation.

6.3.8.2 If Non-Profit Entity requests assistance of City pursuant to Section 6.3.8.1, the following provisions apply:

- (a) Non-Profit Entity shall provide evidence satisfactory to City, in its good faith determination, that (i) if DBI's response time exceeds reasonable expectations and Non-Profit Entity consistently and proactively pursued actions to advance

progress, (ii) Non-Profit Entity has made, and continues to make, diligent efforts to obtain DBI's cooperation and commenced coordination at the earliest time, including, with respect to the DBI site permit, during the PDA Term (including submitting and actively pursuing applications for the Major Approval and promptly and actively responding to DBI, taking into account the Project Schedule and the Major Approval Deadline), (iii) Non-Profit Entity has submitted a fully compliant and complete request and application for the Major Approval to DBI, as reasonably determined by DBI in accordance with applicable Law and the policies and procedures of DBI, including any requirements of the CEQA MMRP related to issuance of the Major Approval; (iv) Non-Profit Entity has paid in full all fees and charges required for the review, consultation and issuance of the Major Approval by DBI in a timely manner; (v) Non-Profit Entity has consistently been responsive to DBI comments in a timely and proper manner; (vi) Non-Profit Entity has satisfied all other conditions to the commencement of review by DBI in accordance with applicable Law and the policies and procedures of DBI; and (vii) DBI is not cooperating (clauses (a)(i) through (vii) above are referred to herein as the "Major Approval Conditions to Assistance").

- (b) Following receipt by City of satisfactory evidence, City shall take such reasonable steps as City may reasonably determine to obtain the cooperation of DBI with respect to the Major Approval or resolve the dispute; provided, however, City shall have no obligation to prosecute any legal proceedings, or to exercise any other legal remedy available to it under Law or existing contract, unless City elects to do so in its sole discretion. City may, at its sole discretion, participate in the resolution of any dispute between Non-Profit Entity and DBI, whether or not requested to do so by Non-Profit Entity.
- (c) Without limiting City's obligations under clause (b) above or the terms of this Agreement related to a Major Approval Delay, if City holds contractual rights that might be used to enforce the Governmental Entity's obligation to cooperate, City shall have the right not to exercise those rights. The decision not to exercise those rights shall be in the sole discretion of City.

6.3.8.3 Any assistance provided by City shall not relieve Non-Profit Entity of its sole and primary responsibility for the satisfactory compliance with its obligations under the Contract Documents and its obligations with respect to obtaining any Major Approval.

6.3.8.4 Major Approval Delay shall only apply to an unreasonable and unjustified delay by DBI in connection with a Major Approval beyond the applicable Major Approval Deadline following receipt by City of proper Notice pursuant to Section 6.3.8.1, provided that (i) all of the "Major Approval Conditions to Assistance" described in Section 6.3.8.2 have been satisfied; (ii) Non-Profit Entity shall actively and diligently cooperate with DBI and pursue the issuance of the Major Approval at all times; and (iii) Non-Profit Entity shall respond to, and address, DBI comments, including through resubmittals of design, data, construction documents and revised applications no later than 7 days after delivery by DBI of comments, questions and/or issues lists. Delay in issuance of a Major Approval resulting in whole or in part from any failure by Non-Profit Entity to satisfy the conditions set forth in clauses (i)-(iii) of this Section or any act or omission of any NPE-Related Entity or any NPE Fault shall not be counted towards Major Approval Delay.

6.3.8.5 Notwithstanding the foregoing, the term "Major Approval Delay" also does not include and is not intended to address (i) City Changes relating to a Major Approval, the impact of which will be addressed in a Change Order, (ii) any Regulatory Approvals other than a Major Approval; (iii) additional work associated with a Project design change unless such design change is as a direct and sole result of a City Change or Delay Event (excluding Major Approval Delay); or (iv) any delay or impact relating to or arising out of the failure by any NPE-Related Entity to undertake the coordination activities with DBI contemplated by the Predevelopment Agreement or based on the results of a Reasonable Investigation (even if such delay otherwise would have been considered a Major Approval Delay but for such failure). Non-Profit Entity shall not rely upon any proposed schedules, durations or deadlines, if any, included in the Reference Documents with respect to a Major Approval, and Non-Profit Entity may not base any Claims for a time extension or additional compensation upon such proposed schedules, durations, and deadlines.

6.3.8.6 Subject to the limitations and restrictions in this Section 6.3.8 (Major Approval Delay) and Articles 13 (General Provisions Applying to Delay Events) and 14 (Compensation and Other Relief for Delay Events), relief for Major Approval Delay shall be in accordance with and subject to Sections 14.1.2 (Extension of Deadlines for Delay Events) through 14.1.4 (Costs Payable for Compensable Delay Events).

6.3.8.7 Non-Profit Entity shall not be entitled to extension of any Contract Deadline or other relief for a Major Approval Delay pursuant to Sections 14.1.2 (Extension of Deadlines for Delay Events) through 14.1.4 (Costs Payable for Compensable Delay Events), or otherwise unless all of the following conditions are satisfied (in addition to satisfaction of any conditions specified in Section 6.3.8 ((Major Approval Delay))):

- (a) Non-Profit Entity has timely satisfied the "Major Approval Conditions to Assistance" requirements described in Section 6.3.8.2;
- (b) Non-Profit Entity has provided evidence satisfactory to City that (i) Non-Profit Entity took advantage of Float available early in the Project Schedule for coordination activities with respect to DBI relating to the Major Approval, (ii) Non-Profit Entity has fulfilled its obligation to coordinate with DBI to prevent or reduce such delays, and (iii) Non-Profit Entity has otherwise made diligent efforts to obtain timely performance by DBI but has been unable to obtain such timely performance;
- (c) There exist no circumstances which have delayed or are delaying the Major Approval, other than those that fit within the definition of a Major Approval Delay; and
- (d) The delay is otherwise allowable under Articles 13 (General Provisions Applying to Delay Events) and 14 (Compensation and Other Relief for Delay Events).

6.4 Compliance with Laws

6.4.1 Applicable Laws

6.4.1.1 Non-Profit Entity shall comply with, and require that all Contractors comply with, all applicable Laws, including those set forth or described in Exhibit 16 (Federal, State and City Requirements).

6.4.1.2 All provisions required by applicable Laws to be included in this Agreement are incorporated by reference in this Agreement.

6.4.2 Environmental Compliance

6.4.2.1 Without limiting the generality of Section 6.4.1.1, Non-Profit Entity shall comply with, and require that all Contractors comply with, all Environmental Laws.

6.5 Compliance with Regulatory Approvals

Throughout the course of the Work, Non-Profit Entity shall:

- (a) comply with all commitments, obligations, responsibilities, conditions and requirements imposed by all Regulatory Approvals, except, with respect to Environmental Approvals only, those obligations, commitments and responsibilities of City that are expressly allocated to City or a Third Party and are expressly excluded from Non-Profit Entity's scope of Work;
- (b) undertake all actions required by, or necessary to maintain in full force and effect all Regulatory Approvals to be obtained by Non-Profit Entity; and
- (c) comply with and implement, and cause Contractors to comply with and implement, all mitigation, monitoring, and reporting measures listed in the CEQA MMRP and the NEPA document or associated decision document, as applicable.

6.6 Communication and Public Outreach

6.6.1 Non-Profit Entity shall prepare and implement City's Public Outreach Plan developed pursuant to Section 1.15 of Division 1 of the Technical Requirements and Division 9 of the Technical Requirements.

6.6.2 Non-Profit Entity is prohibited from making any public announcement or disclosure with respect to the Project, whether for publication in the press, radio, television or any other medium, unless Non-Profit Entity has obtained City's prior written approval. Notwithstanding the foregoing, Non-Profit Entity may make public disclosures regarding this Agreement in connection with the public offering of Project Debt and/or as required by the continuing disclosure agreement executed in connection with the Project Debt.

6.7 Coordination, Cooperation and Access

6.7.1 Non-Profit Entity shall coordinate and cooperate with City, Third Parties, Utility Owners, Other Contractors and Governmental Entities with jurisdiction in matters relating to the Work, including facilitating their Oversight of the Work, as applicable, including pursuant to Sections 1.12 and 1.13 of Division 1 of the Technical Requirements. Non-Profit Entity shall coordinate and cooperate with Other Contractors that may be carrying out work within the Project Site or in the land adjoining or near the Project Site.

6.7.2 Non-Profit Entity shall provide City and City's representatives with:

- (a) safe and unrestricted access to the Project Site and the Project at all times; and
- (b) safe access during normal business hours to Non-Profit Entity's Project offices, operations buildings, and Temporary Areas.

6.7.3 Notwithstanding anything to the contrary in this Agreement, whenever City or its representatives are present on the Project Site and production facilities, including while conducting Oversight, they will abide by the applicable Contractor's reasonable, non-discriminatory safety policies and practices and will take appropriate measures to avoid unreasonable interference with normal construction activity.

6.7.4 Non-Profit Entity shall not interfere with the work of or cause any delay to any Other Contractors that may be carrying out work within the Project Site or in the land adjoining or near the Project Site and will allow them reasonable access to the Project Site, provided that Non-Profit Entity shall not be in breach of this Section 6.7.4 for any temporary interruption to the work of any Other Contractors that (a) has been agreed to in advance in accordance with procedures agreed to by Non-Profit Entity, such contractor and any relevant Third Party; or (b) is reasonably necessary in accordance with Law and Good Industry Practice to respond to emergencies creating an immediate and serious threat to public health, safety, security or the Environment.

6.8 Intentionally Deleted

6.9 Safety Compliance

6.9.1 City may from time to time issue Safety Compliance Orders to Non-Profit Entity with respect to the Project to implement Safety Compliance.

6.9.2 Promptly upon City obtaining Actual Knowledge of any circumstance or information relating to the Project that, in City's reasonable judgment, is likely to result in a Safety Compliance Order, City will provide Notice to Non-Profit Entity regarding the issue. Except in the case of an Emergency, City will consult with Non-Profit Entity before issuing a Safety Compliance Order concerning the risk to public or worker safety, alternative compliance measures, cost impacts, and the availability of Non-Profit Entity resources to fund the Safety Compliance work.

6.9.3 Where a Governmental Entity or other regulatory authority other than City directs a Safety Compliance Order, in order for Non-Profit Entity to comply with the Safety Compliance Order, City shall issue a corresponding Safety Compliance Order to Non-Profit Entity.

6.9.4 Non-Profit Entity shall implement each Safety Compliance Order as expeditiously as reasonably possible following its issuance. Non-Profit Entity shall diligently prosecute the work necessary to achieve such Safety Compliance until completion.

6.10 Law Enforcement and Security

6.10.1 Law Enforcement Services

6.10.1.1 Non-Profit Entity acknowledges and agrees that law enforcement agencies, including City in its regulatory capacity, are empowered to enforce all applicable Laws and to enter the

Project, and that any person engaged by City to provide law enforcement services has the authority to enter the Project, at any and all times to carry out their duties. Non-Profit Entity shall ensure that law enforcement agencies have necessary access to the Project to carry out their duties, power and jurisdiction.

6.10.1.2 City shall not have any liability or obligation to Non-Profit Entity arising out of, relating to or resulting from the failure of law enforcement agencies to provide services, or any of their, or their respective agents' or employees' acts, omissions, negligence or misconduct in providing services, except to the extent such failure, act, omission, negligence or misconduct otherwise qualifies as a Compensable Delay Event Relief under clause (i) of the definition thereof. The general indemnity in Section 10.6.1 (General Indemnity) shall not apply to the extent that a claim, cause of action, suit, legal or administrative proceeding or any other occurrence, loss or damage of the type listed in Section 10.6.1 (General Indemnity) is directly attributable to actions of a law enforcement agency designated by City to provide services for the Project, and is not due to any NPE Fault.

6.10.2 Security

6.10.2.1 Non-Profit Entity is responsible for the security of the Project and safety of the workers and public within the Project Site and the Infrastructure Facility during the performance of the D&C Work.

6.10.2.2 Non-Profit Entity shall comply with all rules, directives and guidance of the U.S. Department of Homeland Security and other comparable agencies, and shall coordinate and cooperate with all Governmental Entities providing security, first responder and other public emergency response services.

6.11 Warranties

6.11.1 Project Warranties

6.11.1.1 Non-Profit Entity warrants the Work against Defects during the period commencing on Substantial Completion of the Project and ending two years thereafter (the "**Warranty Period**"). The general warranty contained in this Section 6.11.1.1 is in addition to any express warranties provided for elsewhere in the Contract Documents. Non-Profit Entity warrants, and shall cause Principal Project Company to warrant, that:

- (a) the Work shall be free of Defects, except to the extent that such Defects are inherent in prescriptive specifications included in the Contract Documents;
- (b) materials and equipment furnished by or on behalf of any NPE-Related Entity under the Contract Documents shall be of good quality and when installed, shall be new;
- (c) equipment furnished by or on behalf of any NPE-Related Entity shall be in good working condition;
- (d) the Work shall meet all of the requirements of the Contract Documents and Good Industry Practice;

- (e) the Work shall be free of Deviations that have not been approved by City; and
- (f) the Project shall be fit for use for the intended function as contemplated by the Contract Documents.

6.11.1.2 Non-Profit Entity shall perform, at Non-Profit Entity's sole cost and expense, the Warranty Work:

- (a) with respect to which City delivers written Notice to Non-Profit Entity within the Warranty Period; or
- (b) of which Non-Profit Entity otherwise has Actual Knowledge before the expiry of the Warranty Period.

6.11.1.3 Subject to Section 6.11.1.5, Non-Profit Entity shall perform the Warranty Work in accordance with the below:

- (a) for emergency repairs, Non-Profit Entity shall commence within 2 Business Days, and complete promptly, following written Notice of the relevant Defect from City or Non-Profit Entity's Actual Knowledge thereof, whichever is earlier; and
- (b) for all other Defects, Non-Profit Entity shall commence within 5 Business Days, and complete within 14 days, following written Notice of the relevant Defect from City or Non-Profit Entity's Actual Knowledge thereof, whichever is earlier.

6.11.1.4 If the nature of the Defect is such that the Warranty Work cannot with diligence be completed within the time period under Section 6.11.1.3 and Non-Profit Entity has commenced and is diligently pursuing meaningful steps to promptly complete the Warranty Work, Non-Profit Entity shall have such additional period of time as is necessary to diligently complete the Warranty Work. During such period in excess of the time periods under Section 6.11.1.3, Non-Profit Entity shall provide Notice to City every 10 days reasonably detailing the status of the Warranty Work, the diligent steps taken by Non-Profit Entity to complete the Warranty Work, the diligent steps planned by Non-Profit Entity to be taken to complete the Warranty Work during the next 10 days and the then-current projected schedule for completion of the Warranty Work. Non-Profit Entity shall promptly provide Notice to City in writing of completion of Warranty Work.

6.11.1.5 If Non-Profit Entity fails to commence or pursue with diligence and complete the Warranty Work as required, City may provide written Notice of such failure to the Non-Profit Entity. If the Non-Profit Entity's failure continues for three Business Days after the City delivers this Notice, the City may, in its sole discretion, perform the Warranty Work, and Non-Profit Entity shall reimburse City within seven days after any written demand from City for Recoverable Costs incurred by City in connection with the performance of the Warranty Work, including any related reasonable attorneys' and consultants' fees and expenses.

6.11.1.6 In the event of an emergency constituting an immediate hazard to health or safety of Building Occupants or City property due to a Defect, City may undertake, at Non-Profit Entity's

sole cost and expense and without prior Notice, all work necessary to correct such hazardous condition(s).

6.11.1.7 Before expiry of the Warranty Period, Non-Profit Entity shall execute and deliver to City a written assignment, in form and substance reasonably acceptable to City and effective as at the end of the Warranty Period, of all Non-Profit Entity's and Contractors' right, title and interest in and to all warranties, and to the extent assignable, claims and causes of action held by Non-Profit Entity or its Contractors against Third Parties, concerning the Work.

6.11.1.8 The warranties set forth in this Section 6.11 shall not apply to the extent:

- (a) That City has materially altered the Construction Work after Substantial Completion and such alteration is the direct and primary cause of the failure of such Construction Work to meet the warranties;
- (b) That City has materially improperly operated or maintained the Construction Work and such failure by City is the direct and primary cause of the failure of such Construction Work to meet the warranties;
- (c) Of normal wear and tear;
- (d) Of City's gross negligence; or
- (e) Of City's breach of the Contract Documents in incorporating material or equipment into the Project and such failure by City is the direct and primary cause of the failure of such Construction Work to meet the warranties.

6.11.1.9 The Warranty Work and Non-Profit Entity's obligations under the Contract Documents during the Warranty Period shall be secured throughout the Warranty Period by the D&C Performance Bond and the D&C Payment Bond.

6.11.1.10 The warranties set forth in this Section and the Contract Documents are in addition to all rights and remedies available under the Contract Documents or applicable Law or in equity, and the occurrence of Final Acceptance and the expiration of the Warranty Period shall not relieve Non-Profit Entity or any NPE-Related Entity of any liability or responsibility expressly imposed by the Contract Documents after the Warranty Period or applicable Law with respect to the Work, including liability for design defects, latent construction defects, other defects, strict liability, breach, negligence, willful misconduct or fraud; provided that the obligations of Non-Profit Entity specified in this Agreement with respect to Warranty Work shall only apply to a Defect or Nonconforming Work if the relevant Defect or Nonconforming Work is notified to Non-Profit Entity before the end of the Warranty Period. Nothing in this section shall extend any statute of limitations under applicable Law with respect to the Work.

6.11.2 Contractor Warranties and Guaranties

6.11.2.1 Non-Profit Entity shall obtain from Principal Project Company and shall obtain, or shall cause the Principal Project Company to obtain, from the D&C Contractor, warranties identical to Non-Profit Entity's warranty under Section 6.11.1, which warranties shall all extend not only to Non-Profit Entity and Principal Project Company but also to City and any Utility Owner or Authority Having Jurisdiction for whom Work is being performed. Non-Profit Entity

shall obtain from all other Contractors representations, warranties, guarantees and obligations in accordance with Good Industry Practice for work of similar scope and scale, with respect to design, materials, workmanship, equipment, tools and supplies furnished by all such Contractors and Suppliers, which shall extend not only to Non-Profit Entity but also to City and any Utility Owner or Authority Having Jurisdiction for whom Work is being performed. The warranties from Key Contractors (other than the D&C Contractor) shall be for such periods as specified in the Technical Requirements or, if not specified, a period of not less than two years from the date of the Certificate of Substantial Completion. All representations, warranties, guarantees and obligations of Key Contractors: (a) shall be written so as to survive all City and any Third Party inspections, tests and approvals; and (b) shall provide that upon expiration or any earlier termination of this Agreement before the expiration of such representations, warranties, guarantees and obligations they shall automatically be for the benefit of and enforceable by City and its successors and assigns, and any Utility Owner or Authority Having Jurisdiction for whom Work is being performed, subject to the rights of the Lenders as provided in any Direct Agreement.

6.11.2.2 To the extent that any Contractor warranty or guaranty is voided after termination of this Agreement by reason of Non-Profit Entity's negligence or failure to comply with the requirements of the Contract Documents in incorporating material or equipment into the Project, Non-Profit Entity shall correct any Defects which would otherwise have been covered by such warranty.

6.11.2.3 Contractor warranties are in addition to all rights and remedies available under the Contract Documents or applicable Law, and shall not limit Non-Profit Entity's liability or responsibility imposed by the Contract Documents or applicable Law with respect to the Work, including liability for design Defects, construction Defects, strict liability, breach, negligence, willful misconduct or fraud.

6.11.3 Warranties for Utility Owners and Authorities Having Jurisdiction

If required by the Utility Owner or Authority Having Jurisdiction, as applicable, Non-Profit Entity shall provide, or obtain and ensure performance under as if Non-Profit Entity provided, warranties and guaranties, for all Work performed by any NPE-Related Entity for Utility Owners and Authorities Having Jurisdiction, for two years after the date of acceptance of such work by the Utility Owner or Authority Having Jurisdiction, as applicable or such longer term as provided in any agreement between an NPE-Related Entity and the Utility Owner or Authority Having Jurisdiction, for the benefit (with rights of enforcement) of such Utility Owner or Authority Having Jurisdiction. City shall have, and shall be identified as a third party beneficiary of the right to enforce, all such warranties and guaranties of such work. Upon acceptance of such work by the Utility Owner or Authority Having Jurisdiction, as applicable, and delivery of an assignment of the relevant warranty and guaranty rights, Non-Profit Entity shall be relieved of responsibility for maintenance of such work.

6.12 Maintain Good Standing

6.12.1 Non-Profit Entity shall remain qualified to do business in the State and remain in and maintain good standing and shall undertake all actions to do so, including continued timely submission of all required information and payments when due to the California Secretary of State, Franchise Tax Board, Internal Revenue Service, or any other applicable agency or entity.

Non-Profit Entity shall immediately provide Notice to City if it is no longer duly qualified and in good standing.

6.12.2 Non-Profit Entity shall ensure that each Key Contractor shall remain duly qualified to do business in the State and in good standing throughout the term of the Key Contract and immediately provide Notice to City if a Key Contractor is no longer duly qualified or in good standing.

ARTICLE 7. DESIGN AND CONSTRUCTION

7.1 General Obligations of Non-Profit Entity Concerning D&C Work

7.1.1 Non-Profit Entity shall:

- (a) expeditiously and diligently progress performance of the D&C Work to achieve Substantial Completion by the Substantial Completion Deadline;
- (b) carry out or do all things necessary to perform the D&C Work and design and construct the Infrastructure Facility in accordance with the Contract Documents and Good Industry Practice;
- (c) ensure the Infrastructure Facility meets the requirements of the Contract Documents, including that the Infrastructure Facility be constructed in compliance with the San Francisco Green Build Code (Chapter 7 (Green Building Requirements for City Buildings) of the San Francisco Environment Code) and achieve LEED Gold certification;
- (d) provide maintenance and other services as described in the Contract Documents;
- (e) ensure adequate materials, equipment and resources are available to ensure compliance with the requirements of the Contract Documents under normal conditions and reasonably anticipated abnormal conditions;
- (f) ensure all materials and equipment are of good quality and new unless otherwise expressly stated;
- (g) ensure, as of the Substantial Completion Date, the Construction Work shall be free of Defects, errors and omissions, except as may be set out in the Punch List (which shall be fully resolved as of Final Acceptance of the Infrastructure Facility);
- (h) ensure, as of the Substantial Completion Date, the Design Work meets each of the requirements set out in this Agreement;
- (i) ensure the Project Site is kept in a safe, secure, neat and clean condition at all times;
- (j) cooperate with City and Authorities Having Jurisdiction in all matters relating to the D&C Work, including their Oversight of D&C Work;
- (k) remove and replace Nonconforming Work and/or materials, whether discovered or rejected by City or Non-Profit Entity, or otherwise remedy such Nonconforming Work and/or materials in an acceptable manner and in accordance with the requirements of the Contract Documents;

- (l) pay all direct and indirect costs for all Utility services required to perform and complete the D&C Work in accordance with the requirements of the Contract Documents; and
- (m) without duplication, perform all Warranty Work during the Warranty Period.

7.2 Performance, Design and Construction Standards

7.2.1 Non-Profit Entity shall construct and equip the Infrastructure Facility in accordance with the Project's Release for Construction Documents, taking into account the Project Site limits and other constraints affecting the Project.

7.2.2 The Project design and construction shall be subject to certification in accordance with the procedures contained in the approved NPE's Design Quality Plan and NPE's Construction Quality Plan.

7.2.3 Non-Profit Entity shall use reasonable efforts to identify and provide Notice to City of any specifications or other provisions in the Technical Requirements that are erroneous, create a potentially Unsafe Condition, or may be inconsistent with Good Industry Practice or applicable Law. Such Notice must include a request for City approval of a Deviation or changes to the provision that Non-Profit Entity believes are necessary to render it correct, safe and consistent with Good Industry Practice and applicable Law. If Non-Profit Entity commences or continues any D&C Work affected by the change after the need for the change was known, or should have been known through the exercise of reasonable care, Non-Profit Entity shall bear any additional costs and time associated with redoing the D&C Work already performed.

7.2.4 After Commercial Close, City may modify relevant provisions of the Technical Requirements to incorporate any changed, added or replaced Standards and Specifications applicable to the D&C Work by delivering a City Change to Non-Profit Entity.

7.3 Design Implementation

Non-Profit Entity, through appropriately qualified professional engineers and architects registered and licensed in the State and identified in Non-Profit Entity's Project Management Plan, shall furnish designs, plans and specifications in accordance with the Contract Documents. Non-Profit Entity shall cause the architect(s) of record and/or Engineer(s) of Record for the Project to sign and seal all Final Design Documents.

7.4 Schedule, Deadlines, Notices to Proceed and Commencement of Work

7.4.1 Project Schedule

7.4.1.1 Subject to occurrence of a Delay Event resulting in an extension of time in accordance with this Agreement, if any, Non-Profit Entity represents and warrants that, as of the Effective Date, its Project Schedule represents a practical schedule to complete performance of the Work through Final Acceptance and is consistent with applicable deadlines.

7.4.1.2 Between the Effective Date and the earlier of NTP2 and approval of Non-Profit Entity's Project Schedule in accordance with Section 7.4.1.3, Non-Profit Entity shall perform the Work in accordance with the Initial Schedule.

7.4.1.3 Non-Profit Entity shall submit to City, for City review and approval, a proposed detailed Project Schedule in accordance with Section 1.2 of Division 1 of the Technical Requirements and Exhibit 11 (Submittal Review Process).

7.4.1.4 Upon City's approval, the detailed Project Schedule becomes the Project Schedule and Non-Profit Entity shall perform the remaining Work in accordance with such Project Schedule.

7.4.1.5 The Parties shall use the Project Schedule for planning and monitoring the progress of the D&C Work. The Project Schedule shall include the deadlines for Substantial Completion and Final Acceptance of the Infrastructure Facility.

7.4.1.6 Non-Profit Entity shall not be limited in the sequencing or staging of the D&C Work, except to the extent that the Contract Documents or applicable Law imposes limitations.

7.4.1.7 Non-Profit Entity acknowledges and agrees that the Contract Deadlines provide reasonable and adequate time to perform the Work required within the Contract Deadlines, subject only to Non-Profit Entity's rights to obtain time extensions under Article 14 (Compensation and Other Relief for Delay Events).

7.4.2 Float

7.4.2.1 All Float contained in the Project Schedule, or as generated during the course of the Work, shall be a project resource and available to both City (except to the extent of City Fault) and Non-Profit Entity (except to the extent of NPE Fault), and shall not be considered as time for exclusive use or benefit of either City (except to the extent of NPE Fault) or Non-Profit Entity (except to the extent of City Fault). Non-Profit Entity shall cause each Prime Contractor to acknowledge Float to be available to City as well as Non-Profit Entity on the terms herein as needed to absorb delay caused by Delay Events or other events, achieve interim completion dates and achieve Contract Deadlines.

7.4.2.2 All Float shall be identified as such in the Project Schedule on each affected schedule path. City shall have the right to examine the identification of (or failure to identify) Float on the Project Schedule in determining whether to approve the Project Schedule. Once identified, Non-Profit Entity shall monitor, account for and maintain Float in accordance with critical path methodology.

7.4.3 Commencement of Non-Construction Work

Except as provided in Section 7.4.6 (Work Before NTP 1), Non-Profit Entity shall not commence any Work until City has issued NTP 1 authorizing commencement of non-Construction Work. City shall promptly issue NTP 1 when all of the conditions set forth in Exhibit 15A (Conditions to NTP 1 - Commencement of Non-Construction Work) have been satisfied.

7.4.4 Commencement of Construction Work

Non-Profit Entity shall not commence any portion of the Construction Work until City has issued NTP 2 authorizing commencement of the applicable portion of Construction Work. City shall promptly issue NTP 2 when all of the conditions set forth in Exhibit 15B (Conditions to NTP 2 - Commencement of Construction Work) have been satisfied.

7.4.5 References in the Technical Requirements to Standards and Specifications relating to the D&C Work shall mean the most recent editions in effect as of the Setting Date, unless expressly provided otherwise.

7.4.6 Work Before NTP 1

7.4.6.1 Except as provided in Section 7.4.6.2 and as may be provided pursuant to any Early Works Agreement between Non-Profit Entity and City, Non-Profit Entity shall not perform any Work prior to NTP 1.

7.4.6.2 Before NTP 1, Non-Profit Entity shall perform all Work required to achieve Financial Close, and otherwise undertake all efforts to satisfy the conditions set forth in Exhibit 15A (Conditions to NTP 1 - Commencement of Non-Construction Work). If Financial Close fails to occur, City shall have no obligation to reimburse Non-Profit Entity for any of its costs incurred relating to this Agreement, other than payments allowed under Section 3.6 (No-Fault Termination).

7.5 Acquisition of Real Property

7.5.1 Additional Acquisitions

7.5.1.1 If Non-Profit Entity identifies any property that is not subject to Section 7.5.1.2 but that Non-Profit Entity seeks to add to the Project Site to accommodate Non-Profit Entity's particular design or for Non-Profit Entity's convenience in performing the Work, then Non-Profit Entity may submit to City a request for acquisition of additional property interests and related documentation as reasonably requested by City. In such event, Non-Profit Entity shall prepare and submit to City for review and approval new or revised surveys, legal descriptions, a preliminary title report and a copy of all encumbrances of record, draft site plats, design and other appropriate documentation of basis of acquisition and justification of acquisition. Non-Profit Entity's request shall include an analysis identifying alternative approaches that could be adopted to avoid the need for the acquisition, including use of retaining walls and other design modifications. Following delivery of a request under this Section 7.5.1.1:

- (a) City will review the request and supporting documentation and will determine whether the proposed acquisition appears to be appropriate for the Project, whether any additional information or documentation is necessary for the acquisition, and the anticipated schedule for the acquisition;
- (b) upon agreement between City and Non-Profit Entity regarding the acquisition of any additional property, Non-Profit Entity shall support the acquisition as requested by City; and
- (c) prior to acquisition of any additional property interests under this Section 7.5 (Acquisition of Real Property), Non-Profit Entity shall provide to City any additional documentation required by City for the acquisition.

7.5.1.2 If City chooses to acquire property proposed for acquisition by Non-Profit Entity pursuant to Section 7.5.2.1 ("**Additional Properties**"), City will proceed with the acquisition, subject to this Section 7.5 (Acquisition of Real Property). In all situations, City has no obligation to acquire any Additional Property.

7.5.1.3 Non-Profit Entity shall be responsible for the cost to acquire Additional Properties, together with all costs and expenses incurred by City in connection with acquiring Additional Properties. In paying all such costs and expenses, Non-Profit Entity is not acquiring, and shall not be deemed to be acquiring, any interest in real property for Non-Profit Entity. Such costs and expenses shall include:

- (a) the cost of acquisition services, relocation services and associated document preparation costs;
- (b) the cost of relocation assistance in accordance with applicable Law;
- (c) the cost of condemnation proceedings, including attorneys' and expert witness fees, and all fees and expenses for production of exhibits, transcripts, photos and other documents and materials;
- (d) the acquisition price of the Additional Properties and associated appraisals, costs, settlements, offers of judgment, court awards or judgments, including pre-judgment and post-judgment interest, costs, attorney's fees, claims for loss of business goodwill and any other consideration for the Additional Properties;
- (e) the cost of permanent or temporary acquisition of leases, easements, rights of entry, licenses and other interests in real property, including for drainage, temporary work space, Temporary Areas, and any other convenience of Non-Profit Entity;
- (f) the cost of permitting; and
- (g) closing costs in accordance with City policies.

7.5.1.4 City will submit statements to Non-Profit Entity regarding Recoverable Costs relating to acquisition of Additional Properties, not more often than monthly. Non-Profit Entity shall reimburse City for Recoverable Costs within 30 days of receipt of an invoice. In addition to any other remedy, City shall have the right to curtail or suspend acquisition activities if Non-Profit Entity for any reason fails to pay any such invoice in full when due. City will resume acquisition activities promptly after delinquent amounts are paid in full with interest.

7.5.1.5 Non-Profit Entity shall bear all risk of delays related to acquisition of Additional Properties and the risk that an Additional Property is not able to be acquired. Each Additional Property shall become part of the Project Site only upon City's written Notice to Non-Profit Entity indicating that the Additional Property has been acquired and that City grants Non-Profit Entity access to the Additional Property.

7.5.1.6 Non-Profit Entity shall not be entitled to any compensation or any extension of any Contract Deadline under the Contract Documents or otherwise entitled to make a Claim as a result of (i) site conditions associated with any Additional Properties (including those relating to Hazardous Materials, differing site conditions, or Utilities)

7.5.2 Temporary Interests in Property

7.5.2.1 Non-Profit Entity shall be solely responsible for acquisition of any temporary interests in property that Non-Profit Entity determines is necessary, desirable or advisable to obtain in connection with the Project or the Work. Non-Profit Entity shall pay directly the cost to acquire, maintain, operate, and/or dispose of all such property interests. If the property is within the limits of any real property scheduled for acquisition by City or is intended to be used for permanent improvements, or if Non-Profit Entity intends to request City to acquire such real property, Non-Profit Entity shall coordinate with City and shall not negotiate with the owner(s) of such interests except with express permission of City and in compliance with applicable Law.

7.5.2.2 City shall have no obligation to acquire temporary interests in property. Non-Profit Entity shall solely bear the risk of any delays and cost impacts related to acquisition of temporary interests, regardless of whether City agrees to undertake any such acquisition.

7.5.2.3 Non-Profit Entity shall promptly provide Notice to City regarding all temporary interests in property that it or any of its Contractors acquires in the vicinity of the Project.

7.5.3 Property Acquisitions and Scheduling Work

7.5.3.1 Non-Profit Entity's Project Schedule shall not provide for any Work to be done on any Additional Properties acquired or to be acquired in accordance with Section 7.5.1 (Additional Acquisitions) until after City has granted Non-Profit Entity access to the Additional Property in writing.

7.5.3.2 Concurrently with the initial review of the Project Schedule, Non-Profit Entity and City shall meet to discuss:

- (a) Non-Profit Entity's access requirements associated with planned activities and the extent to which delay in access to property identified for acquisition under Section 7.5.1 (Additional Acquisitions) is likely to affect a Critical Path;
- (b) what efforts (if any) could reasonably be undertaken by the Parties to accelerate acquisition of any critical real property interests;
- (c) whether schedule delays may be avoided by providing access to property subject to conditions or restrictions;
- (d) whether any changes should be made to the Project Schedule; and
- (e) whether anticipated covenants, conditions and restrictions affecting access will affect Non-Profit Entity's ability to perform Work as scheduled, and how to mitigate any such problems.

7.5.3.3 Non-Profit Entity shall coordinate with City regarding:

- (a) completion of Project design and identification of final site requirements and construction impacts;

- (b) any adjustments to the Project Schedule necessary to reflect City's expected timeline to acquire any property identified for acquisition under Section 7.5.1 (Additional Acquisitions); and
- (c) any design features that may impact properties for which no property acquisition is contemplated, with the goal of avoiding damages to properties not previously identified and addressed.

7.6 Utilities, Utility Adjustments, Major Utility Adjustment Delay and PG&E Offsite Utility Delay

7.6.1 Utilities to Serve Facility

7.6.1.1 Non-Profit Entity shall be solely responsible for obtaining and implementing all new Utility services needed for the Infrastructure Facility, and must timely submit the appropriate applications to obtain electricity, water, sewer, cable, etc. This work expressly includes obtaining electricity and power from PG&E for the Project, including all applications and coordination required to obtain such Utility services.

7.6.1.2 City shall, from time to time as required, enter into contracts with Energy suppliers for the supply of Energy to the Infrastructure Facility and shall be responsible for all payments due pursuant to such supply contracts. For avoidance of doubt, the Infrastructure Facility's electricity, natural gas, water, and other such Utility bills will be sent to City and City will be responsible for paying such utility bills. Non-Profit Entity will be provided with copies of the invoices.

7.6.2 Non-Profit Entity's General Responsibilities

7.6.2.1 Subject to and in accordance with the terms of this Agreement, Non-Profit Entity shall be responsible for all Utility Adjustments required by the Project.

7.6.2.2 City agrees to cooperate as reasonably requested by Non-Profit Entity in advancing Utility Adjustments, including attendance at negotiation sessions and review with Utility Owners. Non-Profit Entity shall timely keep City informed of the status of any such negotiations.

7.6.2.3 Non-Profit Entity shall bear the sole risk, cost and schedule impact of Utility Adjustments other than, subject to Articles 13 (General Provisions Applying to Delay Events) and 14 (Compensation and Other Relief for Delay Events), as a direct result of a City Change or Delay Event.

7.6.3 Avoiding Utility Adjustments and Minimizing Costs

7.6.3.1 Non-Profit Entity shall minimize Utility Adjustments in the design and construction of the Infrastructure Facility and costs for which Non-Profit Entity may be entitled to additional compensation pursuant to the Contract Documents, including by taking into account existing Utilities (and their location) in its design and working around existing Utilities (including existing PG&E poles at or adjacent to the Project Site), including through its construction sequencing, means and methods. If a Utility Adjustment could have been avoided through Non-Profit Entity undertaking a Reasonable Investigation prior to the Setting Date, then, to the extent of such Utility Adjustment Costs resulting from such failure to undertake a Reasonable Investigation,

Non-Profit Entity shall bear the full risk and liability associated with such Utility Adjustment, irrespective of any other provisions in this Agreement that might provide compensation, time or other relief in connection with such Utility Adjustment.

7.6.3.2 Non-Profit Entity shall reimburse City for any costs City incurs as a result of Non-Profit Entity's failure to comply with the requirements of this Section 7.6.3 (Avoiding Utility Adjustments and Minimizing Costs).

7.6.4 Allocation of Work Responsibility

7.6.4.1 The allocation of responsibility for performing Utility Adjustment design, construction, and/or materials procurement for each Utility Adjustment as between Non-Profit Entity and the Utility Owner shall be determined in accordance with Section 1.13 of Division 1 of the Technical Requirements (including pursuant to the Utility Coordination Work Plan and Utility Project Execution Plan). For purposes of this Section 7.6 (Utilities, Utility Adjustments, Major Utility Adjustment Delay and PG&E Offsite Utility Delay) and Section 1.13 of Division 1 of the Technical Requirements, references to responsibility for performing Utility Adjustment design and construction include all tasks customarily associated therewith; provided, however, that Non-Profit Entity shall be responsible for all coordination with Utility Owners that is necessary in order to accomplish the Utility Adjustments in compliance with the requirements of the Contract Documents.

7.6.4.2 Non-Profit Entity is responsible for scheduling all Utility Adjustments so as allow for the issuance of NTP 2 as soon as practicable and to meet all applicable Contract Deadlines, without regard to whether a Utility Adjustment is performed by Non-Profit Entity or by the affected Utility Owner (or its contractors). Accordingly, under no circumstances shall any reallocation of responsibility for Utility Work between Non-Profit Entity and a Utility Owner be considered grounds for a time extension hereunder.

7.6.4.3 No increase or decrease in compensation payable to Non-Profit Entity shall be made pursuant to this Section 7.6.4 (Allocation of Work Responsibility) on account of any change in the allocation of responsibility for Incidental Utility Work, or any other matter for which the Contract Documents specify how liability, cost or risk is to be allocated between City and Non-Profit Entity.

7.6.5 Utility Adjustment Costs

7.6.5.1 Non-Profit Entity is responsible for all costs of the Utility Work, including costs of acquiring Utility easements and costs with respect to relinquishment or acquisition of Utility Owner property interests, but excluding (a) costs attributable to Utility Betterments, for which the Utility Owner is responsible and which are not paid to Utility Owner by City; and (b) any other costs for which the Utility Owner is responsible under Law which are not paid to Utility Owner by City. Non-Profit Entity shall fulfill this responsibility either by performing the Utility Work at its own cost, if permitted by the Utility Owner, or by reimbursing the Utility Owner for the Utility Owner's performance of the Utility Work, in accordance with Section 7.6.5.4. Non-Profit Entity shall bear the costs due to the Utility Owner and all costs and expenses associated therewith, including the costs of Utility Owner inspections and any overtime charges incurred by the Utility Owner. Non-Profit Entity is solely responsible for collecting directly from the Utility Owner any amount due to Non-Profit Entity for Utility Betterment costs or other costs incurred by Non-Profit Entity for which the Utility Owner is responsible, whether under Law or otherwise.

7.6.5.2 If for any reason Non-Profit Entity is unable to collect any amounts due to Non-Profit Entity from any Utility Owner, then as between City and Non-Profit Entity, (a) City shall have no liability for such amounts, (b) Non-Profit Entity shall have no right to collect such amounts from City or to offset such amounts against amounts otherwise owing from Non-Profit Entity to City, and (c) Non-Profit Entity shall have no right to stop Work, sue for *mandamus*, demand or plead in any court for City's participation in resolution of any dispute with the Utility Owner, or seek to exercise any other remedies against City on account of the Utility Owner's failure to pay.

7.6.5.3 Non-Profit Entity shall maintain a complete set of records for the costs of Utility Work performed (whether incurred by Non-Profit Entity or by the Utility Owner), in a format reasonably satisfactory to City and in sufficient detail for analysis. For both Utility Owner costs and Non-Profit Entity costs, the totals for each cost category shall be shown in such manner as to permit comparison with the categories stated on the estimate. Non-Profit Entity. All records with respect to Utility Work shall comply with the record keeping and audit requirements of the Contract Documents.

7.6.5.4 To the extent that City is required to initially pay a Utility Owner for any costs related to Utility Owner's performance of Utility Work under this Section 7.6.5 (Utility Adjustment Costs), Non-Profit Entity, on a monthly basis, shall reimburse City for any costs incurred in connection with such Utility Work. The amounts reimbursed shall be due and payable within 10 days after receipt of City's invoice for such Utility Work. City, in its sole discretion, may also deduct the amount to be reimbursed from Milestone Payment 2 in accordance with this Agreement, or any other payment due and payable to Non-Profit Entity on or before the Substantial Completion Date, should Non-Profit Entity fail to reimburse City for such Utility Work. Following the Substantial Completion Date, City may require Non-Profit Entity to pay City amounts owing under this Section 7.6.5.4, collect such amounts from the Performance Bond and/or exercise any such rights and remedies set forth in Section 11.6.3.

7.6.5.5 The Non-Profit Entity shall have Allowances for Underground Existing PG&E Power Lines Work, New PG&E Service Work, and Work associated with the temporary removal and new OCS installation outside of the Project Site, as described in Section 11.12. Once each Allowance is fixed under Section 11.12.1(d), Work subject to these Allowances are subject to the terms of this Section 7.6 with respect to Utility Work.

7.6.6 Incidental Utility Work

Notwithstanding any contrary provision of the Contract Documents, Non-Profit Entity shall be responsible for all Incidental Utility Work without regard to the allocation of Work responsibility otherwise established pursuant to this Section 7.6 (Utilities, Utility Adjustments, Major Utility Adjustment Delay and PG&E Offsite Utility Delay). Without limiting the provision of Section 7.6.2.3, Non-Profit Entity also shall be responsible for furnishing all designs for Incidental Utility Work that Non-Profit Entity performs, unless such designs are included among that portion of the Utility Work to be performed by the Utility Owner. Non-Profit Entity shall not be entitled to any adjustment in its compensation or Contract Deadlines on account of costs incurred, cost savings or delays associated with the performance of Incidental Utility Work by Non-Profit Entity or by any Utility Owner.

7.6.7 Bonds and Insurance; Security for Utility Adjustment Costs

7.6.7.1 All Utility Work shall automatically be covered by the Payment Bonds and Performance Bonds described in Section 10.2 (Performance Security) and by the insurance described in Section 10.1 (Insurance).

7.6.7.2 Non-Profit Entity shall satisfy all requirements of Utility Owners to provide security for reimbursement of Utility Adjustment costs to which the Utility Owner is entitled and that are the responsibility of Non-Profit Entity hereunder.

7.6.8 Utility Investigation by Non-Profit Entity

7.6.8.1 During the PDA Term, Non-Profit Entity has undertaken an investigation of Utilities affecting the Project Site and the Offsite Utility Work, including Utilities located on, in, under, around or impacting the Project Site and the Project. With respect to Utilities affecting the Project Site, Non-Profit Entity represents and warrants that it has analyzed Reference Documents, diligently commenced coordination concerning Utility Adjustments (including submitting and actively pursuing relocation applications to Utility Owners with respect to impacted Utilities, taking into account the Project Schedule), contacted and made reasonable inquiries of Utility Owners, performed substantial surface inspections of the Project Site and undertaken such additional inspections, including substantial subsurface utility investigations, as it deems appropriate and as are required by the Contract Documents and in keeping with Good Industry Practice to verify, fully and accurately identify all Utilities (including contacting and accessing Non-Dig Alert Utilities), addressing all field conditions, and reasonably validating the Utility Information. With respect to Unidentified Offsite Utilities affecting the Offsite Utility Work, Non-Profit Entity represents and warrants that it has undertaken an Offsite Utilities Reasonable Investigation. Non-Profit Entity acknowledges that its rights to any compensation, time or other relief in connection with Utilities, Unidentified Utilities, Unidentified Offsite Utilities, Utility Adjustments, Major Utility Adjustment Delay and PG&E Offsite Utility Delay is conditioned on the accuracy of the foregoing representations and warranties.

7.6.8.2 Except as otherwise provided in Sections 7.6.2.3, 7.6.9 (Claims for Inaccuracies in Utility Information), 7.6.13 (Major Utility Adjustment Delays) 7.6.16 (Claims for Unidentified Offsite Utilities), and 7.6.17 (PG&E Offsite Utility Delay), the Parties specifically intend by Section 7.6 (Utilities, Utility Adjustments, Major Utility Adjustment Delay and PG&E Offsite Utility Delay) to delegate to Non-Profit Entity the obligation to perform all responsibilities with respect to identification of all existing Utilities and to allocate to Non-Profit Entity all risk of increased costs and time of the Utility Work resulting from inaccuracies in the reputed locations of such facilities (and in any other relevant information with respect to such facilities).

7.6.9 Claims for Inaccurate Utility Information

7.6.9.1 Subject to the limitations and restrictions in this Section 7.6.9 (Claims for Inaccurate Utility Information) and Articles 13 (General Provisions Applying to Delay Events) and 14 (Compensation and Other Relief for Delay Events), relief for Inaccurate Utility Information shall be in accordance with and subject to Sections 14.1.2 (Extension of Deadlines for Delay Events) through 14.1.4 (Costs Payable for Compensable Delay Events).

7.6.9.2 Non-Profit Entity shall not be entitled to any compensation pursuant to Sections 14.1.2 (Extension of Deadlines for Delay Events) through 14.1.4 (Costs Payable for Compensable Delay Events). or otherwise for any of the following:

- (a) Increased costs of the Work attributable to Unidentified Utilities and Non-Dig Alert Utilities, to the extent that the existence of the facility was known to Non-Profit Entity as of the Setting Date or could have been inferred from a Reasonable Investigation or otherwise from the presence of other facilities, such as buildings, meters, junction boxes, manholes or identifying markers, visible during a surface inspection of the area conducted prior to the Effective Date;
- (b) Increased costs of the Work attributable to Unidentified Utilities and Non-Dig Alert Utilities to the extent that Non-Profit Entity failed to provide timely Notice in accordance with Articles 13 (General Provisions Applying to Delay Events) and 14 (Compensation and Other Relief for Delay Events);
- (c) Increased costs of the Work attributable to Unidentified Utilities and Non-Dig Alert Utilities that can be Protected in Place or removed rather than physically relocated;
- (d) Any additional costs incurred by Utility Owners (that are not reimbursable or payable to the Utility Owner) as a result of the Unidentified Utility;
- (e) Increased costs of the Utility Work attributable to all other Utilities that are not Unidentified Utilities or Non-Dig Alert Utilities; and
- (f) Delay Costs, extended overhead and delay and disruption damages, except as specifically set forth in the Contract Documents.

7.6.10 Changes in Design

7.6.10.1 For purposes of this Section 7.6.10 (Changes in Design), a Project design change impacting Utility Adjustments is a change that (a) requires a Utility Adjustment that was not listed in the Utility Information; or (b) necessitates acquisition of a Utility Easement not included in the real property rights comprising the Project Site.

7.6.10.2 Inasmuch as Non-Profit Entity is both furnishing the design of and constructing the Project, Non-Profit Entity may have opportunities to reduce the costs of certain portions of the Work, which may increase the costs of certain other portions of the Work or of Utility Work to be performed by Utility Owners. In considering such opportunities, Non-Profit Entity shall consider the impact of Project design changes on Utility Adjustments with the overall goal of minimizing the necessity for Utility Adjustments to the extent practical, in compliance with Section 7.6.3 (Avoiding Utility Adjustments and Minimizing Costs). Accordingly, except for cost increases or decreases resulting from City Changes in Project design affecting Utility Work or from Delay Events requiring Project design changes affecting Utility Work, and notwithstanding any other contrary provision of the Contract Documents, the following rules shall apply with respect to Project design changes during the course of the Project which either reduce the nature or extent of or eliminate any Utility Adjustment, or result in unanticipated Utility Adjustments or an increase in the nature, extent, or costs of anticipated Utility Adjustments:

- (a) Non-Profit Entity shall not be entitled to extension of any Contract Deadline on account of delays resulting from any such design changes (including delays in acquisition of Utility Easements by City or Utility Owners);
- (b) Non-Profit Entity shall not be entitled to any increase in compensation for any additional costs which Non-Profit Entity incurs as a result of such design changes (including additional costs of Utility Work, the costs of any additional Work on other aspects of the Project undertaken in order to facilitate the avoidance or minimization of Utility Adjustments, and/or increased costs resulting from any Project Site conditions associated with Utility Easements made necessary by such design changes); and
- (c) If City incurs any additional costs as a result of such design changes (including any increases in amounts owed by City to Utility Owners, e.g., for work which is unusable or which must be redone), then Non-Profit Entity shall reimburse City for such costs within 10 days after receipt of City's invoice therefor, or in the sole discretion of City, City may deduct the amount of reimbursement due from Milestone Payment 2 in accordance with this Agreement, or any other payment due and payable to Non-Profit Entity under the Contract Documents on or before the Substantial Completion Date, should Non-Profit Entity fail to reimburse City for such costs. Following the Substantial Completion Date, City may require Non-Profit Entity to pay City amounts owing under this Section 7.6.10.2, collect such amounts from the Performance Bond and/or exercise any such rights and remedies set forth in Section 11.6.3.

This Section 7.6.10 (Changes in Design) shall not apply to any changes in design made to accommodate any Change in Law.

7.6.11 Utility Betterments

Non-Profit Entity shall be responsible for addressing any requests by Utility Owners that Non-Profit Entity design and/or construct a Utility Betterment. Notwithstanding any other provision of this Section 7.6 (Utilities, Utility Adjustments, Major Utility Adjustment Delay and PG&E Offsite Utility Delay), no Work, Utility Adjustments or other Utility-related items initially included in the Work shall be considered a Utility Betterment. Any Utility Betterment performed as part of a Utility Adjustment, whether by Non-Profit Entity or by the Utility Owner, shall be subject to the same standards and requirements as if it were a necessary Utility Adjustment. Under no circumstances shall Non-Profit Entity proceed with any Utility Betterment that is incompatible with the Project or is not in compliance with applicable Law, the Regulatory Approvals or the Contract Documents, including the Contract Deadlines. Under no circumstances will Non-Profit Entity be entitled to any additional compensation or time extension under the Contract Documents as the result of any Utility Betterment, whether performed by Non-Profit Entity or by the Utility Owner. Non-Profit Entity shall provide City with such information, analyses, and certificates as City may request in order to determine compliance with this Section 7.6.11 (Utility Betterments).

7.6.12 Failure of Utility Owners to Cooperate

7.6.12.1 Non-Profit Entity shall make diligent efforts to obtain the cooperation of each Utility Owner as necessary for the Project. Non-Profit Entity is responsible for verifying the progress of

each Utility Owner's work. Non-Profit Entity shall provide Notice to City within five days after the occurrence of any of the following: (a) Non-Profit Entity reasonably believes for any reason that any Utility Owner would not undertake or permit Utility Work in a manner consistent with the timely completion of the Project or in accordance with Law, the Regulatory Approvals or the Contract Documents, (b) Non-Profit Entity becomes aware that any Utility Owner is not cooperating in a timely manner to agree upon work to be performed or approvals to be obtained or to provide agreed-upon work or approvals in accordance with the Contract Documents, or (c) any other dispute arises between Non-Profit Entity and a Utility Owner with respect to the Project, despite Non-Profit Entity's diligent efforts to obtain such Utility Owner's cooperation or otherwise resolve such dispute. Such Notice may include a request that City assist in resolving the dispute or in otherwise obtaining the Utility Owner's timely cooperation. Non-Profit Entity shall provide City with such information as City reasonably requests regarding the Utility Owner's failure to cooperate and the effect of any resulting delay on the Project Schedule. After delivering Notice to City, Non-Profit Entity shall continue to use diligent efforts to pursue the Utility Owner's cooperation.

7.6.12.2 If Non-Profit Entity requests assistance of City pursuant to Section 7.6.12.1, the following provisions apply:

- (a) Non-Profit Entity shall provide evidence satisfactory to City, in its good faith determination, that (i) the subject Utility Work is necessary, (ii) if the time for Utility Owners' response time exceeds expectations, Non-Profit Entity proactively pursued actions to advance progress, (iii) Non-Profit Entity has made, and continues to make, diligent efforts to obtain the Utility Owner's cooperation and commenced coordination at the earliest time, including during the PDA Term (including submitting and actively pursuing Utility Adjustment applications to Utility Owners with respect to impacted Utilities, taking into account the Project Schedule), (iv) Non-Profit Entity has remained responsive to Utility Owners' comments in a timely manner; (v) the representations and warranties set forth in Section 7.6.8.1 and Section 7.6.16.1, as applicable, were true and accurate as of the Effective Date; and (vi) the Utility Owner is not cooperating (clauses (a)(i) through (vi) above are referred to herein as the "Conditions to Assistance").
- (b) Following receipt by City of satisfactory evidence, City shall take such reasonable steps as City may reasonably determine to obtain the cooperation of the Utility Owner or resolve the dispute; provided, however, City shall have no obligation to prosecute eminent domain or other legal proceedings, or to exercise any other legal remedy available to it under Law or existing contract, unless City elects to do so in its sole discretion. City may, at its sole discretion, participate in the resolution of any dispute between Non-Profit Entity and a Utility Owner, whether or not requested to do so by Non-Profit Entity.
- (c) Without limiting City's obligations under clause (b) above or the terms of this Agreement relating to a Major Utility Adjustment Delay, if City holds contractual rights that might be used to enforce the Utility Owner's obligation to cooperate, City shall have the right not to exercise those rights. The decision not to exercise those rights shall be in the sole discretion of City.
- (d) Without limiting the other provisions of this Section 7.6.12, if Principal Project Company establishes that it has a good faith claim based solely on wrongful

actions or inactions of a Utility Owner pertaining to a Utility within the Project Site or otherwise affected by the Project, upon receipt of Notice from Principal Project Company, City may, in its sole discretion, assign to Principal Project Company City's rights of recovery, as such may exist, under any existing agreement between City and the Utility Owner or under any utility permit.

7.6.12.3 Any assistance provided by City shall not relieve Non-Profit Entity of its sole and primary responsibility for the satisfactory compliance with its obligations under the Contract Documents and its obligations with respect to timely completion of all necessary Utility Adjustments.

7.6.13 Major Utility Adjustment Delays

7.6.13.1 The term "Major Utility Adjustment Delay" shall mean:

- (a) Any material delay by a Utility Owner in connection with a Major Utility Adjustment beyond the later of the date set forth in the approved Project Schedule and any agreement in writing between NPE or NPE-Related Entities and any Utility Owner, following receipt by City of proper Notice pursuant to Section 7.6.12.1 that causes a Critical Path delay to the Work, provided that (i) all of the "Conditions to Assistance" described in Section 7.6.12.2 have been satisfied; (ii) Non-Profit Entity shall actively and diligently cooperate with the Utility Owner and pursue the Major Utility Adjustment and Utility Work at all times; and (iii), if applicable, Non-Profit Entity shall respond to, and address, Utility Owner comments, including through resubmittals of design, data, construction documents and revised submittals no later than the earlier of (x) 7 days after delivery by the Utility Owner of comments, questions and/or issues lists; and (y) the date for response identified by Utility Owner in Utility Owner's comments, questions and/or issues lists. Delays to Major Utility Adjustments resulting in whole or in part from any failure by Non-Profit Entity to satisfy the conditions set forth in clauses (i)-(iii) of this Section or any act or omission of any NPE-Related Entity or any NPE Fault shall not be counted towards Major Utility Adjustment Delay.
- (b) Notwithstanding the foregoing, the term "Major Utility Adjustment Delay" also does not include and is not intended to address (i) City Changes relating to Utilities, the impact of which will be addressed in the Change Order, (ii) any Utility Adjustments other than Major Utility Adjustments beyond the Major Utility Adjustment Deadline; (iii) additional work for a Major Utility Adjustment associated with a Project design change as described in Section 7.6.10 (Changes in Design); (iv) any event described in this Section 7.6.13.1 which results from or arises out of the actions or omissions of any NPE-Related Entity or any NPE Fault; (v) any delay or impact relating to or arising out of the failure by any NPE-Related Entity to undertake the coordination activities with Utilities contemplated by the Predevelopment Agreement or based on the results of a Reasonable Investigation (even if such delay otherwise would have been considered a Major Utility Adjustment Delay but for such failure) or (vi) PG&E Offsite Utility Delay (which is separately addressed in Section 7.6.17 below). Non-Profit Entity shall not rely upon any proposed schedules, durations or deadlines, if any, included in the Reference Documents with respect to Utility Adjustments, and Non-Profit Entity may not base any Claims

for a time extension or additional compensation upon such proposed schedules, durations, and deadlines.

7.6.13.2 Subject to the limitations and restrictions in this Section 7.6.13 (Major Utility Adjustment Delays) and Articles 13 (General Provisions Applying to Delay Events) and 14 (Compensation and Other Relief for Delay Events), relief for a Major Utility Adjustment Delay shall be in accordance with and subject to Sections 14.1.2 (Extension of Deadlines for Delay Events) through 14.1.4 (Costs Payable for Compensable Delay Events).

7.6.13.3 Non-Profit Entity shall not be entitled to extension of any Contract Deadline or other relief for a Major Utility Adjustment Delay pursuant to Section 14.1.2 (Extension of Deadlines for Delay Events) through 14.1.4 (Costs Payable for Compensable Delay Events), or otherwise unless all of the following conditions are satisfied :

- (a) The Utility Adjustment is solely associated with a Major Utility Adjustment Delay;
- (b) Non-Profit Entity has timely satisfied the “Conditions to Assistance” requirements described in Section 7.6.12.2;
- (c) Non-Profit Entity has provided a reasonable Utility Adjustment plan for the Major Utility Adjustment to the Utility Owner that has been approved by City;
- (d) Non-Profit Entity has provided evidence satisfactory to City that (i) Non-Profit Entity has prioritized the Major Utility Adjustment early in the Project Schedule; (ii) Non-Profit Entity took advantage of Float available early in the Project Schedule for coordination activities with respect to the Utility(ies) to which such Major Utility Adjustment Delay relates, (iii) Non-Profit Entity has fulfilled its obligation to coordinate with the Utility Owner to prevent or reduce such delays, and (iv) Non-Profit Entity has otherwise made diligent efforts to obtain timely performance by the Utility Owner but has been unable to obtain such timely performance;
- (e) There exist no circumstances which have delayed or are delaying the affected Major Utility Adjustment(s), other than those that fit within the definition of a Major Utility Adjustment Delay or another Compensable Delay Event; and
- (f) The delay is otherwise allowable under Articles 13 (General Provisions Applying to Delay Events) and 14 (Compensation and Other Relief for Delay Events).

7.6.13.4 Non-Profit Entity shall undertake reasonable efforts to obtain agreements in writing between NPE or NPE-Related Entities and Utility Owners relating to Major Utility Adjustments, but shall not be responsible for failing to obtain such an agreement following the exercise of such reasonable efforts.

7.6.14 Utility-Related Claims; Additional Restrictions on Change Orders Relating to Utility Adjustments

In addition to all of the other requirements and limitations contained in this Section 7.6 (Utilities, Utility Adjustments, Major Utility Adjustment Delay and PG&E Offsite Utility Delay), and Articles 13 (General Provisions Applying to Delay Events) and 14 (Compensation and Other Relief for Delay Events), Non-Profit Entity’s entitlement to any relief relating to Utility Adjustments shall be

subject to the restrictions and limitations set forth in this Section 7.6.14 (Utility-Related Claims; Additional Restrictions on Change Orders Relating to Utility Adjustments).

7.6.14.1 Non-Profit Entity shall provide documentation satisfactory to City showing that the required analysis was performed and an appropriate determination made regarding the need for the Utility Adjustment, and shall also bear the burden of proving that the amount of any additional costs and/or time incurred by Non-Profit Entity are both necessary and reasonable.

7.6.14.2 To the extent compensation for Extra Work Costs is permitted under this Section 7.6 (Utilities, Utility Adjustments, Major Utility Adjustment Delay and PG&E Offsite Utility Delay), any relief increasing compensation to Non-Profit Entity pursuant to this Section 7.6 (Utilities, Utility Adjustments, Major Utility Adjustment Delay and PG&E Offsite Utility Delay) shall include only the Extra Work Costs arising from the circumstances giving rise to such relief, i.e., the amount payable shall take into account the costs that would have been incurred absent such circumstances and a credit shall be allowed for any avoided costs.

7.6.14.3 Non-Profit Entity shall not be entitled to any increase in compensation for any costs of coordinating with Utility Owners.

7.6.15 FTA Requirements

The Project is funded in part with funds made available by the Federal Transit Administration. In carrying out the Utility Adjustments, Non-Profit Entity shall comply with all Laws as necessary for Utility Adjustments to be eligible for reimbursement from such funding.

7.6.16 Claims for Unidentified Offsite Utilities

7.6.16.1 On or before 135 days after Financial Close, Non-Profit Entity shall undertake, and prepare and submit to City for review, the Offsite Utility Information.

7.6.16.2 Subject to the limitations and restrictions in this Section 7.6.16 (Claims for Unidentified Offsite Utilities) and Articles 13 (General Provisions Applying to Delay Events) and 14 (Compensation and Other Relief for Delay Events), relief for Unidentified Early Offsite Utility Delay and Unidentified Late Offsite Utility Delay (as applicable) shall be in accordance with and subject to Sections 14.1.2 (Extension of Deadlines for Delay Events) through 14.1.4 (Costs Payable for Compensable Delay Events).

7.6.16.3 Non-Profit Entity shall not be entitled to any relief pursuant to Sections 14.1.2 (Extension of Deadlines for Delay Events) through 14.1.4 (Costs Payable for Compensable Delay Events) for a Unidentified Early Offsite Delay Events or Unidentified Late Offsite Utility Delay(as applicable) or otherwise for any of the following:

- (a) Prior to the 135-day period in which the Offsite Utility Information must be submitted to City, increased costs of the Offsite Utility Work attributable to Unidentified Offsite Utilities and Non-Dig Alert Utilities, to the extent that the existence of the facility was identified in the Utility Information, known to Non-Profit Entity as of the Setting Date or could have been inferred from an Offsite Utilities Reasonable Investigation or otherwise from the presence of other facilities, such as buildings, meters, junction boxes, manholes or identifying markers, visible during a surface inspection of the area conducted prior to the Effective Date;

- (b) Following the 135-day period in which the Offsite Utility Information must be submitted to City, increased costs of the Offsite Utility Work attributable to Unidentified Offsite Utilities and Non-Dig Alert Utilities, to the extent that the existence of the facility was identified in the Utility Information or Offsite Utility Information, known to Non-Profit Entity as of the expiration of such 135-day period or could have been inferred from an Offsite Utilities Reasonable Investigation or otherwise from the presence of other facilities, such as buildings, meters, junction boxes, manholes or identifying markers, visible during a surface inspection of the area conducted prior to the expiration of the 135-day period;
- (c) Increased costs of the Offsite Utility Work attributable to Unidentified Offsite Utilities and Non-Dig Alert Utilities to the extent that Non-Profit Entity failed to provide timely Notice in accordance with Articles 13 (General Provisions Applying to Delay Events) and 14 (Compensation and Other Relief for Delay Events);
- (d) Increased costs of the Work attributable to Unidentified Offsite Utilities and Non-Dig Alert Utilities that can be Protected in Place or removed rather than physically relocated;
- (e) Any additional costs incurred by Utility Owners (that are not reimbursable or payable to the Utility Owner) as a result of the Unidentified Offsite Utility;
- (f) Increased costs of the Offsite Utility Work attributable to all other Utilities that are not Unidentified Offsite Utilities or Non-Dig Alert Utilities; and
- (g) Delay Costs, extended overhead and delay and disruption damages, except as specifically set forth in the Contract Documents.

7.6.17 PG&E Offsite Utility Delays

7.6.17.1 The term “PG&E Offsite Utility Delay” shall mean:

- (a) Any material delay by PG&E in connection with the Offsite Utility Work to be undertaken by PG&E beyond the later of the date set forth in the approved Project Schedule and any agreement in writing between NPE or NPE-Related Entities and PG&E following receipt by City of proper Notice pursuant to Section 7.6.12.1 that causes a Critical Path delay to the Work, provided that (i) all of the “Conditions to Assistance” described in Section 7.6.12.2 have been satisfied; (ii) Non-Profit Entity shall actively and diligently cooperate with PG&E and pursue the Offsite Utility Work at all times; and (iii), if applicable, Non-Profit Entity shall respond to, and address, PG&E comments, including through resubmittals of design, data, construction documents and revised submittals no later than the earlier of (x) 7 days after delivery by PG&E of comments, questions and/or issues lists; and (y) the date for response identified by PG&E in PG&E’s comments, questions and/or issues lists. Delays to Offsite Utility Work undertaken by PG&E resulting in whole or in part from any failure by Non-Profit Entity to satisfy the conditions set forth in clauses (i)-(iii) of this Section or any act or omission of any NPE-Related Entity or any NPE Fault shall not be counted towards PG&E Offsite Utility Delay.

7.6.17.2 Notwithstanding the foregoing, the term "PG&E Offsite Utility Delay" also does not include and is not intended to address (i) City Changes relating to Utilities, the impact of which will be addressed in the Change Order, (ii) any event described in this Section 7.6.17.1 which results from or arises out of the actions or omissions of any NPE-Related Entity or any NPE Fault; (iii) any Utility Work other than Offsite Utility Work to be undertaken by PG&E; or (iv) any delay or impact relating to or arising out of the failure by any NPE-Related Entity to undertake the coordination activities with PG&E based on the results of an Offsite Utility Reasonable Investigation (even if such delay otherwise would have been considered PG&E Offsite Utility Delay but for such failure). Subject to the limitations and restrictions in this Section 7.6.17.1 (PG&E Offsite Utility Delays) and Articles 13 (General Provisions Applying to Delay Events) and 14 (Compensation and Other Relief for Delay Events), relief for PG&E Offsite Utility Delay shall be in accordance with Sections 14.1.2 (Extension of Deadlines for Delay Events) through 14.1.4 (Costs Payable for Compensable Delay Events).

7.6.17.3 Non-Profit Entity shall not be entitled to extension of any Contract Deadline or other relief for a PG&E Offsite Utility Delay pursuant to Sections 14.1.2 (Extension of Deadlines for Delay Events) through 14.1.4 (Costs Payable for Compensable Delay Events) or otherwise unless all of the following conditions are satisfied (in addition to satisfaction of any conditions specified in Section 7.16.17.1):

- (a) The Offsite Utility Work is solely associated with work undertaken by PG&E;
- (b) Non-Profit Entity has timely satisfied the "Conditions to Assistance" requirements described in Section 7.6.12.2;
- (c) Non-Profit Entity has provided a reasonable plan to coordinate and engage with PG&E that has been approved by City;
- (d) Non-Profit Entity has provided evidence satisfactory to City that (i) Non-Profit Entity has prioritized the Offsite Utility Work to be undertaken by PG&E early in the Project Schedule; (ii) Non-Profit Entity took advantage of Float available early in the Project Schedule for coordination and engagement activities with respect to the Offsite Utility Work to be undertaken by PG&E to which such PG&E Offsite Utility Delay relates, (iii) Non-Profit Entity has fulfilled its obligation to coordinate and engage with PG&E to prevent or reduce such delays, and (iv) Non-Profit Entity has otherwise made diligent efforts to obtain timely performance by PG&E but has been unable to obtain such timely performance;
- (e) There exist no circumstances which have delayed or are delaying the affected Offsite Utility Work to be undertaken by PG&E, other than those that fit within the definition of a PG&E Offsite Utility Delay or another Compensable Delay Event; and
- (f) The delay is otherwise allowable under Articles 13 (General Provisions Applying to Delay Events) and 14 (Compensation and Other Relief for Delay Events).

7.6.17.4 Non-Profit Entity shall undertake reasonable efforts to obtain agreements in writing between NPE or NPE-Related Entities and PG&E relating to Offsite Utility Work, but shall not be responsible for failing to obtain such an agreement following the exercise of such reasonable efforts.

7.7 Hazardous Materials Management; Risk Allocation

7.7.1 Hazardous Materials Management

7.7.1.1 Except as otherwise provided in this Section 7.7.1 (Hazardous Materials Management), Non-Profit Entity shall, as part of the Work, perform, or cause to be performed, all Hazardous Materials Management required in connection with the Project in accordance with applicable Law, Regulatory Approvals, the approved Environmental Protection Program, and all applicable provisions of the Contract Documents.

7.7.1.2 Non-Profit Entity shall have the following duties to identify, avoid, minimize and mitigate adverse monetary and non-monetary impacts to the Project and to City relating to Hazardous Materials:

- (a) Non-Profit Entity shall adopt design and construction techniques for the Project, using Good Industry Practice, that avoid, to the extent reasonably practicable, the need for Hazardous Materials Management;
- (b) when performing Hazardous Materials Management, Non-Profit Entity shall use Good Industry Practice, including design modifications and construction techniques, to minimize costs (including long-term costs) of Hazardous Materials Management; and
- (c) Non-Profit Entity shall use appropriately trained personnel to conduct Hazardous Materials Management activities.

7.7.1.3 Non-Profit Entity shall promptly provide Notice to City of any Hazardous Materials encountered in connection with the Project, the Project Site or the Work that require (a) reporting or Notice to any Governmental Entity and/or (b) taking any response action (e.g., evaluating and addressing the circumstances and location of the Hazardous Materials) under applicable Law, Regulatory Approvals, the approved Environmental Protection Program and the Contract Documents, as applicable. A Notice provided under this Section 7.7.1.3 shall advise City of any obligation to provide Notice to Governmental Entities under applicable Law. Non-Profit Entity shall make all such reports, or deliver all such Notices, to any Governmental Entity with respect to Hazardous Materials encountered in connection with the Project, the Project Site or the Work, providing concurrent Notice and copies of such reports and Notices to City.

7.7.1.4 Procedures for Hazardous Materials Management

- (a) Non-Profit Entity shall manage, treat, handle, store, remediate, remove, transport (where applicable), document and dispose of all Hazardous Materials and perform all other aspects of Hazardous Materials Management as appropriate, in accordance with applicable Law, Regulatory Approvals, the approved plans required to be provided under Section 01 35 44 of Division 10 of the Technical Requirements, and this Agreement.
- (b) Non-Profit Entity is prohibited from starting Hazardous Material removal Work without a City-approved Hazardous Materials Management Plan as described in Section 02 80 13 of Division 10 of the Technical Requirements and the Hazardous Materials submittals required thereunder with respect to the

specific instance of Hazardous Materials and Hazardous Materials removal work. Non-Profit Entity shall not conduct any sampling or analysis of suspected building materials without prior permission from the City. The time utilized by Non-Profit Entity to undertake and obtain City approval of such Hazardous Materials Management Plan and Hazardous Materials submittals regarding any Known or Suspected Hazardous Materials or any Hazardous Materials caused, contributed, or, once discovered, exacerbated, by any NPE-Related Entity shall not be eligible for relief or time extension. The costs incurred by Non-Profit Entity to undertake and obtain City approval of such Hazardous Materials Management Plan and Hazardous Materials submittals regarding any Known or Suspected Hazardous Materials or any Hazardous Materials caused, contributed, or, once discovered, exacerbated, by any NPE-Related Entity shall not be eligible for compensation under this Agreement.

- (c) Except where Non-Profit Entity is required to take immediate action under the Contract Documents or applicable Law, Non-Profit Entity shall afford City the opportunity to inspect sites containing Hazardous Materials and to consult with Non-Profit Entity about the recommended approach before any Hazardous Materials Management or other action is taken which would inhibit City's ability to ascertain the nature and extent of the contamination.
- (d) Where management, treatment, handling, storage, remediation, transport, documentation or disposing of Hazardous Materials constitutes a Hazardous Materials Event, Section 14.1.5 (Additional Limits Relating to Hazardous Materials Event During D&C Period) shall apply regarding Non-Profit Entity's rights to potential compensation and extension of any Contract Deadline.

7.7.1.5 If Non-Profit Entity fails to undertake the Hazardous Materials Management required under this Section 7.7.1 (Hazardous Materials Management) within a reasonable time after discovery of Hazardous Materials, taking into consideration the nature and extent of the contamination and action required and the potential impact upon Non-Profit Entity's schedule for use of and operations on the Project Site, City may provide Notice to Non-Profit Entity that City will undertake the Hazardous Materials Management. If Non-Profit Entity fails to remedy the failure within 3 Business Days following provision of a Notice under this Section 7.7.1.5:

- (a) City may itself undertake Hazardous Materials Management actions or procure a contractor to perform such work, in which case City will do so in accordance with all applicable Environmental Laws;
- (b) Non-Profit Entity shall reimburse City on a current basis, within 10 days of request, for Recoverable Costs from fines, penalties or other assessments against City or the Project by Governmental Entities due to Non-Profit Entity's delay or failure to undertake the Hazardous Materials Management), so long as City has performed in accordance with Section 7.7.1.5(a); and
- (c) City shall have no liability or responsibility to Non-Profit Entity arising out of, relating to or resulting from City's Hazardous Materials Management actions and such actions shall not constitute a Delay Event or other basis for a Claim.

7.7.1.6 In the event of an emergency constituting an immediate hazard to health or safety of Building Occupants or City property due to Non-Profit Entity's failure to undertake the Hazardous Materials Management required under this Section 7.7.1 (Hazardous Materials Management), City may undertake, at Non-Profit Entity's sole cost and expense and without prior Notice, all work necessary to correct such hazardous condition(s).

7.7.2 Additional Hazardous Materials Obligations of Non-Profit Entity

7.7.2.1 Non-Profit Entity shall avoid exacerbating Hazardous Materials (including Pre-Existing Hazardous Materials as well as new Releases) in, on, under or migrating from the Project Site. For purposes of determining liability, as between City and Non-Profit Entity, under Sections 7.7.1.4(a) and 7.7.1.4(c), Non-Profit Entity shall only be liable for exacerbation of Hazardous Materials arising out of or relating to NPE Fault.

7.7.2.2 Non-Profit Entity shall take all reasonable efforts to ensure that no act or omission of any NPE-Related Entity will result in an unlawful Release of Hazardous Materials to or into wastewater, storm or sanitary sewer systems, surface water, air, soils or groundwater in, on, under or migrating from the Project Site.

7.7.3 Hazardous Materials Generator Responsibilities

7.7.3.1 As between Non-Profit Entity and City, City shall be considered the generator and assume generator responsibility for Hazardous Materials, other than any NPE Release, and City shall not assert that Non-Profit Entity has legal responsibility for such Hazardous Materials (other than a NPE Release) as a generator. City has approval rights of Non-Profit Entity's selection of the destination facility to which Hazardous Materials, other than any NPE Release, will be transported.

7.7.3.2 With regard to Hazardous Materials other than any NPE Release, City shall comply with the applicable standards for generators including those found at 40 CFR Part 262, including the responsibility to sign manifests and other waste tracking records for the transport of Hazardous Materials.

7.7.3.3 Sections 7.7.3.1 and 7.7.3.2 shall not preclude or limit any rights, remedies or defenses that City or Non-Profit Entity may have against any Governmental Entity or other third parties, including prior owners, lessees, and licensees nor shall Sections 7.7.3.1 and 7.7.3.2 be interpreted as an admission of City's liability as to any Governmental Entity or other third parties, or otherwise preclude City from asserting to any Governmental Entity or other third parties that another entity, other than Non-Profit Entity or City, is the generator of any Hazardous Materials. Notwithstanding the foregoing, Non-Profit Entity (and not City) shall be considered the generator with respect to any NPE Release.

7.8 Substantial Completion

7.8.1.1 The City and Non-Profit Entity mutually agree that time is of the essence with respect to the dates and times specified in this Agreement.

7.8.1.2 Non-Profit Entity shall achieve Substantial Completion on or before the Substantial Completion Deadline. Failure to achieve Substantial Completion by the Long Stop Date is a NPE Default under Section 16.1.1(c).

7.8.1.3 The conditions to Substantial Completion are set forth in Exhibit 15C (Conditions to Substantial Completion).

7.8.1.4 Approximately six calendar months before the date on which Non-Profit Entity expects to achieve Substantial Completion, Non-Profit Entity shall provide to City its anticipated schedule to achieve Substantial Completion. Non-Profit Entity shall promptly advise City if at any time Non-Profit Entity determines that its anticipated schedule to achieve Substantial Completion will change. Non-Profit Entity shall provide an updated schedule to City 21 days before the date Non-Profit Entity expects to achieve Substantial Completion. Non-Profit Entity's schedule shall include, at a minimum, dates when Non-Profit Entity will submit all remaining documentation and evidence required by Exhibit 15C (Conditions to Substantial Completion) and the Technical Requirements with respect to Substantial Completion.

7.8.1.5 When Non-Profit Entity determines that it has satisfied all conditions to Substantial Completion, it shall deliver to City a request for Certificate of Substantial Completion, in a form reasonably acceptable to City, stating the date that Non-Profit Entity determined it satisfied all conditions in Exhibit 15C (Conditions to Substantial Completion). Together with the request for Certificate of Substantial Completion, Non-Profit Entity shall submit a Punch List of items to be completed as a condition precedent to achievement Final Acceptance, obtain approval from Utility Owners and Authorities Having Jurisdiction of any Punch List items affecting Utilities and elements subject to the jurisdiction of an Authority Having Jurisdiction and obtain City's acceptance of the Punch List, which acceptance shall not be unreasonably withheld or delayed. The Punch List shall not include any items that adversely affect the safety, use or operability of the Project.

7.8.1.6 During the 14-day period following the receipt of such request for Certificate of Substantial Completion:

- (a) Non-Profit Entity and City shall meet and confer to facilitate City's determination of whether Non-Profit Entity has met the conditions for Substantial Completion; and
- (b) City will conduct an inspection of the Project, review the applicable Final Design Documents, Construction Documents and other Submittals and conduct such other investigations as may be necessary to evaluate whether Substantial Completion has been achieved.

7.8.1.7 As soon as reasonably practicable and, in any event, no later than 14 days after receipt of Non-Profit Entity's Notice under Section 7.8.1.5, City's Authorized Representative shall inspect, in conjunction with Non-Profit Entity, the D&C Work and City's Authorized Representative shall either:

- (a) If the conditions to Substantial Completion set forth in this Agreement, including in Exhibit 15(C) (Conditions to Substantial Completion) have been achieved, issue the Certificate of Substantial Completion to Non-Profit Entity within 7 days after the inspection:
 - (i) certifying that Substantial Completion has taken place;

- (ii) stating the Substantial Completion Date (consistent with the terms of Section 7.8.1.5);
 - (iii) listing any Punch List items which, in its opinion, remains to be performed; and
 - (iv) setting out reasonable details of the work remaining to be performed to achieve Final Acceptance; or
- (b) if the conditions to Substantial Completion set forth in this Agreement, including in Exhibit 15(C) (Conditions to Substantial Completion), have, in City's determination, not been achieved, issue a Notice to Non-Profit Entity within 7 days after the inspection:
- (i) listing, in reasonable detail, the work and conditions which, in its determination, remain(s) to be performed or satisfied to achieve Substantial Completion; or
 - (ii) stating in its reasonable determination, that Substantial Completion is so far from being achieved that it is not practicable to provide a list of the type referred to in Section 7.8.1.7(b)(i), but including, in reasonable detail, a description of the reasons for such determination.

7.8.1.8 Non-Profit Entity shall give Notice to City's Authorized Representative when Non-Profit Entity considers that the work listed in a Notice issued by City's Authorized Representative under Section 7.8.1.7(b)(i) has been completed.

7.8.1.9 Sections 7.8.1.4 through 7.8.1.8 will apply in respect of any new Non-Profit Entity Notice under Section 7.8.1.8 in the same way as if it were the original Notice given under Section 7.8.1.4.

7.8.1.10 City's Authorized Representative's reasonable determination as to whether the conditions to Substantial Completion set forth in this Agreement, including in Exhibit 15(C) (Conditions to Substantial Completion), have been achieved will not be restricted by any Notice, list or opinion which City previously provided to Non-Profit Entity under Section 7.8.1.7(b)(i).

7.8.1.11 In the event that the Non-Profit Entity and City disagree as to whether or not the conditions to Substantial Completion set forth in this Agreement, including in Exhibit 15(C) (Conditions to Substantial Completion), have been achieved, the Substantial Completion Date, the list of work remaining to be performed or the list of or estimated cost to perform Punch List items, City and Non-Profit Entity will meet to resolve such dispute, failing which such dispute shall be resolved in accordance with Article 18 (Partnering; Contract Dispute Procedures) .

7.8.1.12 Notwithstanding any other provision of this Agreement, City is under no obligation to certify Substantial Completion or commence the payment of Availability Payments prior to the original Substantial Completion Deadline, regardless of whether Substantial Completion has been achieved prior to the original Substantial Completion Deadline.

7.9 Final Acceptance

7.9.1.1 Promptly after achieving Substantial Completion, Non-Profit Entity shall perform all remaining D&C Work, including expeditiously and diligently correcting all of the Punch List items specified pursuant to Section 7.8.1.7(a)(iii), to achieve Final Acceptance by the Final Acceptance Deadline.

7.9.1.2 The conditions to Final Acceptance are set forth in Exhibit 15D (Conditions to Final Acceptance).

7.9.1.3 When Non-Profit Entity determines that it has satisfied all conditions to Final Acceptance, it shall provide a certification to City, in a form reasonably acceptable to City, stating the date that Non-Profit Entity determined that it satisfied all the conditions in Exhibit 15D (Conditions to Final Acceptance).

7.9.1.4 Within 21 days after receipt of Non-Profit Entity's Notice under Section 7.9.1.3, City's Authorized Representative shall inspect, in conjunction with Non-Profit Entity, the D&C Work and shall either:

- (a) if City's Authorized Representative agrees that Final Acceptance has been achieved, issue a Certificate of Final Acceptance to Non-Profit Entity within 15 days after the inspection certifying that Final Acceptance has taken place and the Final Acceptance Date; or
- (b) if in City's Authorized Representative's opinion, Final Acceptance has not been achieved, issue a Notice to Non-Profit Entity within 15 days after the inspection listing the work it believes remains to be performed to achieve Final Acceptance.

7.9.1.5 Without limiting Non-Profit Entity's other obligations under this Agreement, immediately upon receipt of a Notice under Section 7.9.1.4(b), Non-Profit Entity shall expeditiously and diligently progress performance of the work specified in the Notice.

7.9.1.6 Non-Profit Entity shall give Notice to City's Authorized Representative when Non-Profit Entity considers that the work listed in City's Authorized Representative's Notice under Section 7.9.1.4(b) has been completed.

7.9.1.7 Sections 7.9.1.4 through 7.9.1.6 will apply in respect of any new Non-Profit Entity Notice under Section 7.9.1.6 in the same way as if it were the original Notice under Section 7.9.1.4

7.9.1.8 City's Authorized Representative's opinion as to whether Final Acceptance has been achieved will not be restricted by any:

- (a) Certificate of Substantial Completion, Notice, list or opinion already provided under this Agreement; or
- (b) warranty provided by any NPE-Related Entity.

7.9.1.9 In the event that City and Non-Profit Entity disagree as to whether or not Final Acceptance has been achieved or the Final Acceptance Date, City and Non-Profit Entity will meet to resolve such dispute, failing which such dispute shall be resolved in accordance with Article 18 (Partnering; Contract Dispute Procedures) .

7.10 Responsibility for Loss or Damage

7.10.1 The D&C Work includes having full charge and care of the Project Site and the D&C Work (including bearing risk of loss and damage to the D&C Work and Project Site, subject to the terms of the Contract Documents, through Substantial Completion (or in the case of any Punch List Items, Final Acceptance), except to the extent that City or Third Parties have accepted elements of the D&C Work and expressly assumed responsibility for maintenance of such elements. For certainty, following Substantial Completion, City shall have full charge and care of the Project Site and the Infrastructure Facility and shall bear all risk of loss and damage to the Project Site and Infrastructure Facility except (a) with respect to Punch List Items, Non-Profit Entity shall bear the risk of loss and damage to the D&C Work and the Project Site with respect to such items until the Final Acceptance Date, and (b) with respect to Warranty Work, Non-Profit Entity shall bear responsibility for Defects in the relevant Work for the duration of the Warranty Period.

7.10.2 Non-Profit Entity shall take every reasonable precaution against Loss or damage to any part of the Project from any cause, whether arising from the performance or nonperformance of the D&C Work.

7.10.3 For so long as Non-Profit Entity bears the risk of loss and damage to D&C Work under Section 7.10.1, Non-Profit Entity shall repair, restore and replace Losses or damages to such D&C Work occasioned by any cause, subject to potential relief in accordance with, and subject to the terms of the Contract Documents. Non-Profit Entity shall ensure that such work is performed in accordance with the Contract Documents and applicable Law.

7.10.4 Non-Profit Entity shall repair, restore and replace any Losses or damages to City property other than the D&C Work caused by any NPE-Related Entity.

7.11 Nonconforming Work

7.11.1 Obligation to Replace Nonconforming Work

Non-Profit Entity shall perform all Work in conformity with the Contract Documents. If Non-Profit Entity has not performed the Work in conformity with the Contract Documents, then, in addition to any other remedies available to City, City may direct Non-Profit Entity to, and Non-Profit Entity shall, remove and replace or otherwise remedy the Nonconforming Work. Non-Profit Entity shall not be entitled to make a Claim in connection with such D&C Work except as it relates to a dispute regarding whether Non-Profit Entity had performed the D&C Work in conformity with the Contract Documents.

7.11.2 Remedial Plan for Nonconforming Work

7.11.2.1 Promptly after Nonconforming Work is identified but no later than 10 Business Days after the earlier of (i) Notice from City to Non-Profit Entity; and (ii) Non-Profit Entity first obtains Actual Knowledge of such Nonconforming Work, Non-Profit Entity shall submit a remedial plan

to City, for review and approval, describing the error or Defect giving rise to the Nonconforming Work and describing Non-Profit Entity's planned remedial action. Such proposal shall address Infrastructure Facility integrity, aesthetics, operational impact on City including MOT, impact on the public, Building Occupants and any applicable Governmental Entities, maintainability, the effect on the Project Schedule and other relevant issues.

7.11.2.2 If City determines that a proposed plan of correction may infringe upon Infrastructure Facility integrity, operations or maintainability, then City may elect to perform a technical assessment of Non-Profit Entity's proposal. City shall provide Notice to Non-Profit Entity promptly upon determining that an assessment is required, and shall take reasonable efforts to expedite the assessment. Should City elect to perform any such technical assessment, (a) if so requested by City, Non-Profit Entity shall not proceed with the remedial plan until City has conducted its technical assessment and provided prior approval of the remedial plan and (b) Non-Profit Entity shall not be entitled to make any Claim in connection with the technical assessment or reasonable delay in the remedial plan pending City's approval.

7.11.3 City's Remedies

7.11.3.1 City shall have the right and authority to cause Nonconforming Work to be removed, replaced or otherwise remedied and to withhold or deduct the costs from Milestone Payment 2 in accordance with this Agreement, or any other payment due and payable to Non-Profit Entity under the Contract Documents on or before the Substantial Completion Date, upon (a) any failure of Non-Profit Entity to provide a proposed remedial plan as described in Section 7.11.2.1 and obtain City's approval thereof, or (b) any failure of Non-Profit Entity to comply with City's direction under this Agreement relating to any safety issue, including Safety Compliance Orders. Following the Substantial Completion Date, City may require Non-Profit Entity to pay City amounts owing under this Section 7.11.3.1, collect such amounts from the Performance Bond and/or exercise any such rights and remedies set forth in Section 11.6.3.

7.11.3.2 In addition to the right to cause the removal, replacement or remedy of the Nonconforming Work, at the request of Non-Profit Entity or upon its failure to remove, replace or otherwise remedy the Nonconforming Work within the timelines set forth in this Agreement, City may, in its sole discretion, accept such Nonconforming Work and receive reimbursement in an amount equal to the greater of: (a) the amount deemed appropriate by City (acting in good faith) to provide compensation for future impacts, maintenance and/or other costs relating to the Nonconforming Work, or (b) 100% of Non-Profit Entity's cost savings associated with its failure to perform the Work in accordance with the requirements of the Contract Documents.

7.12 Design and Construction of The HCC

Nothing contained in this Agreement shall obligate City to design and construct the HCC or utilize Non-Profit Entity or any NPE-Related Entity in connection with the design and construction of the HCC.

7.13 FF&E During D&C Period

7.13.1 Selection and Procurement of NPE-Furnished FF&E

7.13.1.1 Non-Profit Entity shall:

- (a) update the Equipment List from time to time as appropriate to:
 - (i) reflect decisions made during the design development process;
 - (ii) ensure that like NPE-Furnished FF&E are grouped together;
 - (iii) address any comments provided by the City's Authorized Representative with respect to NPE-Furnished FF&E in accordance with Exhibit 11 (Submittals Review Process); and
 - (iv) ensure that Non-Profit Entity provides NPE-Furnished FF&E as necessary to satisfy the requirements of this Agreement;
- (b) defer final selection of those items of NPE-Furnished FF&E which have high technical obsolescence risk to a time as close as reasonably possible to Substantial Completion, to better ensure that Non-Profit Entity will provide the most technically up to date items of such NPE-Furnished FF&E as of Substantial Completion; and
- (c) procure and provide the NPE-Furnished FF&E, as it may be amended in accordance with this Section 7.13.1 (Selection and Procurement of NPE-Furnished FF&E) or as a result of a Change Order.

7.13.1.2 Unless necessary to meet its obligations under Section 7.13.1(a)(iv) or to carry out a Change Order, Non-Profit Entity shall not decrease the quantity or provide NPE-Furnished FF&E of a lesser quality (which may be determined based on attributes such as specification, brand, and place of manufacture) than an item identified in the Equipment List as of the Effective Date.

7.13.2 Selection of City-Furnished Equipment and Existing FF&E

7.13.2.1 City will select City-Furnished Equipment and identify Existing FF&E to be included in the Infrastructure Facility and update the Equipment List when reasonably required by Non-Profit Entity prior to Substantial Completion.

7.13.2.2 Non-Profit Entity shall defer as long as reasonably possible the time for City to select the City-Furnished Equipment and identify the Existing FF&E.

7.13.2.3 City will procure the City-Furnished Equipment identified in the Equipment List, as it may be amended as a result of a Change Order.

7.13.3 Installation of NPE-Furnished FF&E

Non-Profit Entity shall install or locate (as applicable depending on whether the FF&E is loose or fixed) all items of NPE-Furnished FF&E within the Project Site in accordance with the Release for Construction Documents and so that the Infrastructure Facility meets the requirements of the Principal Project Documents. If the Release for Construction Documents do not identify locations for the placement of loose items of NPE-Furnished FF&E, Non-Profit Entity shall locate such items in accordance with direction from City's Authorized Representative.

7.13.4 Installation of City-Furnished IT/Comms FF&E

7.13.4.1 Non-Profit Entity must provide City or its authorized representative continued and uninterrupted access to the IT/Comms Site for no less than 14 consecutive days prior to the commencement of commissioning and testing of the Infrastructure Facility (“**City Access Period**”) for the City to install the City-Furnished IT/Comms FF&E. The access provided shall be sufficient for City to complete such installation and transition and shall comply with the conditions in Section 1.11.8f of Division 1 of the Technical Requirements.

7.13.4.2 Provided City complies with Project Site safety standards, Non-Profit Entity shall have no entitlement to make any claim against City for any delay to the Work caused by any access to or work undertaken by City under Section 7.13.5.1. Non-Profit Entity shall be entitled to relief in accordance with, and subject to the terms of the Contract Documents in connection with City’s access or work undertaken by City under Section 7.13.5.1.

7.13.4.3 Subject to Section 7.13.4.4, City shall install City-IT/Comms FF&E to the IT/Comms Site during the City Access Period.

7.13.4.4 City will release Non-Profit Entity from all claims and liability in connection with the transfer of and installation of the City-IT/Comms FF&, except to the extent that Non-Profit Entity or a NPE-Related Entity (i) damages such FF&E or (ii) fails to comply with its obligations under this Agreement concerning such FF&E.

7.13.5 Commissioning of FF&E for Substantial Completion

7.13.5.1 Following installation of the NPE-Furnished FF&E and the City-Furnished IT/Comms FF&E, Non-Profit Entity shall finish completion testing and commissioning of the Infrastructure Facility, in accordance with the requirements of this Agreement and Division 6 of the Technical Requirements to achieve the requirements of Substantial Completion.

7.13.5.2 City will release Non-Profit Entity from all claims and liability in connection with the City-Furnished IT/Comms FF&E, to the extent that Non-Profit Entity is unable to successfully commission or undertake tests of such FF&E in accordance with the requirements of this Agreement and Division 06 of the Technical Requirements, except to the extent that the failure of such FF&E is caused by an act or omission of Non-Profit Entity or a NPE-Related Entity.

7.14 Move-In

7.14.1 General

7.14.1.1 As provided in Section 6.10 (Move-In Services) of Division 6 of the Technical Requirements, Non-Profit Entity shall plan, coordinate, manage and execute the physical Move-In of the Infrastructure Facility, including Existing FF&E and City Furnished Equipment (excluding City-Furnished IT/Comms FF&E), following Substantial Completion in accordance with the Move-In Plan and in coordination with the Move-In Subcommittee (“**Move-In**”).

7.14.1.2 City will release Non-Profit Entity from all claims and liability in connection with the transfer of and installation of the City Furnished Equipment and Existing FF&E, except to the extent that Non-Profit Entity or a NPE-Related Entity (i) damages such FF&E or (ii) fails to comply with its obligations under this Agreement concerning such FF&E.

7.14.2 Move-In Subcommittee

7.14.2.1 The move-in subcommittee (the “**Move-In Subcommittee**”) shall consist of three representatives of each Party (and PPC may serve on behalf of Non-Profit Entity). Members of the Move-In Subcommittee may invite, on prior notice to all members, such other advisors and consultants as they require from time to time to attend meetings and provide briefings to the Move-In Subcommittee.

7.14.2.2 The Move-In Subcommittee shall assist the Parties by promoting cooperative and effective communication with respect to matters related to the Move-In, including issues related to the move-in into the Infrastructure Facility, the City Access Periods and the transfer and installation of all Existing FF&E.

7.14.2.3 The primary role of the Move-In Subcommittee shall be to oversee and coordinate the Move-In in a timely and efficient manner and in accordance with the Project Schedule.

7.14.2.4 The Move-In Subcommittee shall be responsible for receiving and reviewing all matters related to the Move-In.

7.14.2.5 The members of the Move-In Subcommittee may adopt such procedures and practices for the conduct of the activities of the Move-In Subcommittee as they consider appropriate from time to time.

7.14.2.6 Unless otherwise agreed, the Move-In Subcommittee shall operate only until the Final Acceptance Date.

7.14.3 Move-In Resource

7.14.3.1 Non-Profit Entity shall, at least 24 months prior to Substantial Completion, prepare and submit to City a list of prospective candidates, including from existing resources, (each a “**Move-In Resource Candidate**”) for appointment as Move-In Resource, each of which must have experience planning and executing staff and logistical transitions in projects of similar size, scope and complexity in the United States.

7.14.3.2 Subject to Section 24.17(c), Non-Profit Entity shall conduct a competitive bid process for the selection of the Move-In Resource from among the Move-In Resource Candidates, which bid process shall be completed by no later than 18 months prior to the Scheduled Substantial Completion Date. Non-Profit Entity shall consult with City in the design and implementation of such competitive bid process, including the development of the evaluation criteria, and shall accommodate any reasonable request of City with respect thereto. City may participate in the evaluation and selection of the successful Move-In Resource Candidate for appointment as Move-In Resource. City may, but is not required to, retain the Move-In Resource at City’s cost to plan, coordinate, manage and execute the transition from the Existing Facilities to the Infrastructure Facility.

7.15 Coordination with HCC Project Company and HCC

City covenants and agrees in favor of Principal Project Company, and Non-Profit Entity acknowledges and agrees, that an HCC may be constructed prior to or following Substantial Completion; provided, however, that notwithstanding anything to the contrary in this Agreement,

no HCC shall be constructed by the City prior to Substantial Completion unless the D&C Contractor performs such HCC construction. Non-Profit Entity shall not interfere with the work of or cause any delay to any HCC Project Company that may be carrying out work within the Project Site or in the land adjoining or near the Project Site, including with respect to the HCC, and will allow them reasonable access to the Project Site, provided that Non-Profit Entity shall not be in breach of this Section 7.15 (Coordination with HCC Project Company and HCC) for any temporary interruption to the work of the HCC Project Company that (a) has been agreed to in advance in accordance with procedures agreed to by Non-Profit Entity, such contractor for the HCC and any relevant Third Party; or (b) is reasonably necessary in accordance with Law and Good Industry Practice to respond to emergencies creating an immediate and serious threat to public health, safety, security or the Environment.

7.16 Failure to Meet LEED Requirements

7.16.1 In the event that LEED BD+C Gold Rating, including the mandatory 12x EAc2 Optimize Energy Performance credits, is not obtained within 12 months after the Substantial Completion Date, other than as a sole and direct result of any affirmative act or omission of City or unless unreasonably withheld by USGBC or an equivalent body, Non-Profit Entity shall pay to City liquidated damages in the amount of \$100,000. Non-Profit Entity shall submit all necessary documentation to achieve LEED BD+C Gold within 6 months after the Substantial Completion Date.

7.16.2 The Parties agree that such liquidated damages are not a penalty but represent a genuine and reasonable pre-estimate of the damages that the City will suffer as a result of the happening of the specified event and would be difficult or impossible to quantify upon the happening of the specified event. Such payment shall constitute full and final settlement of all damages that may be claimed by the City as a result of a failure by Project Company to achieve LEED BD+C Gold Rating and the minimum credit requirements and, for greater certainty, a failure by Project Co to achieve LEED BD+C Gold Rating shall not result in a NPE Default Event provided that such liquidated damages are promptly paid. The Parties agree that such liquidated damages shall be payable whether or not City incurs or mitigates its damages, and that City shall not have any obligation to mitigate any such damages.

ARTICLE 8. INTENTIONALLY OMITTED

ARTICLE 9. CONTRACTING AND LABOR PRACTICES

9.1 Disclosure of Contracts and Contractors

9.1.1 The provisions of this Section 9.1 (Disclosure of Contracts and Contractors) apply with respect to (a) Prime Contracts and lower tier Contracts entered into by Prime Contractors, excluding personal services contracts and contracts with Suppliers other than Key Contractors, and (b) Contracts with Affiliates, regardless of the nature or tier of the Contract.

9.1.2 With each Monthly Report required during the D&C Period, Non-Profit Entity shall provide City with a list of all Contracts, including, for each Contract, (a) the name of the Contractor (indicating the Contractor is an Affiliate, if applicable), (b) a summary of the scope of work, and (c) the dollar value. If the Contract includes Construction Work or Renewal Work, include assurance that the prevailing wage for labor, as specified in the Contract Documents, is paid for all labor performed under such Contract.

9.1.3 Non-Profit Entity shall allow City full access to all Contracts and records regarding Contracts and shall deliver to City, (a) within 10 days after execution, copies of all Key Contracts, guarantees thereof and amendments and supplements to Key Contracts and guarantees thereof, and (b) within 10 days after receipt of a request from City, copies of all other Contracts (including amendments and supplements) as may be requested.

9.2 Responsibility for Work, Contractors and Employees

9.2.1 Non-Profit Entity may enter into one or more Contracts with Contractors to perform portions of the Work.

9.2.2 The retention of Contractors by Non-Profit Entity does not relieve Non-Profit Entity of its responsibilities under this Agreement or for the quality of the Work or materials or services provided by it.

9.2.3 Each Contract shall include (a) terms sufficient to ensure both the acknowledgement of and compliance by the Contractor with the applicable requirements of the Contract Documents and to ensure that City has the ability to exercise its rights specified in the Contract Documents, (b) those terms that are specifically required by the Contract Documents to be included in such Contract, and (c) all applicable Laws.

9.2.4 Non-Profit Entity shall require each Contractor to familiarize itself with the requirements of any and all applicable Laws and the conditions of any required Regulatory Approvals.

9.2.5 Nothing in this Agreement will create any contractual relationship between City and any Contractor. No Contract entered into by or under Non-Profit Entity shall impose any obligation or liability upon any Indemnitee to any Contractor or any of its employees. Non-Profit Entity shall include, or cause to be included, a provision in all Contracts acknowledging the same.

9.2.6 Non-Profit Entity shall supervise and be fully responsible for any NPE Fault while performing Work under this Agreement or while on the Project Site, as though Non-Profit Entity directly employed all such individuals.

9.2.7 If City has reasonable cause to disapprove of an employee of any NPE-Related Entity, Non-Profit Entity shall remove such employee within 10 Business Days after receipt of written Notice from City of such disapproval.

9.3 Key Contracts; Contractor Qualifications

9.3.1 Key Contract Approvals, Amendments and Termination; Use of and Change in Key Contractors

9.3.1.1 Non-Profit Entity shall provide City, for City's review, comment and approval, draft copies of proposed amendments to the Project Implementation Agreement. Such drafts shall be provided at least 30 days before execution of an amendment to the Project Implementation Agreement.

9.3.1.2 Non-Profit Entity shall provide City, for City's review and comment, draft copies of (a) any Key Contracts not executed before the Effective Date and (b) proposed material amendments to Key Contracts (regardless of whether the Key Contract to be amended was executed before the Effective Date), other than the Project Implementation Agreement, which is addressed in Section 9.3.1.1. Such drafts shall be provided at least 30 days before execution of such Key Contract or an amendment to a Key Contract, as applicable. Any proposed amendment to required terms described in Section 9.3.2 (Key Contract Provisions) shall be considered a material amendment and shall require the prior approval of City.

9.3.1.3 Except as otherwise approved by City, Non-Profit Entity shall retain, employ and utilize the firms and organizations identified in the Implementation Proposal to fill the roles designated therein.

9.3.1.4 Non-Profit Entity shall not terminate or permit termination of the Project Implementation Agreement or permit any substitution, replacement or assignment of Principal Project Company, except with City's prior approval, in its sole discretion.

9.3.1.5 Non-Profit Entity shall not terminate or permit termination of any Key Contract (other than the Project Implementation Agreement, which is addressed in Section 9.3.1.4) or permit any substitution, replacement or assignment of any Key Contractor (other than Principal Project Company, which is addressed in Section 9.3.1.4), except with City's prior approval; provided, however, that City's prior approval is not required in the event of (a) any termination of this Agreement where City elects not to assume Non-Profit Entity's future obligations under such Key Contract, (b) any suspension, debarment, disqualification or removal (distinguished from ineligibility due to lack of financial qualifications) of the Key Contractor, or (c) any agreement for voluntary exclusion of the Key Contractor, from bidding, proposing or contracting with any federal, State or local department or agency. City agrees to act reasonably with respect to approval of a replacement in the case of material uncured default by the Key Contractor under the Key Contract, other than with respect to the Project Implementation Agreement and Principal Project Company, which is addressed in Section 9.3.1.4. In the event of a debarment or other event that would prevent the Non-Profit Entity from completing its obligations under this Agreement, Principal Project Company shall have the right to assume the Non-Profit Entity's obligations under this Agreement.

9.3.2 Key Contract Provisions

9.3.2.1 Each Key Contract shall comply with the requirements set forth in Exhibit 14 (Key Contract Provisions).

9.4 Prompt Payment to Contractors

Non-Profit Entity shall comply, and shall cause each Contractor to comply, with the provisions of Business and Professions Code section 7108.5, California Civil Code sections 8122-8138, and any other applicable Law relating to prompt payment of contractors and/or subcontractors and waivers and releases by them of stop payment notices and payment bond rights.

9.5 Key Personnel

Non-Profit Entity shall:

- (a) retain, employ and utilize the individuals specifically listed in the Implementation Proposal, and retain, employ and utilize individuals qualified for the positions described in Section 1.1.4 of Division 1 of the Technical Requirements to fill Key Personnel positions for the relevant period identified in the Technical Requirements; Non-Profit Entity acknowledges that if City reasonably determines that an individual is not qualified for a Key Personnel position, Non-Profit Entity shall at City's request replace that individual with one that meets the required qualifications;
- (b) not change or substitute any such individuals except due to retirement, death, disability, incapacity, or voluntary or involuntary termination of employment, or as otherwise approved by City under Section 9.5(c);
- (c) promptly provide Notice to City of any proposed replacement for any Key Personnel position. City shall have the right to review the qualifications and character of each individual to be appointed to a Key Personnel position and shall act reasonably in approving or disapproving use of such individual in such position before the commencement of any Work by such individual;
- (d) cause each Key Person to dedicate the full amount of time necessary for the proper prosecution and performance of the Work, as more specifically described in Section 1.1.4 of Division 1 of the Technical Requirements;
- (e) commit each Key Person to the Project in accordance with Section 1.1.4 of Division 1 of the Technical Requirements;
- (f) provide City with office and cell phone numbers and email addresses for each Key Person. City may contact Key Personnel 24 hours per day, seven days per week, with response times in compliance with the Technical Requirements and Exhibit 4 (Payment Mechanism), or if none are specified, within commercially reasonable expectations for response times;
- (g) ensure that the Project Manager identified in the Implementation Proposal or otherwise approved by City (i) will have full responsibility for the prosecution of

the D&C Work, (ii) will act as agent and be a single point of contact in all matters relating to the D&C Work on behalf of Non-Profit Entity at least until Final Acceptance, (iii) will be present (or ensure that his or her approved designee is present) at the construction site at all times that Construction Work is performed, and (iv) will be available to respond promptly to City; and

- (h) ensure that the Quality Program Manager identified in the Implementation Proposal or otherwise approved by City (i) will have full responsibility for quality assurance and quality control with respect to D&C Work until Final Acceptance, (ii) is present (or his or her approved designee is present) at the construction site at all times that Construction Work is performed, and (iii) will be available to respond promptly to City,

provided that, the Parties acknowledge and agree that all Key Personnel obligations shall be passed down to Principal Project Company pursuant to the Project Implementation Agreement.

9.5.1 Key Personnel Deductions

9.5.1.1 If an individual filling a Key Personnel role is not available for, or actively involved in, the performance of the Work per their position requirement as required in Section 1.1.4 of Division 1 of the Technical Requirements, as determined by City in its good faith discretion, then:

- (a) Non-Profit Entity acknowledges and agrees that City and the Project will suffer significant and substantial damages and that it is impracticable and extremely difficult to ascertain and determine the actual damages which would accrue to City in such event;
- (b) Subject to Section 9.5.2 (Limitations on Deductions for Unavailability of Key Personnel), Non-Profit Entity shall pay City a Key Personnel deduction as follows, for each position held by such individual, as deemed compensation to City for such damages:

Category	KEY PERSONNEL DEDUCTION
Project Manager	\$150,000
Deputy Project Manager	\$75,000
Design Manager	\$75,000
Construction Manager	\$75,000
Quality Program Manager	\$75,000
Project Safety Representative	\$75,000
Construction Superintendent	\$75,000
Third Party and Utility Coordinator Manager	\$75,000

and

- (c) Non-Profit Entity agrees to pay a further Key Personnel deduction for all Key Personnel in the amount of 50% of the applicable amounts listed under

Section 9.5.1.1(b) for each 6 calendar month period where any Key Personnel position is vacant or not being fulfilled in accordance with this Agreement as determined by City.

9.5.1.2 Non-Profit Entity agrees that the Key Personnel deductions payable in accordance with Section 9.5.1.1 are liquidated damages, not a penalty and are reasonable under the circumstances existing as of the Effective Date. The Parties have agreed to liquidated damages under this Section 9.5.1 (Key Personnel Deductions) in order to fix and limit Non-Profit Entity's costs and to avoid later Contract Disputes over what amounts of damages are properly chargeable to Non-Profit Entity.

9.5.1.3 Without modifying City's rights to make deductions from Milestone Payment 2 in accordance with this Agreement, on or before the Substantial Completion Date, City may deduct amounts owing from Non-Profit Entity to City under Section 9.5.1.2 from amounts owing from City to Non-Profit Entity under this Agreement (including Milestone Payment 2), or to collect such liquidated damages from the Performance Bond. Following the Substantial Completion Date, City may require Non-Profit Entity to pay City amounts owing under Section 9.5.1.2, collect such liquidated damages from the Performance Bond and/or exercise any such rights and remedies set forth in Section 11.6.3.

9.5.2 Limitations on Deductions for Unavailability of Key Personnel

9.5.2.1 Non-Profit Entity is not liable for liquidated damages under Section 9.5.1.1 if:

- (a) Non-Profit Entity removes or replaces such personnel at the direction of City; or
- (b) An individual filling a Key Personnel position is unavailable because of the application of applicable Law, or due to death, disability, family leave, retirement, injury or no longer being employed by the applicable NPE-Related Entity (provided that moving to an affiliated company or a Subcontractor is not considered grounds for avoiding liquidated damages),

provided Non-Profit Entity promptly proposes to City a replacement for such personnel for review and approval within 30 days of unavailability, in the case of Sections 9.5.2.1(a) or 9.5.2.1(b).

9.5.2.2 Non-Profit Entity may replace the Non-Profit Entity's Project Manager not more frequently than every three years following Final Acceptance without incurring liquidated damages under Section 9.5.1 (Key Personnel Deductions), but only if Non-Profit Entity replaces the outgoing Non-Profit Entity's Project Manager with a City-approved replacement before the outgoing individual vacates the position.

9.5.2.3 Upon approval of any Key Personnel replacement, the new individual shall be considered a Key Personnel for all purposes under this Agreement, including this Section 9.5.2 (Limitations on Deductions for Unavailability of Key Personnel).

9.5.3 Skilled Personnel; Removal at City Direction

All individuals performing the Work shall have the skill and experience and any licenses or certifications required to perform the Work assigned to them. If City determines, in its good faith discretion, that any individual employed by Non-Profit Entity or by any Subcontractor is not performing the Work in a proper, safe and skillful manner, then at the written request of City, Non-Profit Entity or such Subcontractor shall promptly remove such individual and such individual shall not be re-employed on the Project without the prior written approval of City, in its good faith discretion. If Non-Profit Entity or the Subcontractor fails to remove such individual or individuals or fails to furnish skilled and experienced personnel for the proper performance of the Work, then City may, in its good faith discretion, suspend the affected portion of the Work for cause by delivery of Notice of such suspension to Non-Profit Entity. Such suspension shall in no way relieve Non-Profit Entity of any obligation contained in the Contract Documents or entitle Non-Profit Entity to a time extension, compensation or other Change Order. Once compliance is achieved, as determined by City, City will deliver Notice to Non-Profit Entity and Non-Profit Entity shall be entitled to and shall promptly resume the Work. If City’s determination is later found to not have been exercised in good faith, such suspension shall be considered a suspension for convenience.

9.6 SBE Participation

9.6.1 This Project is subject to the “Small Business Enterprise/Disadvantaged Business Enterprise (“SBE/DBE”) Plan” dated December 2024, (the “SBE/DBE Plan”) as updated from time to time, which has SBE participation goals as set forth in Section 9.6.3. The SBE/DBE Plan is binding on Non-Profit Entity and the Project.

9.6.2 Non-Profit Entity shall comply with the terms and conditions set forth in the SBE/DBE Plan, and shall be responsible for ensuring that D&C Contractor complies with requirements of the SBE/DBE Plan and with D&C Contractor’s Open-Ended Performance Plan (“OEPP”) submitted in compliance therewith. Non-Profit Entity shall also comply with SFMTA’s SBE/DBE Program and federal regulations (49 CFR 26) issued March 4, 1999, as amended from time to time.

9.6.3 Non-Profit Entity shall either achieve or demonstrate it has exercised good faith efforts to achieve, and shall be responsible for ensuring that D&C Contractor either achieves or demonstrates it has exercised good faith efforts to achieve, the following SBE participation goals:

Infrastructure Facility Project Phase	SBE Goal	DBE Goal
Design and Professional Services Work	25%	0%
Construction Work	20%	0%

9.6.4 Intentionally Omitted.

9.6.5 Non-Profit Entity shall comply with, and shall be responsible for ensuring D&C Contractor complies with, the following requirements for SBE set-asides set forth in the SBE/DBE Plan:

Infrastructure Facility Project Phase	SBE Set-Aside																						
Design and Professional Services Work	At least one SBE designer, the participation of which shall count towards the Design and Professional Services Work SBE participation goal set forth in <u>Section 9.6.3</u> .																						
Construction Work	<table border="1" data-bbox="719 562 1308 1144"> <thead> <tr> <th data-bbox="719 562 1040 699">CATEGORIES</th> <th data-bbox="1040 562 1308 699">SET-ASIDE PERCENTAGE (%) <i>At a minimum</i></th> </tr> </thead> <tbody> <tr> <td data-bbox="719 699 1040 768">Structural Concrete Contractor</td> <td data-bbox="1040 699 1308 768">10%</td> </tr> <tr> <td data-bbox="719 768 1040 837">Site Concrete within Sidewalks</td> <td data-bbox="1040 768 1308 837">10%</td> </tr> <tr> <td data-bbox="719 837 1040 871">Earthwork & Paving</td> <td data-bbox="1040 837 1308 871">100%</td> </tr> <tr> <td data-bbox="719 871 1040 905">Drywall</td> <td data-bbox="1040 871 1308 905">30%</td> </tr> <tr> <td data-bbox="719 905 1040 938">Electrical</td> <td data-bbox="1040 905 1308 938">10%</td> </tr> <tr> <td data-bbox="719 938 1040 972">Insulation/Acoustical</td> <td data-bbox="1040 938 1308 972">100%</td> </tr> <tr> <td data-bbox="719 972 1040 1005">Landscape</td> <td data-bbox="1040 972 1308 1005">100%</td> </tr> <tr> <td data-bbox="719 1005 1040 1039">Traffic Control</td> <td data-bbox="1040 1005 1308 1039">100%</td> </tr> <tr> <td data-bbox="719 1039 1040 1073">Trucking and Hauling</td> <td data-bbox="1040 1039 1308 1073">75%</td> </tr> <tr> <td data-bbox="719 1073 1040 1144">Construction Clean-up</td> <td data-bbox="1040 1073 1308 1144">100%</td> </tr> </tbody> </table> <p data-bbox="1328 1081 1414 1150">The above</p> <p data-bbox="719 1157 1403 1268">SBE set-aside participation shall count towards the Construction Work SBE participation goal set forth in <u>Section 9.6.3</u>.</p>	CATEGORIES	SET-ASIDE PERCENTAGE (%) <i>At a minimum</i>	Structural Concrete Contractor	10%	Site Concrete within Sidewalks	10%	Earthwork & Paving	100%	Drywall	30%	Electrical	10%	Insulation/Acoustical	100%	Landscape	100%	Traffic Control	100%	Trucking and Hauling	75%	Construction Clean-up	100%
CATEGORIES	SET-ASIDE PERCENTAGE (%) <i>At a minimum</i>																						
Structural Concrete Contractor	10%																						
Site Concrete within Sidewalks	10%																						
Earthwork & Paving	100%																						
Drywall	30%																						
Electrical	10%																						
Insulation/Acoustical	100%																						
Landscape	100%																						
Traffic Control	100%																						
Trucking and Hauling	75%																						
Construction Clean-up	100%																						

9.6.6 Non-Profit Entity shall comply with, and shall be responsible for ensuring D&C Contractor complies with, the 75% SBE trucking set-aside applicable to all eligible trucking work, in accordance with the SBE/DBE Plan.

9.6.7 To obtain accurate records of Non-Profit Entity’s performance towards meeting its SBE participation goals, Non-Profit Entity shall develop and utilize, and cause D&C Contractor to utilize, a reporting system to track SBE participation, in accordance with the SBE/DBE Plan. Such reporting system shall be submitted for City approval within 60 days of the Effective Date.

9.6.8 Achievement of the SBE participation goal for each type of Work identified in Section 9.6.3 will be measured as a percentage of Non-Profit Entity’s costs for each such type of Work, where the total amount paid to SBE firms for each such type of Work will be measured against Non-Profit Entity’s costs for each such type of Work, without reduction for D&C Period Deductions or other offsets.

9.6.9 If Non-Profit Entity fails to achieve any SBE participation goals, then Non-Profit Entity must demonstrate it met all good faith efforts requirements for achieving the goals, including demonstrating that the Non-Profit Entity caused the D&C Contractor to implement and demonstrate good faith efforts, in accordance with the SBE/DBE Plan. In addition to good faith efforts, Non-Profit Entity is encouraged to perform, and shall cause D&C Contractor to perform, best faith outreach efforts to maximize SBE participation in the Work.

9.6.10 Non-Profit Entity shall not, nor shall it permit D&C Contractor to, terminate any listed SBE, including approved substitutions, or any portion of an SBE's Work, without prior written consent of City and in compliance with the SBE/DBE Plan. Unless City's prior written consent is provided for termination or substitution of an SBE, Non-Profit Entity shall not be entitled to any payment for work or materials identified for an SBE unless it is performed or supplied by such SBE.

9.6.11 City will provide written notice to the Non-Profit Entity of any complaint, failure to report, or other action or inaction on the part of the Non-Profit Entity or D&C Contractor that causes City to question SBE participation under this Agreement. Non-Profit Entity shall, or shall cause D&C Contractor, to demonstrate to the satisfaction of City that it has exercised good faith efforts to satisfy its obligations under this Section 9.6 (SBE Participation), the SBE/DBE Plan, the OEPP, SFMTA's SBE/DBE Program and federal regulations (49 CFR 26).

9.6.12 Failure by Non-Profit Entity to carry out, or failure of the Non-Profit Entity to cause D&C Contractor to carry out, the SBE/DBE requirements set forth in this Section 9.6 (SBE Participation) and/or the SFMTA's SBE/DBE Program is a material breach of this Agreement, which may result in:

- (a) the termination of this Agreement;
- (b) the withholding of funds pursuant to Section 11.6.1, pending investigation of a complaint of violation of the SBE/DBE Plan;
- (c) D&C Noncompliance Points and D&C Period Deductions as set forth in Exhibit 4A (Milestone Payment Mechanism); and/or
- (d) other administrative remedies, including monetary liability, as set forth in the SBE/DBE Plan or in this Agreement.

9.6.13 OEPP

9.6.13.1 In accordance with the SBE/DBE Plan, D&C Contractor's OEPP shall be binding upon the D&C Contractor and Non-Profit Entity shall use the OEPP as a measure of compliance with the requirements of this Section 9.6 (SBE Participation) and the SBE/DBE Plan.

9.6.13.2 Non-Profit Entity shall cause D&C Contractor to update its OEPP at least quarterly, on January 15, April 15, July 15, and October 15 of each year until the Final Acceptance Date. OEPP updates shall be in accordance with the SBE/DBE Plan and shall be subject to City review and approval.

9.6.14 Non-Profit Entity Liaison and D&C Contractor SBE/DBE Liaison

Non-Profit Entity shall retain a Non-Profit Entity Liaison, and shall cause D&C Contractor to retain a D&C Contractor SBE/DBE Liaison, in accordance with the SBE/DBE Plan.

9.6.15 Small Business Assistance

Non-Profit Entity shall develop, or shall cause Principal Project Company to develop and cooperate in the development of, a capacity building initiative that is multi-pronged and designed to support SBE growth and development, in accordance with the SBE/DBE Plan and including education and training programs and a mentor-protégé program.

9.7 Contracts with Affiliates

9.7.1 Excluding Work for which the full, fixed price has been included in the Implementation Proposal Final Price and been financed as of Financial Close, Affiliates of Non-Profit Entity or any NPE-Related Entity may perform Work only if:

- (a) Non-Profit Entity or a Contractor executes a written Contract with the Affiliate which:
 - (i) complies with all applicable provisions of the Contract Documents, including this Article 9 (Contracting and Labor Practices), is consistent with Good Industry Practice, and is in form and substance substantially similar to Contracts then being used by Non-Profit Entity or Affiliates for similar Work or services with unaffiliated contractors;
 - (ii) sets forth the scope of Work and all the pricing, terms respecting the scope of Work;
 - (iii) contains pricing, scheduling and other terms no less favorable to Non-Profit Entity than those that Non-Profit Entity could reasonably obtain in an arms'-length, competitive transaction with an unaffiliated Contractor. Non-Profit Entity shall bear the burden of proving that the same are no less favorable to Non-Profit Entity; and
- (b) The Work to be performed by the Affiliate is not Work that any Contract Document, the Project Management Plan indicates is to be performed by an independent or unaffiliated party.

9.7.2 Before Non-Profit Entity or a Contractor enters into a written Contract (including supplements and amendments) with an Affiliate, Non-Profit Entity shall submit a true and complete copy of the proposed Contract to City for comment. City shall have 20 days after receipt to deliver its comments to Non-Profit Entity. If the Contract with the Affiliate is a Key Contract, it shall be subject to City's approval as provided in Section 9.3.1 (Key Contract Approvals, Amendments and Termination; Use of and Change in Key Contractors).

9.7.3 Non-Profit Entity shall make no payments to Affiliates for work or services in advance of provision of such work or services, except for reasonable mobilization payments or other payments consistent with arm's length, competitive transactions of similar scope. Advance payments in violation of this provision shall be excluded from the calculation of Termination Compensation.

9.8 Labor Standards

9.8.1 In performing the Work, Non-Profit Entity shall comply, and require all Contractors to comply, with all applicable federal and State labor, occupational safety and health Laws and orders, including payment of Prevailing Rate of Wages.

9.8.2 By the 15th day of each calendar month until the Final Acceptance Date has occurred, Non-Profit Entity shall submit to City certified payroll records for all employees of Non-Profit Entity and Contractors at all tiers for the preceding calendar month.

9.8.3 In the event a prevailing wage law violation is discovered, City may withhold pursuant to Section 11.6.1, from payments owing to the Non-Profit Entity (including Milestone Payment 2) Non-Profit Entity's underpaid back wages plus penalties as required under Section 6.22(e)(8) (Non-Compliance with Wage Provisions – Penalties) of the San Francisco Administrative Code until the violation is resolved.

9.8.4 All individuals performing the Work shall be qualified, experienced, competent and skilled in the performance of the portion of the Work assigned and related obligations of Non-Profit Entity in accordance with the Contract Documents and any applicable minimum levels in the Technical Requirements.

9.8.5 If any individual employed by Non-Profit Entity or any Contractor lacks required qualifications, skill, competence, experience, licensing, certification, registration, permit, approval, bond or insurance or is not performing the Work in a proper, safe and skillful manner, then Non-Profit Entity shall, or shall cause such Contractor to, remove such individual, and such individual shall not be re-employed on the Work.

9.8.6 If, after Notice and reasonable opportunity to cure, Non-Profit Entity fails to take action as required by Section 9.8.5, or if Non-Profit Entity fails to ensure that qualified, skilled, experienced, competent, licensed, certified, registered, permitted and approved personnel are furnished for the proper performance of the Work, then City may suspend the affected portion of the Work by delivering to Non-Profit Entity Notice of such suspension. Such suspension shall in no way relieve Non-Profit Entity of any obligation contained in the Contract Documents.

9.9 Local Hiring Requirements for Construction Work and Renewal Work

Non-Profit Entity shall comply with local hiring requirements for Construction Work and Renewal Work, as mandated by the San Francisco Local Hiring Policy for Construction set forth in Chapter 82 of the Administrative Code and related implementing regulations.

9.10 First Source Hiring Program

Non-Profit Entity shall comply with all applicable provisions of the First Source Hiring Program as set forth in Chapter 83 of the San Francisco Administrative Code, including all enforcement and penalty provisions.

9.11 SFMTA Employment Training Program

9.11.1 As part of the SFMTA Employment Training Program, Non-Profit Entity shall cause at least 4 professional services trainees to be hired during the period of the D&C Work for

professional services performed for the Infrastructure Facility. If a person hired through the First Source Hiring Program also meets the trainee requirements described below, that person may be counted toward these trainee hiring requirements. Trainees may be obtained through the City's One Stop Employment Center, which works with various employment and job training agencies/organizations or other employment referral source.

9.11.2 Non-Profit Entity shall ensure that:

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

Non-Profit Entity acknowledges its obligation to hire or cause to be hired trainees pursuant to the Trainee Plan and shall comply with the Trainee Plan during the D&C Period.

9.12 D&C Period Deductions and D&C Noncompliance Points Relating to Local Hire and SFMTA Training Program Requirements Development

If Non-Profit Entity fails to meet certain requirements set forth in this Article 9 (Contracting and Labor Practices), City may, without limiting City's other rights and remedies under this Agreement, assess D&C Period Deductions and D&C Noncompliance Points as provided in Exhibit 4A (Milestone Payment Mechanism).

9.13 Ethical Standards

9.13.1 Non-Profit Entity or its representatives shall not make, nor cause to be made, any cash payments, commissions, employment, gifts, entertainment, free travel, loans, free work, substantially discounted work, or any other considerations to (a) City representatives, employees, or their relatives, or (b) representatives of subcontractors, or material suppliers or any other individuals, organizations, or businesses receiving funds in connection with this Project.

9.13.2 Non-Profit Entity employees (or their relatives), agents, or subcontractors shall not receive any cash payments, commissions, employment, gifts, entertainment, free travel, loans, free work, or substantially discounted work or any other considerations from any other contractors or from any City employee, agent, representative.

9.13.3 Non-Profit Entity agrees to provide Notice to a designated City representative within 48 hours of any instance where Non-Profit Entity becomes aware of a failure to comply with the provisions of this Section 9.13 (Ethical Standards).

ARTICLE 10. INSURANCE; PAYMENT AND PERFORMANCE SECURITY; INDEMNITY

10.1 Insurance

10.1.1 Insurance Policies and Coverage

Non-Profit Entity shall procure and maintain, or cause to be procured or maintained, the Insurance Policies identified in this Section 10.1 (Insurance) and in Exhibit 7 (Insurance Requirements) strictly in accordance with the minimum coverage requirements and terms of coverage as set forth in Exhibit 7 (Insurance Requirements) and in this Section 10.1 (Insurance). Non-Profit Entity shall timely pay, or cause to be paid, the premiums for all Insurance Policies and insurance coverages required by this Agreement. There shall be no recourse against City or any of the other City Additional Insureds for payment of premiums or other amounts with respect to the Insurance Policies, except to the extent (a) included within the Milestone Payments and/or the Availability Payments or (b) an increase in premiums is a compensable Extra Work Cost as part of a Compensable Delay Event.

10.1.2 General Insurance Requirements

10.1.2.1 Insurers

All insurance required hereunder shall be procured from insurers that at the time coverage commences are authorized to do business in the State and have a rating of not less than A-:VIII according to A.M. Best's Financial Strength Rating and Financial Size Category, except as otherwise provided in Exhibit 7 (Insurance Requirements) or approved in writing by City in its reasonable discretion.

10.1.2.2 Deductibles; Self-Insured Retentions; Claims Exceeding Policy Limits

Except to the extent expressly provided otherwise in the Contract Documents, Non-Profit Entity shall be responsible for paying all insurance deductibles and self-insured retentions, and City shall have no liability for deductibles, self-insured retentions or claim amounts exceeding the required policy limits. If City is the sole cause of an insured Loss (including Losses caused by the SFMTA's operations) City shall pay the applicable insurance deductibles and self-insured retentions, notwithstanding any subrogation waivers. In the event that any required insurance coverage involves a self-insured retention: (a) the entity responsible for the self-insured retention shall have an authorized representative issue a letter to City, at the same time the Insurance Policy is to be procured, stating that it shall protect and defend City to the same extent as if an insurer provided coverage for City; and (b) Non-Profit Entity shall ensure that the relevant Insurance Policy expressly permits (but does not obligate) City, or a designee of City, to pay the self-insured retention to satisfy any policy condition requiring payment of the self-insured retention for coverage to apply. If the entity responsible for the self-insured retention does not pay the self-insured retention amount when due, then City may, but is not obligated to, pay the self-insured retention amount on behalf of such entity, and Non-Profit Entity shall indemnify City for such amount and any other Losses incurred by City in connection with the entity's failure to pay the self-insured retention amount when due.

10.1.2.3 Primary Coverage

Without any limitation, each policy shall provide that the coverage afforded under the policy is primary and noncontributory with respect to any other insurance available to all named and City Additional Insureds.

10.1.2.4 Verification of Coverage

- (a) When Non-Profit Entity is required by the Contract Documents to initially obtain or cause to be obtained an Insurance Policy, Non-Profit Entity shall deliver to City a certificate of insurance before policy inception followed by a binder of insurance in a form reasonably acceptable to City no later than 45 days following policy inception. Non-Profit Entity shall make submit all certificates of insurance including relevant endorsements attached to the certificates of insurance prior to each policy effective date and binders of insurance as soon as they are issued by the insurers but not later than 45 days following policy inception. Each required binder must state the identity of all insurers, list all named and additional insureds, state the type of coverage and limits including any applicable sublimits, list all deductibles and self-insured retentions, provide the policy effective and expiration date, and list all applicable endorsements once available.
- (b) In addition, as soon as they become available, Non-Profit Entity shall deliver to City (i) a true and complete copy of each such Insurance Policy or modification, or renewal or replacement Insurance Policy obtained by Non-Profit Entity or a Prime Contractor and all endorsements thereto and (ii) satisfactory evidence of payment of the premium therefor.
- (c) If Non-Profit Entity has not provided City with the certificates of insurance, including applicable endorsements, prior to policy inception and evidence of premium payment within 30 days after each payment is due, City may, upon written Notice to Non-Profit Entity, in addition to any other available remedy, without obligation and without further inquiry as to whether such insurance is actually in force, elect to obtain such an Insurance Policy; and Non-Profit Entity shall reimburse City for any Recoverable Costs thereof upon demand. In addition, City shall have the right, without obligation or liability, to suspend all or any portion of Work, during any time that such proofs of coverage, in compliance with this Section 10.1 (Insurance), have not been provided.

10.1.2.5 Waivers of Subrogation

City and Non-Profit Entity waive all rights against each other, against each of their respective agents, employees and Project consultants, and against Contractors and their respective members, directors, officers, employees, subcontractors and agents for any claims to the extent covered and paid by insurance obtained pursuant to this Section 10.1 (Insurance), with the exception of professional liability insurance and except such rights as they may have to the proceeds of such insurance. Non-Profit Entity shall require all Contractors to provide similar waivers in writing, each in favor of all other parties specified above. Each policy for which Non-Profit Entity or any Contractor is required to provide coverage for the City Additional Insureds shall include a waiver of any right of subrogation against the City Additional Insureds.

10.1.2.6 No Recourse

Except as may be inclusive within the Availability Payments or as expressly provided otherwise in this Agreement, there shall be no recourse against City for payment of premiums or other amounts with respect to the insurance Non-Profit Entity is required to provide hereunder.

10.1.2.7 Support of Indemnifications

The insurance coverage Non-Profit Entity is required to provide hereunder shall support but is not intended to limit Non-Profit Entity's indemnification obligations under the Contract Documents.

10.1.2.8 Additional Terms and Conditions

- (a) Each Insurance Policy shall state or be endorsed to state that coverage cannot be canceled except after 30 days' prior Notice (or ten days in the case of cancellation for non-payment of premium) has been given to City. No policy language or endorsement shall include any limitation of liability of the insurer for failure to provide such Notice.
- (b) No Insurance Policy shall provide coverage on a "claims made" basis, with the exception of any professional liability Insurance Policies, unless specifically approved in writing by City.

10.1.2.9 Requirements Not Limiting

The Parties acknowledge and agree that:

- (a) requirements for specific coverage features or limits contained in this Section 10.1 (Insurance) and in Exhibit 7 (Insurance Requirements) are not intended as a limitation on coverage, limits or other requirements, or a waiver of any coverage normally provided by any Insurance Policy;
- (b) specific reference to a given coverage feature is not intended to be all inclusive, or to the exclusion of other coverage, or a waiver of any type; and
- (c) all insurance coverage and limits provided by Non-Profit Entity, or by third parties pursuant to obligations of Non-Profit Entity under this Agreement, and, in each case, available or applicable to this Agreement are intended to apply to the full extent of the Insurance Policies, and nothing contained in this Agreement limits, or shall be deemed to limit, the application of such insurance coverage.

Except as otherwise specifically set forth in the Contract Documents, Non-Profit Entity may meet its insurance obligations in any manner Non-Profit Entity deems reasonably appropriate, so long as, in each case, and with respect to the coverages prescribed for each Insurance Policy, Non-Profit Entity meets all the requirements therefor.

10.1.2.10 Deemed Self-Insurance by Non-Profit Entity

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

10.1.2.11 Umbrella and Excess Policies

Non-Profit Entity shall have the right to satisfy the requisite insurance coverage amounts for liability insurance through a combination of primary policies and umbrella or excess policies. Umbrella and excess policies shall comply with all insurance requirements for the applicable type of coverage ("follow form").

10.1.2.12 Inadequacy of Required Coverage

City makes no representation that the scope of coverage and limits of liability specified for any Insurance Policy to be carried pursuant to this Agreement or approved variances therefrom are adequate to protect Non-Profit Entity against its undertakings under this Agreement to City, or its liabilities to any third party. It is the responsibility of Non-Profit Entity and each Subcontractor to determine if any changes or additional coverages are required to adequately protect their interests. No such limits of liability or approved variances therefrom shall preclude City from taking any actions as are available to it under this Agreement, or otherwise under applicable Law.

10.1.2.13 No Relief from Liabilities and Obligations

Neither compliance nor failure to comply with the insurance provisions of this Agreement will relieve Non-Profit Entity or City of their respective liabilities and obligations under this Agreement.

10.1.3 Reserved

10.1.4 Insurance Unavailability

10.1.4.1 If an Insurance Unavailability risk occurs, then:

- (a) Non-Profit Entity shall notify City within 10 days of becoming aware that the risk has become an Insurance Unavailability; and
- (b) City will meet with Non-Profit Entity within 10 days after receipt of Non-Profit Entity's Notice to discuss the risk, including whether the risk is in fact Insurance Unavailability.

10.1.4.2 If Non-Profit Entity demonstrates to City's reasonable satisfaction that it has used diligent efforts in the global insurance and reinsurance markets to procure the required

Insurance Policy coverages for the Insurance Unavailability, and if, despite such diligent efforts and, through no fault of Non-Profit Entity or any other NPE-Related Entity, any Insurance Unavailability exists or occurs, the Parties shall meet further to discuss how the risk should be managed.

10.1.4.3 If the Parties cannot agree on how to manage the Insurance Unavailability, then City, in its sole discretion, shall elect one of the following, and City's election shall be final and not subject to Article 18 (Partnering; Contract Dispute Procedures):

- (a) compensate Non-Profit Entity for the costs of any Claim or liability incurred in connection with the Insurance Unavailability, up to an amount equal to the Insurance Proceeds that would have been payable had the relevant Insurance Policy continued to be available on the previous terms of that Insurance Policy and deduct from Milestone Payment 2 owing to Non-Profit Entity 100% of the greater of (i) the amount of insurance premiums Non-Profit Entity would have been obligated to pay under this Agreement (up to the Commercially Reasonable Insurance Rates) and (ii) the premiums assumed in the Financial Model;
- (b) if the Insurance Policies are available from insurers meeting the requirements in Section 10.1.2.1 (Insurers), but not at Commercially Reasonable Insurance Rates, provide Notice to Non-Profit Entity to obtain the Insurance Policy and that City will be responsible for 100% of the premiums that exceed the Commercially Reasonable Insurance Rates;
- (c) provide Notice to Non-Profit Entity approving one or more variances from Exhibit 7 (Insurance Requirements) such that the risk ceases to be Insurance Unavailability, in which case City will be entitled to a reduction in Milestone Payment 2 equal to 100% of the insurance premiums that Non-Profit Entity avoids as a result of the variance from Exhibit 7 (Insurance Requirements). In determining Non-Profit Entity's avoided insurance premiums, the Parties shall compare the actual premiums up to the greater of (i) the amount of insurance premiums Non-Profit Entity would have been obligated to pay for the relevant Insurance Policy had it been available under normal market conditions without variance from Exhibit 7 (Insurance Requirements) or (ii) the premiums for the relevant Insurance Policy assumed in the Financial Model; or
- (d) terminate this Agreement by Notice to Non-Profit Entity, as further set out in Section 17.2.6 (Termination for Insurance Unavailability).

10.1.5 Review of Insurance Unavailability Risks

10.1.5.1 Whenever Non-Profit Entity has received information from its insurance adviser or other credible insurance industry source that Insurance Unavailability will likely exist during the next insurance renewal period, and annually during any period that Insurance Unavailability exists, Non-Profit Entity shall deliver Notice thereof to City and submit a report to City that includes the following elements:

- (a) evidence of Non-Profit Entity's efforts to obtain from at least three insurers meeting the requirements in Section 10.1.2.1 (Insurers) the relevant Insurance

Policy required to be maintained during the D&C Period and an explanation of the reasons such efforts were unavailing;

- (b) a comprehensive assessment by Non-Profit Entity's independent insurance broker identifying the Insurance Unavailability risk, the reasons for unobtainability of insurance, and trends in insurance market conditions respecting the Insurance Unavailability risk;
- (c) a comprehensive written explanation and analysis of:
 - (i) any claims and loss experience (paid or reserved) with respect to any NPE-Related Entity or Affiliate, whether in connection with the Project or Work or in connection with any unrelated work or activity of a NPE-Related Entity or Affiliate, since the last review period, with claim date(s), description of incident(s), claims amount(s), and the level of deductibles or self-insured retentions provided; and
 - (ii) the effect thereof on obtainability or unobtainability of the relevant Insurance Policies and coverage.

10.1.5.2 City retains the right to independently assess the accuracy of the information on insurance markets, Insurance Unavailability and impacts of claims and loss experience, and retains the right to perform its own independent insurance review, which may include retaining advisors and seeking independent quotes for the Insurance Policies, all of which shall be undertaken and performed by City and any of its retained experts in good faith and a commercially reasonable manner.

10.1.5.3 If City's review conducted in accordance with Section 10.1.5.2 determines that the relevant Insurance Unavailability is insurable at Commercially Reasonable Insurance Rates, then Non-Profit Entity will promptly procure the insurance in connection with that risk in accordance with Exhibit 7 (Insurance Requirements).

10.1.5.4 Non-Profit Entity shall use commercially reasonable efforts to ensure that the process set forth in this Section 10.1.5 (Review of Insurance Unavailability Risks) concludes sufficiently in advance of expiration of such Insurance Policies to ensure continuation of insurance coverage under renewed or replacement Insurance Policies. City will cooperate with Non-Profit Entity in its discharge of this obligation.

10.1.5.5 Defense Costs

Unless otherwise agreed to in writing by City, defense costs shall not erode the limits of coverage of any of the Insurance Policies, except that defense costs may be included within the limits of coverage of professional liability, contractor's pollution liability and pollution legal liability policies.

10.1.5.6 Contesting Denial of Coverage

If any Insurer under an Insurance Policy described in Section 10.1.1 (Insurance Policies and Coverage) denies coverage with respect to any claims reported to such Insurer, Non-Profit Entity and City shall cooperate in good faith to establish whether and to what extent to contest,

and how to fund the cost of contesting, the denial of coverage; provided that if the reported claim is a matter covered by an indemnity in favor of City or the denial is the result of Non-Profit Entity's failure to comply with an insurance requirement, then Non-Profit Entity shall bear all costs of contesting the denial of coverage.

10.1.6 Lender Insurance Requirements

If, under the terms of any Financing Agreement or Security Document, Non-Profit Entity is obligated to, and does, carry insurance coverage with higher limits, lower deductibles or self-insured retentions, or broader coverage than required under this Agreement, Non-Profit Entity's provision of such insurance shall satisfy the applicable requirements of this Agreement provided such policy meets all the other applicable requirements of this Section 10.1 (Insurance) and Exhibit 7 (Insurance Requirements). If Non-Profit Entity carries insurance coverage in addition to that required under this Agreement, then, except for any directors and officers liability insurance carried by Non-Profit Entity, Non-Profit Entity shall include the City Additional Insureds as additional insureds thereunder and shall provide to City the proofs of coverage and certificates, binders and copies of the policy as described in Section 10.1.2.4 (Verification of Coverage). If, however, Non-Profit Entity demonstrates to City that inclusion of such City Additional Insureds as additional insureds will increase the premium, City shall elect either to pay the increase in premium or forego additional insured status.

10.1.7 Prosecution of Claims

10.1.7.1 Unless otherwise directed by City in writing with respect to City's insurance claims, Non-Profit Entity shall be responsible for reporting and processing all potential claims by City or Non-Profit Entity against the Insurance Policies required to be provided by Non-Profit Entity under the Contract Documents. City will make reasonable efforts to report to Non-Profit Entity incidents that City's Authorized Representative has Actual Knowledge of and that may give rise to an insurance claim against the Insurance Policies required to be provided by Non-Profit Entity under the Contract Documents. City will report such incidents to Non-Profit Entity within a reasonable period of time after City's Authorized Representative actually becomes aware of such incidents. Non-Profit Entity agrees to report timely to the insurer(s) under such policies any and all matters which may give rise to an insurance claim by Non-Profit Entity or City and to promptly and diligently pursue such insurance claims in accordance with the claims procedures specified in such policies, whether for defense or indemnity or both. Non-Profit Entity shall enforce all legal rights against the insurer under the applicable Insurance Policies and applicable Laws in order to collect thereon, including pursuing necessary litigation and enforcement of judgments, provided that Non-Profit Entity shall be deemed to have satisfied this obligation if a judgment is not collectible through the exercise of lawful and diligent means.

10.1.7.2 Non-Profit Entity shall immediately provide Notice to City, and thereafter keep City fully informed, of any incident, potential claim, claim or other matter of which Non-Profit Entity becomes aware that involves or could conceivably involve either City or City Additional Insureds as a defendant. City agrees to promptly provide Notice to Non-Profit Entity of City's incidents, potential claims, and matters which may give rise to a City insurance claim, to tender to the insurer City's defense of the claim (if applicable) under such Insurance Policies, and to cooperate with Non-Profit Entity as necessary for Non-Profit Entity to fulfill its duties hereunder.

10.1.7.3 If, in any instance, Non-Profit Entity (i) has not performed its obligations respecting insurance coverage set forth in this Agreement, or (ii) is unable to enforce and collect any such

insurance for failure (x) to assert claims in accordance with the terms of the Insurance Policies or (y) to prosecute claims diligently, then for purposes of determining Non-Profit Entity's liability and the limits thereon or determining reductions in compensation due from City to Non-Profit Entity on account of available insurance, Non-Profit Entity shall be treated as if it has elected to self-insure up to the full amount of insurance coverage which would have been available had Non-Profit Entity performed such obligations. Nothing in this Section 10.1.7 (Prosecution of Claims) or elsewhere in this Section 10.1 (Insurance) shall be construed to treat Non-Profit Entity as electing to self-insure where Non-Profit Entity is unable to collect due to the bankruptcy or insolvency of any insurer which at the time the Insurance Policy is written meets the rating qualifications set forth in this Section 10.1 (Insurance).

10.1.7.4 In the event that an Insurer providing any of the Insurance Policies required by this Agreement becomes the subject of bankruptcy proceedings, becomes insolvent, or is the subject of an order or directive limiting its business activities given by any Governmental Entity, including the State Department of Insurance, Non-Profit Entity shall exercise best efforts to promptly and at its own cost and expense secure alternative coverage in compliance with the insurance requirements contained in this Section 10.1 (Insurance) so as to avoid any lapse in insurance coverage.

10.1.7.5 If, in any instance, Non-Profit Entity has not promptly performed its obligation to report to applicable insurers and process any potential insurance claim tendered by City, then City may report the claim directly to the insurer and thereafter seek coverage under the relevant policy.

10.1.8 Application of Insurance Proceeds

All insurance proceeds received for physical property damage to the Project under any Insurance Policies required under Exhibit 7 (Insurance Requirements) shall be first applied to repair, reconstruct, rehabilitate, restore, renew, reinstate and replace each part or parts of the Project with respect to which such proceeds were received.

10.2 Performance Security

10.2.1 D&C Performance Security

10.2.1.1 On or before the Financial Close Date, Non-Profit Entity shall deliver, or cause to be delivered, the D&C Performance Security to City. The D&C Performance Security shall be comprised of the following ("**D&C Performance Security**"):

- (a) the D&C Performance Bond; and
- (b) the D&C Payment Bond.

10.2.1.2 The D&C Performance Bond shall remain in full force and effect until:

- (a) The expiration of the Warranty Period;
- (b) There exists no NPE Default with respect to the D&C Work; and

- (c) No event has occurred that, with the giving of Notice or passage of time, or both, would constitute a NPE Default with respect to the D&C Work.

10.2.1.3 The D&C Payment Bond shall remain in full force and effect until:

- (a) Expiration of the Warranty Period;
- (b) Receipt of evidence satisfactory to City that all Persons eligible to file a Claim under applicable Law against the D&C Payment Bond have been fully paid;
- (c) Receipt of unconditional releases of Claims and stop notices from all Subcontractors who have filed preliminary notices of Claims against the D&C Payment Bond; and
- (d) Expiration of the statutory period for Contractors to file a Claim against the D&C Payment Bond, if no claims have been filed.

10.3 General Requirements for D&C Performance Security

10.3.1.1 Each D&C Performance Security shall be issued by an Eligible Surety or panel of Eligible Sureties.

10.3.1.2 The D&C Performance Security will be subject to the rights of Lenders under the Direct Agreement.

10.3.1.3 If the D&C Contract Amount is increased in connection with a Change Order, City may, in its sole discretion, require a corresponding and proportionate increase in the amount of each D&C Performance Security, or alternative security, as applicable.

10.3.1.4 Non-Profit Entity agrees that it may not seek an injunction to restrain City from calling upon any D&C Performance Security.

10.3.1.5 Unless otherwise specified in this Agreement, a draw on the D&C Performance Security or exercise of any rights under such D&C Performance Security will not be conditioned on prior resort to any other security of, or provided for the benefit of, Non-Profit Entity.

10.3.1.6 Non-Profit Entity will pay all Recoverable Costs imposed in connection with City's exercise of its remedies against any D&C Performance Security or replacements thereof.

10.3.1.7 Non-Profit Entity may:

- (a) procure the D&C Performance Security, so that they are security, as applicable, for (i) Non-Profit Entity's performance obligations under the Contract Documents respecting the D&C Work and (ii) Non-Profit Entity's payment obligations to the designated Persons supplying labor or materials respecting the D&C Work; or
- (b) subject to this Section 10.3 (General Requirements for D&C Performance Security), deliver D&C Performance Security from the Key Contractors for performance of any portion of the Work, so that each security is security for, as applicable, (i) performance of the Key Contractor's obligations under its

Contract for D&C Work or (ii) payment to the designated Persons supplying labor or materials respecting the D&C Work.

10.3.1.8 If Non-Profit Entity makes the election under Section 10.3.1.7(b), then:

- (a) the language of the bond forms in Exhibit 6B (Form of D&C Payment Bond), Exhibit 6C (Form of D&C Performance Bond), Exhibit 6D (Form of Multiple Obligee Rider for D&C Payment Bond) and Exhibit 6E (Form of Multiple Obligee Rider for D&C Performance Bond) shall be adjusted to reflect this election, but only as necessary to (i) identify the Key Contract for D&C Work as the bonded contract, and (ii) identify the Key Contractor as the principal;
- (b) if there are two or more parties providing the D&C Performance Security, then the aggregate sum of the D&C Performance Security shall equal the required bond amounts under this Agreement and the size of each bond shall be in proportion to the scope and cost of the Work to be provided under each bonded Key Contract. Subject to the terms of this Agreement, City may proceed against any or both of such bonds in the order that City, in its sole discretion, determines; and
- (c) the Parties acknowledge and agree that if the D&C Performance Security is provided by the D&C Contractor, then the D&C Contract shall be the bonded contract, Principal Project Company shall be the principal thereunder, and recourse to such D&C Performance Security under this Agreement may only be based on the underlying obligations of the D&C Contractor thereunder.

10.3.1.9 City, as an additional obligee under the D&C Performance Security, will forbear from exercising remedies thereunder as additional obligee so long as Non-Profit Entity, Principal Project Company or the Collateral Agent, each as principal or additional obligee thereunder, has commenced the good faith, diligent exercise of remedies to cure the relevant default. The foregoing shall not obviate any agreement by City to forbear from exercising its rights and remedies contained in a Direct Agreement.

10.3.1.10 Non-Profit Entity, as an additional obligee under the D&C Performance Security, will forbear from exercising remedies thereunder in connection with the circumstances constituting a NPE Default so long as, subject to Section 10.3.1.9 above, City, as an additional obligee thereunder, has commenced the good faith, diligent exercise of remedies.

10.4 Letters of Credit

10.4.1 General Provisions

Wherever in the Contract Documents Non-Profit Entity has the option or obligation to deliver, or cause to be delivered, to City a letter of credit, in addition to any specific requirements relating to a particular letter of credit, the following provisions shall apply.

10.4.1.1 Except to the extent expressly provided otherwise in the Contract Documents, the letter of credit shall:

- (a) be a direct pay, irrevocable standby letter of credit;

- (b) be issued by a financial institution that is not an Affiliate, has a credit rating for long-term, unsecured debt of at least “A-” (or its equivalent) from one of the Rating Agencies, and has an office in Los Angeles, California, San Francisco, California, Chicago, Illinois, or New York, New York (or within reasonable proximity to these metropolitan areas) at which the letter of credit can be presented for payment. If the issuer’s long-term, unsecured debt rating is downgraded such that the issuer no longer meets the ratings standard set forth above, Non-Profit Entity shall provide a replacement letter of credit issued by a financial institution meeting such standard within 30 days after the downgrade;
- (c) be payable on demand, conditioned only on written presentment from a beneficiary thereof to the issuer of a sight draft drawn on the letter of credit and a certificate stating that the beneficiary has the right to draw under the letter of credit in the amount of the sight draft, up to the amount due to such beneficiary, without requirement to present the original letter of credit;
- (d) be in place for the entire period of time for which the letter of credit is providing security;
- (e) allow for multiple draws;
- (f) name City as sole beneficiary; and
- (g) be consistent with the requirements of this Section 10.4 (Letters of Credit).

10.4.1.2 Except to the extent expressly provided otherwise in the Contract Documents, if Non-Profit Entity has failed to pay or perform when due the duty, obligation or liability under the Contract Documents for which the letter of credit is held, City has the right, subject to any rights of Lenders under the Direct Agreement, to draw on the letter of credit as and when provided in Section 16.2.7 (Performance Bond). If City makes such a draw on the letter of credit, City shall use and apply the proceeds as provided in this Agreement for such letter of credit.

10.4.1.3 Except to the extent expressly provided otherwise in the Contract Documents and the Direct Agreement, City has the right to draw on the letter of credit, without prior Notice to Non-Profit Entity, if (a) Non-Profit Entity has failed to pay or perform when due the duty, obligation, or liability under this Agreement for which the letter of credit is held, (b) for any reason Non-Profit Entity fails to deliver to City a new or replacement letter of credit, on the same terms, at least 30 days before the expiry of the letter of credit, unless the applicable terms of the Contract Documents expressly provide that no further letter of credit is required with respect to such duty, obligation or liability, or (c) the financial institution issuing the letter of credit fails to meet the requirements in Section 10.4.1.1(b) and Non-Profit Entity fails to provide a substitute letter of credit issued by a qualified financial institution within 30 days after the downgrade. If City makes such a draw on the letter of credit, City shall be entitled to draw on the full face amount of the letter of credit and shall retain such amount as cash security to secure the obligations under the letter of credit, without payment of interest to Non-Profit Entity.

10.4.1.4 Except to the extent expressly provided otherwise in the Contract Documents and the Direct Agreement, a draw on letters of credit shall not be conditioned on prior resort to Non-Profit Entity or any other security of Non-Profit Entity. For all draws conditioned on prior Notice

from City to Non-Profit Entity, no such Notice shall be required if it would preclude draw before the expiration date of the letter of credit. City will use and apply draws on letters of credit (or cash security held from draws on letters of credit) toward satisfying the relevant obligation of Non-Profit Entity (or, if applicable, any other Person for which the letter of credit is performance security). Subject to City's rights under Sections 10.4.1.2 and 10.4.1.3, if City receives proceeds of a draw in excess of the relevant obligation, City will promptly refund the excess to Non-Profit Entity (or such other Person) after all relevant obligations are satisfied in full.

10.4.1.5 Except to the extent expressly provided otherwise in the Contract Documents, Non-Profit Entity's sole remedy in connection with the improper presentment or payment of sight drafts drawn under letters of credit shall be to obtain from City a refund of the proceeds which are misapplied, reimbursement of the reasonable costs Non-Profit Entity incurs as a result of such misapplication; provided that at the time of such refund Non-Profit Entity increases the amount of the letter of credit to the amount (if any) then required under applicable provisions of this Agreement. Non-Profit Entity acknowledges that the presentment of sight drafts drawn upon a letter of credit could not under any circumstances cause Non-Profit Entity injury that could not be remedied by an award of money damages, and that the recovery of money damages would be an adequate remedy. Accordingly, Non-Profit Entity covenants (a) not to request or instruct the issuer of any letter of credit to refrain from paying any sight draft drawn under the letter of credit and (b) not to commence or pursue any legal proceeding seeking, and Non-Profit Entity irrevocably waives and relinquishes any right, to enjoin, restrain, prevent, stop or delay any draw on any letter of credit.

10.4.1.6 Non-Profit Entity shall obtain and furnish all letters of credit and replacements thereof at its sole cost and expense, and shall pay all charges imposed in connection with City's presentment of sight drafts and drawing against letters of credit or replacements thereof.

10.4.1.7 If City makes a permitted assignment of its rights and interests under this Agreement, then Non-Profit Entity shall cooperate so that concurrently with the effectiveness of such assignment, either replacement letters of credit for, or appropriate amendments to, the outstanding letters of credit shall be delivered to the assignee naming the assignee as beneficiary, at no cost to Non-Profit Entity.

10.4.1.8 City acknowledges that if the letter of credit is performance security for a Person other than Non-Profit Entity or Principal Project Company (e.g., a Key Contractor other than Principal Project Company), City's draw may only be based on the underlying obligations of such Person; provided that City, as a beneficiary of any such letter of credit, will forbear from drawing upon such letter of credit so long as Non-Profit Entity, Principal Project Company or the Collateral Agent, each to the extent of its rights as a beneficiary thereunder, has commenced the good faith, diligent exercise of remedies to cure the relevant default. The foregoing shall not obviate any agreement by City to forbear from exercising its rights and remedies contained in a Direct Agreement. With respect to any letter of credit from Principal Project Company or pursuant to the Project Implementation Agreement, City may draw upon such letter of credit pursuant to either or both of this Agreement and the Project Implementation Agreement.

10.4.1.9 Non-Profit Entity, as a beneficiary of any letter of credit under which City is also a direct beneficiary, will forbear from drawing upon such letter of credit in any circumstances in which Non-Profit Entity is entitled to make such a draw to the extent that City is entitled under this Agreement to draw upon such letter of credit at such time.

10.5 Guarantees

10.5.1 Non-Profit Entity shall obtain, or shall cause Principal Project Company to obtain, a written guaranty, in form and substance set forth in Exhibit 6F (Form of D&C Contractor Guaranty), from the D&C Contractor Guarantor guaranteeing payment and performance of all obligations of the D&C Contractor under the D&C Contract (the “**D&C Contractor Guaranty**”). The D&C Contractor Guaranty shall expressly include City as a direct guaranteed party, with the same protections and rights of notice, enforcement and collection as are available to Non-Profit Entity and Principal Project Company, subject to the terms of Section 10.5.4. The D&C Contractor Guaranty shall provide that the rights and protections of City shall not be reduced, waived, released or adversely affected by the acts or omissions of any other guaranteed party. Non-Profit Entity shall deliver or cause to be delivered to City, concurrently with the issuance of the D&C Contractor Guaranty, a duplicate original of the D&C Contractor Guaranty.

10.5.2 If Non-Profit Entity, any Key Contractor, any Affiliate or any Lender receives from any Person a guaranty of payment or performance of any obligation(s) of a Key Contractor (other than the D&C Contractor Guaranty), then either Non-Profit Entity shall cause such Person to expressly include City as a guaranteed party under such guaranty, with the same protections and rights of Notice, enforcement and collection as are available to any other guaranteed party, subject to the terms of Sections 10.5.3 and 10.5.4, and deliver to City a duplicate original of such guaranty, which guaranty shall provide that the rights and protections of City shall not be reduced, waived, released or adversely affected by the acts or omissions of any other guaranteed party, other than through the rendering of payment and performance to another guaranteed party; and upon receipt of written Notice from City of the occurrence of the circumstances described in Section 10.5.3, such other documents reasonably satisfactory to City permitting City, subject to the rights of the Collateral Agent under any Direct Agreement, to become the transferee beneficiary under such guaranty and to enforce it, including enforcing the guaranty in favor of City or the Project, or both, which transfer documents shall include a certified copy of the guaranty and an executed transfer and assignment of the beneficiary rights from Non-Profit Entity or Collateral Agent, as applicable, to City; and the guaranty shall expressly authorize such transfer without condition and permit draw without presentation of the original guaranty.

10.5.3 City’s rights as a transferee beneficiary are exercisable if, subject to Section 10.5.4 and the Direct Agreement, City determines that (a) a Key Contractor has breached or failed to perform any obligations under its Contract and any Notice thereof required under such Contract has been provided and the applicable cure period has expired without full and complete cure, (b) such breach has caused a NPE Default and the applicable cure period has expired without full and complete cure and (c) Non-Profit Entity, Principal Project Company or the Collateral Agent has failed to call upon or otherwise enforce such guaranty for the purpose of causing the performance of such obligations by or on behalf of the Contractor within 10 days after City delivers Notice of such NPE Default to Non-Profit Entity, Principal Project Company and the Collateral Agent and the Cure Period (as defined in the Direct Agreement) has expired.

10.5.4 So long as Non-Profit Entity, Principal Project Company or a Lender is diligently pursuing remedies under a guaranty under which City is a direct beneficiary, City agrees to forbear from (a) exercising remedies under any such guaranty that names City as a direct beneficiary, and (b) exercising its right to become a beneficiary under Section 10.5.2; provided, however, that if the NPE Default giving rise to exercise remedies under any such guaranty remains uncured at the end of the applicable cure period in Section 16.1.2 (Default Notice and

Cure Periods), City's obligation to forbear from exercising remedies as a guaranteed party shall cease. The foregoing shall not obviate any agreement by City to forbear from exercising its rights and remedies contained in a Direct Agreement.

10.6 Indemnities

10.6.1 General Indemnity

10.6.1.1 Subject to Section 10.6.3 (Limitations on Indemnification Obligations), Non-Profit Entity shall defend, indemnify, protect and hold harmless the Indemnitees from and against any and all claims, causes of action, suits, investigations, legal or administrative proceedings, demands and Losses arising out of or in connection with:

- (a) any alleged or actual NPE Fault, if asserted or incurred by or awarded to any Third Party or any NPE-Related Entity;
- (b) Losses to the Infrastructure Facility, and any interference, disruption, or delay to the Project occurring on or before the Final Acceptance Date, to the extent caused by or related to the work of any NPE-Related Entity in connection with the HCC;
- (c) damage to public or private property owned by Third Parties (or any NPE-Related Entity), and for injuries to any person or entity, arising out of performance of the Project or Work by any NPE-Related Entity;
- (d) any alleged intellectual property infringement or other allegedly improper appropriation or use of intellectual property by any NPE-Related Entity in performance of the Project or the Work, or in connection with the Infrastructure Facility;
- (e) any and all claims by any governmental or taxing authority claiming taxes based on gross receipts, purchases or sales, or the use of any property or income of any NPE-Related Entity with respect to any payment for the Project or Work made to or earned by any NPE-Related Entity;
- (f) the failure or alleged failure by any NPE-Related Entity to pay sums due for the Work or services of Contractors, laborers, or suppliers;
- (g) any actual or threatened NPE Release;
- (h) the claim or assertion by any Other Contractor or a Utility that any NPE-Related Entity (i) failed to cooperate reasonably with such party, so as to cause interference, disruption, delay or loss; or (ii) interfered with or hindered the progress or completion of work being performed by such Other Contractor or Utility, so as to cause interference, disruption, delay or loss, to the extent such claim arises out of any NPE Fault;
- (i) any NPE-Related Entity's breach of or failure to perform an obligation that City owes to a Third Party, including any Governmental Entity and any Utility, under applicable Law or under any agreement between City and a Third Party,

where City has delegated performance of the obligation to Non-Profit Entity under this Agreement or the acts or omissions of any NPE-Related Entity which render City unable to perform or abide by an obligation that City owes to a Third Party, including any Governmental Entity and any Utility, under any agreement between City and a Third Party, where, in each case, the agreement was expressly disclosed or known to Non-Profit Entity;

- (j) inverse condemnation, trespass, nuisance or similar taking of or harm to real property by reason of (i) the failure of any NPE-Related Entity to comply with Good Industry Practice, requirements of this Agreement, the Project Management Plan or Regulatory Approvals respecting control and mitigation of construction activities and construction impacts, (ii) the intentional misconduct or negligence of any NPE-Related Entity in connection with the performance of the Project or the Work, or (iii) the actual physical entry onto or encroachment upon another's property by any NPE-Related Entity in connection with the performance of the Project or the Work;
- (k) errors or other Defects in the supply and construction (including installation) of the Project;
- (l) Design Work that fails, in whole or in part, to meet the requirements of this Contract;
- (m) any Non-Profit Entity failure to implement environmental mitigation measures to control environmental impacts, as required by the Governmental Approvals, the CEQA MMRP and the NEPA document; and
- (n) Losses, including any costs of Refinancing and any increase in Availability Payments, arising out of or relating to, any Refinancing that occurs pursuant to clause (f) of the definition of "Exempt Refinancing" except to the extent that such Refinancing was required due to or in connection with any City Fault.

10.6.1.2 Non-Profit Entity's responsibilities pursuant to this Section 10.6.1 (General Indemnity) include both the obligation to (a) defend the Indemnitees from and against any and all claims, causes of action, suits, investigations, legal or administrative proceedings, demands and Losses, and (b) indemnify the Indemnitees when liability is sustained pursuant to the Contract Dispute Procedures or through judicial proceedings or is mutually agreed upon by the Parties.

10.6.1.3 Non-Profit Entity's indemnification shall include reasonable fees of attorneys, consultants, and experts and related costs and City's costs of investigating any claims against City. In addition to Non-Profit Entity's obligation to indemnify City, Non-Profit Entity specifically acknowledges and agrees that it has an immediate and independent obligation to defend City from any claim which actually or potentially falls within this indemnification provision, even if the allegations are or may be groundless, false or fraudulent, which obligation arises at the time such claim is tendered to Non-Profit Entity by City and continues at all times thereafter.

10.6.1.4 Non-Profit Entity's responsibilities pursuant to this Section 10.6.1 (General Indemnity) are in addition to any right that City may have under the terms of this Agreement to assess D&C Noncompliance Points and/or D&C Period Deductions with respect to the same event or

circumstance giving rise to a Third Party claim, cause of action, suit, legal or administrative proceeding.

10.6.1.5 Non-Profit Entity's defense, indemnity, and hold harmless obligations shall extend to City's consultants (e.g., design professionals and construction managers) providing services covering any portion of the Project under a separate written agreement with City and designated in the Contract Documents as persons or entities to be listed on Non-Profit Entity's insurance policies as "Additional Insureds." Non-Profit Entity's defense, indemnity, and hold harmless obligations shall not extend to the liability of a City consultant (including architects and engineers) designated as an Indemnitee or its agents, employees, or subconsultants arising out of, connected with or resulting from such Indemnitee's own active negligence, willful misconduct, bad faith, fraud, errors or omissions or from such Indemnitee's preparation or approval of maps, plans, opinions, reports, surveys, change orders, designs or specifications, or such Indemnitee's issuance of or failure to issue directions or instructions provided that such issuance or failure to issue is the primary cause of the damage or injury.

10.6.2 Design Defects

10.6.2.1 Non-Profit Entity agrees that, because the Reference Documents are subject to review and modification by Non-Profit Entity, (a) it is appropriate for Non-Profit Entity to assume liability for errors, omissions, inconsistencies and other Defects in the completed Project even though they may be related to errors, omissions, inconsistencies and other Defects in the Reference Documents, and (b) such documents shall not be deemed "design furnished" by City or any of the other Indemnitees, as the term "design furnished" is used in Civil Code section 2782. Non-Profit Entity hereby waives the benefit (if any) of Civil Code section 2782 and agrees that this Section 10.6.2 (Design Defects) constitutes an agreement governed by Civil Code section 2782.5.

10.6.2.2 Subject to Section 10.6.3 (Limitations on Indemnification Obligations), Non-Profit Entity shall indemnify, defend and hold harmless the Indemnitees from and against any and all claims and Losses arising out of, relating to or resulting from errors, omissions, inconsistencies or other defects in the Design Documents, regardless of whether such errors, omissions, inconsistencies or other defects were also included in the Reference Documents.

10.6.3 Limitations on Indemnification Obligations

10.6.3.1 Subject to Section 23.8 (Limitation on Third Party Beneficiaries) and the releases and disclaimers herein, including all the provisions set forth in Section 5.1.3 (Limitations on Non-Profit Entity's Right to Rely), Non-Profit Entity's indemnity obligations shall not extend to any claims, suits, actions or Losses to the extent directly caused by:

- (a) the active negligence, gross negligence, reckless or willful misconduct, bad faith or fraud of an Indemnitee;
- (b) a City-Caused Delay Event; or
- (c) City's breach of any of its obligations under the Contract Documents.

10.6.3.2 With respect to Work performed by a design professional as defined in California Civil Code section 2782.8, such indemnities shall apply only to the extent permitted by section 2782.8 as of the Effective Date.

10.6.3.3 Claims by Employees

In claims by an employee of a NPE-Related Entity, the indemnification obligation under this Section 10.6 (Indemnities) shall not be limited by any limitation on the amount or type of damages, compensation or benefits payable by or for a NPE-Related Entity under workmen's compensation, disability benefit or other employee benefits laws; provided that this provision shall not be construed as a waiver in favor of any employee by Non-Profit Entity or any Contractor of any limitation of liability afforded by such laws.

10.6.3.4 Indemnity as Alternative Cause of Action

The requirement to provide an indemnity as specified in this Section 10.6 (Indemnities) is not intended to provide City with an alternative cause of action against Non-Profit Entity for damages for breach of contract incurred directly by Indemnitees in connection with the event giving rise to the indemnification obligation.

10.6.4 Non-Profit Entity's Defense

In Non-Profit Entity's defense of Indemnitees under this Section 10.6 (Indemnities), negotiation, compromise, and settlement of any action, City shall, without prejudice to the rights of any Indemnitees to be indemnified by Non-Profit Entity, retain reasonable discretion in and control of the litigation, negotiation, compromise, settlement, and appeals therefrom.

10.7 Indemnities by Contractors

Non-Profit Entity shall ensure that each Contract includes indemnity provisions appropriate to the scope of the Work to be performed by the Contractor, naming the Indemnitees as indemnitees.

10.8 Notice of Claims by Third Parties

10.8.1 If the City receives Notice of a claim, cause of action, suit, legal or administrative proceeding covered by the indemnities in Section 10.6 (Indemnities), or otherwise has Actual Knowledge of such a claim, cause of action, suit, legal or administrative proceeding that it believes is within the scope of the indemnities under Section 10.6 (Indemnities), as soon as practicable after receipt of the claim, cause of action, suit, legal or administrative proceeding, City shall:

- (a) inform Non-Profit Entity in writing of the claim, cause of action, suit, legal or administrative proceeding, and
- (b) send to Non-Profit Entity a copy of all relevant written materials City has received asserting such claim, cause of action suit, legal or administrative proceeding.

10.8.2 As soon as is practicable after Non-Profit Entity receives Notice of a claim, cause of action, suit, legal or administrative proceeding covered by the indemnities in Section 10.6 (Indemnities), Non-Profit Entity shall promptly provide Notice to City in writing and, unless subject to evidentiary privilege, promptly furnish to City copies of all factual reports and factual portions of any other reports given to Non-Profit Entity's insurance carrier or carriers.

ARTICLE 11. PAYMENTS TO NON-PROFIT ENTITY

11.1 Milestone Payments

11.1.1 Subject to any limitations and exceptions expressly provided in this Agreement, City will pay each Milestone Payment to Non-Profit Entity, calculated and otherwise in accordance with the process in Exhibit 4A (Milestone Payment Mechanism).

11.2 Availability Payments

11.2.1 Subject to any limitations and exceptions expressly provided in this Agreement, City will make Availability Payments to Non-Profit Entity as provided in this Section 11.2 (Availability Payments) and Exhibit 4B (Availability Payment Mechanism).

11.2.2 City will make Availability Payments to Non-Profit Entity in accordance with Exhibit 4B (Availability Payment Mechanism).

11.2.3 Non-Profit Entity acknowledges and agrees that any Availability Payment or portion thereof not received by Non-Profit Entity as a result of a delay in achieving Substantial Completion for which Non-Profit Entity is not entitled to compensation under this Agreement represents the liquidated amount of delay damages suffered by City due to such delay.

11.3 Substantial Completion Development Fee 1

11.3.1 Subject to any limitations and exceptions expressly provided in this Agreement, City will pay Substantial Completion Development Fee 1 to Non-Profit Entity, calculated and otherwise in accordance with the process in Exhibit 4A (Milestone Payment Mechanism).

11.4 Invoice, Other Amounts and Payments

11.4.1 Prior to issuing any invoice required by this Agreement, Non-Profit Entity must submit to City a form invoice to be approved by City, and any invoice issued in accordance with this Agreement must be substantially in the form agreed by the City.

11.4.2 Non-Profit Entity shall submit an invoice (i) for the Availability Payment no later than the 10th day of the month immediately following the relevant Contract Quarter; (ii) for any other proposed payment adjustments in accordance with this Agreement, including the Milestone Payments, Compensable Delay Events, Substantial Completion Development Fee, or Termination Compensation (collectively, "**Other Amounts**") no later than the 10th day of the month immediately following the applicable event triggering such invoice, unless a different time period is set out in the Agreement for such event. All invoices shall include any supporting mathematical corrections or reconciliations to enhance the accuracy of payments due to Non-Profit Entity under this Agreement, to the satisfaction of City.

11.4.3 City shall review each properly submitted invoice within 7 days of receipt. If City, in its sole discretion, determines that the invoice is improper, the invoice will be returned to Non-Profit Entity not later than 7 days after receipt, along with a document setting forth the reasons why the invoice is not proper.

11.4.4 Unless otherwise specified in this Agreement, City will pay NPE any amount owing under this Agreement within 45 days after receipt of a properly submitted invoice for such payment.

11.5 Disputed Amounts

11.5.1 City may dispute, in good faith, any amount specified in an invoice submitted under Section 11.4 (Invoice, Other Amounts and Payments), or any other invoice submitted by Non-Profit Entity under this Agreement. City shall pay all undisputed amounts for which payment is requested and that are not subject to withholding in accordance with Section 11.4 (Invoice, Other Amounts and Payments).

11.5.2 Non-Profit Entity and City shall use reasonable efforts to resolve any invoice dispute within 30 days after the dispute arises.

11.6 Withholding from Payments

11.6.1 Without modifying City's rights to make deductions from Milestone Payment 2 in accordance with this Agreement, City may deduct from any payment owing to Non-Profit Entity under this Agreement on or before the Substantial Completion Date or make a demand of Non-Profit Entity for:

- (a) any amount due and payable by Non-Profit Entity to City (whether in connection with this Agreement or any other Contract Document);
- (b) any sums expended by City in performing any of Non-Profit Entity's obligations under this Agreement which Non-Profit Entity has failed to perform; and
- (c) amounts in respect of any other Claim or Losses by City against Non-Profit Entity in connection with the Work or the Project.

11.6.2 The failure by City to deduct any of the sums under this Section 11.6 (Withholding from Payments) from a payment must not constitute a waiver of City's right to such sums.

11.6.3 Except as expressly set out in Section 17 and without modifying City's rights to make deductions from Milestone Payment 2 in accordance with this Agreement or exercise its rights under this Section 11.6.3, City acknowledges and agrees that it shall not deduct from any payments owing following the Substantial Completion Date. The foregoing shall not limit, modify or waive any rights or remedies City may have (i) with respect to any payment (or portion of payment) to Non-Profit Entity that is under dispute by the Parties in accordance with this Agreement, to withhold the disputed amounts from such payments until resolution of the dispute; and (ii) with respect to (A) the Performance Bond, (B) any unused amounts in any Allowance Account, (C) the Substantial Completion Development Fee, (D) any rights and remedies under the D&C Contractor Guaranty, and (E) any other collateral, warranties, guaranties or security City may have, in each case, related to the performance of obligations by Non-Profit Entity or any NPE-Related Entity under the Contract Documents after the Substantial Completion Date.

11.7 Interest on Late Payments and Overpayments

11.7.1 If Non-Profit Entity fails to pay any undisputed amount due and owing from Non-Profit Entity to the City under this Agreement, Non-Profit Entity shall pay to City interest on such amount at the Late Payment Rate commencing 90 days after the due date thereof until the date of payment.

11.7.2 If any properly submitted invoice is disputed and an amount is determined to be due under the Contract Dispute Procedures, payment of the disputed amount shall be made within 30 Business Days following resolution of the dispute, together with interest at the Late Payment Rate on the amount owing from the date that the payment was originally due (based on the agreement of the parties or the decision of the dispute resolver) until the date of payment.

11.7.3 If as a result of any inaccuracy in an invoice any overpayment is made by City to Non-Profit Entity then, in addition to the adjustments provided in Section 11.2 (Availability Payments), City shall be entitled to deduct, in accordance with Section 11.6.1 and Section 11.6.3, or receive as a payment from Non-Profit Entity interest on such amount at the Late Payment Rate, starting on the date of City's payment of the invoice to the date the overpayment is deducted or paid. City's right to deduct or receive payment of interest is without prejudice to any other rights City may have under this Agreement.

11.8 Taxes

Except as provided in Section 2.4.2 (Possessory Interest Tax), Non-Profit Entity shall pay all applicable Taxes on or before the due date (or delinquency date if applicable). Non-Profit Entity is solely responsible for and has no right to make any Claim due to its misinterpretation of laws respecting Taxes or incorrect assumptions regarding applicability of Taxes. Notwithstanding the foregoing, to the extent that City pays any California sales tax or use taxes to Non-Profit Entity under this Agreement, Non-Profit Entity shall remit such taxes to the State of California and shall promptly provide City with any information reasonably requested to verify compliance with State reporting requirements. If an exemption from applicable sales or use taxes becomes available for the Project, City shall have no obligation to reimburse Non-Profit Entity for any such taxes previously paid. Following the date such exemption becomes available, City shall be entitled to an upfront payment from Non-Profit Entity or a reduction in payments made by City, as agreed upon by the Parties, equal to the amount actually saved as a result of such exemption.

11.9 Payment Not Evidence of Approval

No payment by City is or must be construed as:

- (a) evidence of the value of Work or that Work has been satisfactorily carried out in accordance with this Agreement;
- (b) an admission of liability by City;
- (c) approval by City of Non-Profit Entity's performance or compliance with this Agreement;
- (d) acknowledgement that City has inspected or accepted the Work; or

- (e) waiver of any Claim or right that City may then or thereafter have, including among others, warranty and indemnity rights.

11.10 Other Adjustments; Full Compensation

11.10.1 Non-Profit Entity acknowledges and agrees:

- (a) Milestone Payment 2 and Availability Payments calculated in accordance with this Article 11 (Payments to Non-Profit Entity) and Exhibit 4 (Payment Mechanism) are subject to adjustment to reflect previous over-payments and/or under-payments, and on or before the Substantial Completion Date, any interest payable in respect of any amounts owed, and any other amount due and payable from Non-Profit Entity to City or from City to Non-Profit Entity under this Agreement, including pursuant to the D&C Noncompliance Event and D&C Period Deduction regime;
- (b) Substantial Completion Development Fee is subject to adjustment as set forth in Exhibit 4 (Payment Mechanism); and
- (c) that the payments provided for in this Article 11 (Payments to Non-Profit Entity) constitute full compensation for performance of all the Work, subject only to Non-Profit Entity's rights under Articles 12 (City Change Process; Unilateral Change Orders; Deviations), 13 (General Provisions Applying to Delay Events), 14 (Compensation and Other Relief for Delay Events) and 17 (Termination).

11.10.2 Residual Funds Adjustment

- (a) On the date that is 90 days prior to the Payment Commencement Date, Non-Profit Entity shall provide City with a statement setting forth all funds in the Project accounts that are not reasonably anticipated at that time to be required by Non-Profit Entity to pay Project costs (including return of any cash retention to the D&C Contractor), pay debt service, or maintain compliance with all requirements in the Financing Documents (the "D&C Period Residual Amounts"). Such D&C Period Residual Amounts shall be certified by the Collateral Agent pursuant to the Financing Documents over the balance of the Term based on receipt of a certificate from the LTA. Subject to Non-Profit Entity obtaining a written opinion of bond counsel that such actions will not adversely affect the tax-exempt status of the bonds, in the Non-Profit Entity's first Availability Payment invoice, Non-Profit Entity shall reduce the amount of the first Availability Payment in accordance with Section 1.4.2 of Exhibit 4B (Availability Payment Mechanism).
- (b) Within 90 days after full and complete discharge of the bonds, Non-Profit Entity shall pay City any remaining amounts in the Project accounts, less any funds that are reasonably anticipated to be required to pay Project costs.

11.11 Appropriation; Certification of Funds

11.11.1 All payments due from City to Non-Profit Entity under this Agreement, including any Termination Compensation, shall be paid solely from monies made available to City from an appropriation of funds for the purpose of making all such payments coming due in such fiscal year. No payment obligation under this Agreement shall constitute a general obligation of the City and County of San Francisco or a pledge of its general funds. SFMTA, or the San Francisco Board of Supervisors, as applicable, shall have the absolute and unconditional right, to be exercised in their discretion, for any reason, not to appropriate such funds.

11.11.2 This Agreement is subject to the fiscal provisions of the City's Charter and the budget decisions of its Mayor and Board of Supervisors, each acting in its sole discretion. No funds will be available hereunder until prior written authorization certified by the City's Controller. The City's Controller cannot authorize payments unless funds have been certified as available in the budget or in a supplemental appropriation. City shall use commercially reasonable efforts to obtain the certification from the City's Controller if the funds have been appropriated for such purpose. Without prejudice to Non-Profit Entity's rights and remedies as set forth in this Agreement for unexcused and undisputed non-payment by City of any payment due Non-Profit Entity when due, City's obligations hereunder shall never exceed the amount certified by the City's Controller for the purpose and period stated in such certification. City, its employees and officers are not authorized to offer or promise any additional funding without City's Controller certification of such additional funding. Without such lawful approval and certification, City shall not be required to provide such additional funding.

11.11.3 City shall:

- (a) make a timely submission for (i) the fiscal year in which the Substantial Completion Deadline is scheduled to occur of a budget proposal to the SFMTA Board of Directors requesting a budget that includes Milestone Payment 2A and initial APC_{DC} and (ii) the fiscal year in which Substantial Completion of the Infrastructure Facility will occur of a budget proposal to the SFMTA Board of Directors requesting a budget that includes Milestone Payment 2B and initial APC_{Base};
- (b) for each fiscal year beyond the fiscal year in which the initial Availability Payment is made, make a timely submission of a budget proposal to the SFMTA Board of Directors requesting a budget for each and every Availability Payment, including any subsequent change to the Availability Payment; and
- (c) request an appropriation of funds for the purpose of paying any Termination Payment payable by City or any other amount due from City under this Agreement other than the Availability Payments.

11.11.4 City shall respond promptly in writing to any reasonable written request submitted by Non-Profit Entity for information regarding the status of any request City is obligated to make under Section 11.11.3.

11.11.5 If City fails to appropriate money to make a Termination Payment, there shall be no contractual obligation of the City to make such payment that may be enforced; such contractual

payment obligation shall arise only if and when any such amounts have been appropriated by City.

11.11.6 City shall provide written Notice to Non-Profit Entity no later than ten Business Days following the enactment of any City budget with respect to a particular Fiscal Year that does not make an appropriation of funds for the purpose of paying the scheduled Availability Payments or Milestone Payment 2 due for such Fiscal Year. City shall consult with Non-Profit Entity to discuss the situation and the possible solutions, it being understood that such discussions shall be without prejudice to Non-Profit Entity's right to termination for unexcused and undisputed non-payment by City of any payment due Non-Profit Entity when due, as set forth in Section 17.4.1 (Termination for City Default).

11.11.7 The obligation of City to make any payments under this Agreement does not constitute a debt of the City under applicable Law and does not constitute a liability of or a lien or charge upon the funds or property of the City beyond the fiscal year for which there has been an appropriation of funds to make such payments. The obligation of City to make payments hereunder does not constitute an obligation of City for which City is obligated to levy or pledge any form of taxation or for which City has levied or pledged any form of taxation.

11.12 Allowances

11.12.1 Allowances, Generally

- (a) Each of the Allowances is available to pay for certain portions of the D&C Work, with amounts from the Allowance to be used on the basis identified with respect to each such Allowance under this Section 11.12 (Allowances) and otherwise consistent with Exhibit 13 (Costs Schedule).
- (b) Non-Profit Entity shall be entitled to use:
 - (i) the Office/Admin and Training Spaces FF&E Allowance for design, procurement, purchase and installation of Office/Admin and Training Spaces FF&E as set forth in Section 11.12.1 and 11.12.2;
 - (ii) the Partnering Allowance for Partnering as set forth in Section 11.12.1 and Section 11.12.8;
 - (iii) the Undergrounding Existing PG&E Power Lines Allowance for Undergrounding Existing PG&E Power Line Work as set forth in Section 11.12.1 and Section 11.12.5;
 - (iv) the New PG&E Service Allowance for New PG&E Service Work as set forth in Section 11.12.1 and Section 11.12.6;
 - (v) the Exterior OCS Work Allowance for cost and expenses for Work associated with the temporary removal and new OCS installation outside of the Project Site, as set forth in Section 11.12.1 and Section 11.12.7; and

- (vi) the Interior OCS Work Allowance for cost and expenses of Interior OCS Work as set forth in Section 11.12.1 and Section 11.12.9; provided; however, that the Interior OCS Work Allowance may not be used for any design work.

(together the “Non-Profit Entity Allowances”).

- (c) City shall be entitled to draw from the City-Furnished IT/Comms Allowance for amounts incurred with respect to procurement, purchase and installation of the IT/Comms Equipment as set out in Section 11.12.3. To the extent that City directs Non-Profit Entity to procure, purchase or install any City-Furnished IT/Comms FF&E, the provisions applying to the Non-Profit-Entity Allowance Values shall apply the City-Furnished IT/Comms FF&E Allowance.
- (d) Non-Profit-Entity and City shall:
 - (i) collaborate in good faith to review the amount proposed for the Allowances, other than the Partnering Allowance, based on design information as it progresses to confirm that the Allowance values constitute reasonable estimates for the Work the subject of each Allowance;
 - (ii) upon 100% DD as described in Section 1.8.5 (Proprietary Design Review) of Division 1 of the Technical Requirements, negotiate in good faith to agree on revised fixed Allowance values; and
 - (iii) further prepare the design to develop Construction Documents consistent with the Allowance values.
- (e) Except as set out in Section 11.12.1(d)(ii) and 11.12.1(h), Non-Profit Entity acknowledges and agrees that:
 - (i) the Milestone Payments and the Availability Payment include the Allowances and, in the case of the Non-Profit Entity Allowances, represent full compensation to Non-Profit Entity on account of the Non-Profit Entity Allowances; and
 - (ii) except as otherwise expressly set out in this Agreement, all costs, including design fees and overhead for the Work covered by the Allowances are included in the Allowances and the Allowances are not subject to adjustment after being fixed pursuant to Section 11.12.1(d)(ii), regardless of the actual costs of the Allowance Item or Work.
- (f) Intentionally Omitted.
- (g) Without limiting Section 11.12.1(i), if the revised amount for an Allowance determined under Section 11.12.1(d) is greater than the applicable original Allowance value, Section 7.2 of the Costs Schedule (Exhibit 13) shall apply. If the revised amount for an Allowance determined under Section 11.12.1(d) is

less than the applicable original Allowance value, the unused amounts shall be released to the City pursuant to Section 11.13.4).

- (h) Once the Allowances are fixed under Section 11.12.1(d)(ii), Non-Profit Entity agrees that the Milestone Payments and Availability Payment will not be subject to adjustment for any Work which is the subject of Allowances, except as otherwise expressly set out in this Agreement.
- (i) Prior to fixing the Allowances under Section 11.12.1(d)(ii), Non-Profit Entity shall keep detailed records of the quantities, units, or other agreed metrics with respect to the Allowances and shall submit to City supporting documentation of such quantities as part of its monthly progress reports, and such other information as City may require, in its sole discretion.
- (j) Notwithstanding that the Allowances have been developed for specific elements of the D&C Work, prior to fixing the Allowances under Section 11.12.1(d)(ii), City, in its sole discretion, may elect to use some or all of any Allowance as a source of payment for D&C Work for which Non-Profit Entity may be entitled under another Allowance or in connection with a Compensable Delay Event.
- (k) No Change Order is required to complete Work within any Allowance and Non-Profit Entity may use the initial Allowances prior to fixing the Allowances under Section 11.12.1(d)(ii).

11.12.2 Office/Admin and Training Spaces FF&E Allowance

Non-Profit Entity shall be eligible to use the Office/Admin and Training Spaces FF&E Allowance to address City-approved Office/Admin and Training Spaces FF&E, as set forth herein.

- (a) The Office/Admin and Training Spaces FF&E Allowance shall be in an initial amount of \$6,220,000 and subject to adjustment under Section 11.12.1(d).
- (b) The Office/Admin and Training Spaces FF&E Allowance shall be used for design, procurement, purchase and installation of Office/Admin and Training Spaces FF&E.
- (c) For all Office/Admin and Training Spaces FF&E, prior to 50% Conceptual Design as described in Section 1.8.5 (Proprietary Design Review) of Division 1 of the Technical Requirements Non-Profit Entity shall obtain at least three arms-length competitive price quotes (or, if Non-Profit Entity believes it is impractical to obtain such number of competitive price quotes, Non-Profit Entity may submit a request for waiver or modification of the competitive price quote requirement to City, which shall consider such request in its good faith discretion).
- (d) This Section 11.11.2 (Office/Admin and Training Spaces FF&E Allowance) shall not apply to, and the Office/Admin and Training Spaces FF&E Allowance shall not be useable for, repair and replacement of Office/Admin and Training

Spaces FF&E that is damaged, defective or missing prior to Substantial Completion.

11.12.3 City-Furnished IT/Comms Allowance

City shall be eligible to (i) draw against the City-Furnished IT/Comms Allowance for City-Furnished IT/Comms FF&E; or (ii) direct Non-Profit Entity to procure and install such FF&E in which case Non-Profit Entity shall be eligible to invoice against the Office/Admin and Training Spaces FF&E Allowance to address City-approved Office/Admin and Training Spaces FF&E, each as set forth herein.

- (a) The City-Furnished IT/Comms Allowance shall be in an initial amount of \$2,850,000.
- (b) The City-Furnished IT/Comms Allowance is to be used for City-Furnished IT/Comms FF&E.

11.12.4 Intentionally Omitted.

11.12.5 Underground Existing PG&E Power Line Allowance

The Party making payment to PG&E for the Underground Existing PG&E Power Line Work shall be eligible to use the Underground Existing PG&E Power Line Allowance as set forth herein.

- (a) The Underground Existing PG&E Power Line Allowance shall be in an initial amount of \$2,624,043 and subject to adjustment under Section 11.12.1(d).
- (b) The Underground Existing PG&E Power Line Allowance is to be used for payment for PG&E's portion of the Underground Existing PG&E Power Line Work costs and expenses.
- (c) The Underground Existing PG&E Power Line Allowance shall also be subject to adjustment if PG&E incurs additional direct costs to perform PG&E's portion of such work for which PG&E is entitled to payment pursuant to the agreement for such work between Non-Profit Entity and PG&E (or an agreement for such work between City and PG&E, if applicable).

11.12.6 New PG&E Service Allowance

Non-Profit Entity and City (to the extent City is making payment for PG&E's portion of the New PG&E Service costs) shall be eligible to use the New PG&E Service Allowance as set forth herein.

- (a) The New PG&E Service Allowance shall be in an initial amount of \$13,869,877 and subject to adjustment under Section 11.12.1(d).
- (b) The New PG&E Service Allowance is to be used for New PG&E Service costs and expenses.
- (c) The New PG&E Service Allowance shall also be subject to adjustment if PG&E incurs additional direct costs to perform PG&E's portion of such work

for which PG&E is entitled to payment pursuant to the agreement for such work between PG&E and City.

11.12.7 Exterior OCS Work Allowance

Non-Profit Entity shall be eligible to use the Exterior OCS Work Allowance as set forth herein.

- (a) The Exterior OCS Work Allowance shall be in an initial amount of \$8,040,000 and subject to adjustment under Section 11.12.1(d).
- (b) The Exterior OCS Work Allowance is to be used for cost and expenses for Work associated with the temporary removal and new OCS installation outside of the Project Site.

11.12.8 Partnering Allowance

Non-Profit Entity shall be eligible to use the Partnering Allowance, as set forth herein.

- (a) The Partnering Allowance shall be in an initial amount of \$250,000 and subject to adjustment under Section 11.12.1(d).
- (b) The Partnering Allowance is to be used for Partnering costs and expenses incurred by the City and PPC.

11.12.9 Interior OCS Work Allowance

Non-Profit Entity shall be eligible to use the Interior OCS Work Allowance as set forth herein.

- (a) The Interior OCS Work Allowance shall be in an initial amount of \$18,000,000 and subject to adjustment under Section 11.12.1(d).
- (b) The Interior OCS Work Allowance is to be used for Interior OCS Work costs and expenses.
- (c) For all Interior OCS Work to be paid for by the Interior OCS Work Allowance (excepting design work relating thereto), upon 100% DD obtain, or cause its electrical Contractor to obtain, at least three arms-length competitive price proposals and present them to the City (or, if Non-Profit Entity reasonably believes it is commercially impractical to obtain such number of competitive price proposals, Non-Profit Entity may submit a request for waiver or modification of the competitive price proposal requirement to City, which shall consider such request in its good faith discretion).

11.13 Allowance Accounts

11.13.1 Allowance Accounts Generally

On or before the Financial Close Date, Non-Profit Entity shall establish with the Collateral Agent allowance accounts for each of the Allowances set forth in Section 11.12.2 through Section 11.12.8 (each an “**Allowance Account**”) and shall fund each Allowance Account in the amounts set forth above. Non-Profit Entity shall provide to City the details regarding the Allowance

Accounts, including the names, addresses, and contact information for the Collateral Agent and the account numbers, as well as confirmation and evidence of City's security interest created pursuant to this Section. Changes in an Allowance Account shall require City prior approval other than with respect to changes to the names, addresses, and contact information for the Collateral Agent and the account numbers, which shall only require Notice to City. The effective date of such change shall apply immediately upon City approval or written Notice, as applicable. City shall have a priority perfected security interest in each Allowance Account, and the right to receive monthly account statements directly from the Collateral Agent. Non-Profit Entity shall deliver such notices to the Collateral Agent and shall execute such documents as may be required to establish and perfect City's interest in the Allowance Accounts under the Uniform Commercial Code as adopted in the State. Any interest earned on funds held in the Allowance Accounts shall be earned on behalf of Non-Profit Entity, and Non-Profit Entity shall be entitled to draw on such interest earned to pay Project costs without notice to City (other than pursuant to the disbursement process set forth in this Section 11.13.3); provided, however, that all accrued interest remaining in the Allowance Accounts upon the earlier of the Early Termination Date (if applicable) and the Substantial Completion Date, shall be the property of City and distributed pursuant to Section 11.13.4.

11.13.2 Disbursements from Non-Profit Entity Allowance Accounts

The disbursement process applicable to the Non-Profit Entity Allowance Accounts is as follows:

- (a) Except as set forth in Section 11.13.3 or Section 11.13.4 with respect to disbursements to City, Non-Profit Entity shall provide City with written notice of any request to withdraw funds from any of the Allowance Accounts (an "**Allowance Account Disbursement Notice**"). As part of such written notice, Non-Profit Entity shall provide City with the LTA's approval of the D&C Contractor's applicable payment application evidencing the D&C Work completed that is the subject of the Allowance Account Disbursement Notice that is being submitted.
- (b) Subject to Section 11.13.2(c), the LTA's approval the D&C Contractor's applicable payment application will be accepted by City for purposes of disbursements from the Allowance Accounts, provided that the LTA has exercised reasonable skill and care in determining the value of work done and associated payment amount, and will not be subject to further rights of approval of or modification by City.
- (c) City shall, within ten (10) Business Days of a receipt of an Allowance Account Disbursement Notice, advise Non-Profit Entity, in writing, whether City disputes any amount in such notice (a "**City Allowance Account Dispute Determination**"). City may only dispute an Allowance Account Disbursement Notice if it reasonably believes that the LTA did not exercise the requisite skill and care provided in Section 11.13.2(b). Such dispute and payment shall be subject to resolution under the Contract Dispute Procedures. If City does not timely provide Non-Profit Entity a City Allowance Account Dispute Determination, City shall be deemed to have not disputed such Allowance Account Disbursement Notice.

- (d) If City does not dispute an Allowance Account Disbursement Notice under Section 11.13.2(c), Non-Profit Entity shall submit to the Collateral Agent (with a copy to City) the Allowance Account Disbursement Notice and the Collateral Agent shall disburse funds from the Allowance Accounts in accordance with the Financing Documents.

11.13.3 Disbursement from City-Furnished IT/Comms Allowance and Partnering Allowance

- (a) If City elects to invoice against the City-Furnished IT/Comms Allowance for City-Furnished IT/Comms FF&E or against the Partnering Allowance, it may do so and receive a disbursement from such Allowance Accounts without written approval from Non-Profit Entity upon written notice to the Collateral Agent (with a copy to Non-Profit Entity). If City directs Non-Profit Entity to procure and install such FF&E, the disbursement process set forth in Section 11.13.2 shall apply.
- (b) To the extent that City makes payment to PG&E for PG&E's portion of the Underground Existing PG&E Power Line Work costs pursuant to Section 11.12.5, City may invoice against the Underground Existing PG&E Power Line Allowance and receive a disbursement from such Allowance Account without written approval from Non-Profit Entity upon written notice to the Collateral Agent (with a copy to Non-Profit Entity).
- (c) To the extent that City makes payment to PG&E for PG&E's portion of the PG&E New Service costs pursuant to Section 11.12.6, City may invoice against the PG&E New Service Allowance and receive a disbursement from such Allowance Account without written approval from Non-Profit Entity upon written notice to the Collateral Agent (with a copy to Non-Profit Entity).

11.13.4 Release of Unused Allowance Account Amounts

Upon the earlier of the Early Termination Date (if applicable) and the Substantial Completion Date, all amounts in the Allowance Accounts, including any accrued interest, shall be drawn and retained by City as its sole property, excluding any amounts that have not yet been disbursed but are payable to Non-Profit Entity pursuant to this Section 11.13 for completed D&C Work at such time.

ARTICLE 12. CITY CHANGE PROCESS; UNILATERAL CHANGE ORDERS; DEVIATIONS

12.1 General

Exhibit 9 (Change Procedures) sets out the process with respect to (a) Change Orders issued by City following a Proposed Change Order request by City; (b) Unilateral Change Orders unilaterally issued by City; and (c) Change Orders issued by City following a NPE Change Request.

12.2 City Changes

12.2.1 Subject to Section 12.2.2 and in accordance with the procedure set forth in Exhibit 9 (Change Procedures), City may at any time make changes to the Work, including additions or reductions in the scope of the D&C Work, or changes to the requirements applicable to the Work, as it may direct in its sole discretion (each, a “**City Change**”).

12.2.2 Non-Profit Entity shall not be required to implement any City Change to the extent the City Change would:

- (a) result in a breach of Law, a breach of Good Industry Practice or a breach of any conditions of a Regulatory Approval or revocation of any Regulatory Approval;
- (b) require a new Regulatory Approval which would not be reasonably obtainable;
- (c) render any Insurance Policy void or voidable;
- (d) materially and adversely affect the health and safety of any person; or
- (e) materially and adversely affect the nature of the Project as a whole, such that the City Change would constitute a cardinal change under California law.

Non-Profit Entity acknowledges that a City Change relating to the HCC would not fall under clause (e).

12.3 Bonds and Insurance for Change Orders

If the cost of the D&C Work is increased in connection with a Change Order, City may require a corresponding proportionate increase in the amount of insurance and/or any D&C Performance Security, new D&C Performance Security, or alternative security to cover the Change Order work and increase in cost.

ARTICLE 13. GENERAL PROVISIONS APPLYING TO DELAY EVENTS

13.1 Interface with HCC

Without derogating from City's covenant in Section 7.15, Non-Profit Entity acknowledges and agrees that, to the extent any NPE-Related Entity is involved in the development, design and construction of the HCC, then:

- (a) any interference or delay in the performance of the D&C Work or damage affecting the Infrastructure Facility, in each case, caused in whole or in part by such NPE-Related Entity, shall be entirely Non-Profit Entity's responsibility and liability;
- (b) Non-Profit Entity shall not make any Claim for, and shall not receive or be entitled to, any additional compensation, time extensions, or relief from its obligations under this Agreement for any delay, additional costs, or failure to perform due to Losses, interference, delay, or damage caused in whole or in part by or in any way related to the HCC;
- (c) City shall have no liability or responsibility to Non-Profit Entity for any Losses, interference, delay, or damage incurred or suffered by Non-Profit Entity or any NPE-Related Entity with respect to the Infrastructure Facility, including the D&C Work, that is in any way related to or arising out of the HCC; and
- (d) City shall continue to enforce all of City's rights and remedies under this Agreement in circumstances where Non-Profit Entity cannot perform its obligations hereunder due to any Losses, interference, delay, or damage, to the extent caused by any NPE-Related Entity in connection with the HCC, including City's rights to assess and collect D&C Period Deductions, declare a NPE Default, declare a Persistent NPE Default and terminate this Agreement.

13.2 Delay Event Process

13.2.1 If a Delay Event occurs, subject to the limitations and exclusions provided in this Agreement, Non-Profit Entity may seek additional compensation, time extension, and/or other relief, if applicable, in accordance with the entitlements specified in Article 14 (Compensation and Other Relief for Delay Events).

13.2.2 The agreement of the Parties as to the specific compensation, time extension, or other relief to be given Non-Profit Entity on account of a Delay Event shall be evidenced by a written amendment or Change Order to this Agreement.

13.2.3 Either Party may initiate the Contract Dispute Procedures if:

- (a) the Parties are unable to agree as to the specific compensation, time extension, or other relief to be given Non-Profit Entity on account of an alleged Delay Event; or
- (b) City rejects the Delay Event claim.

13.3 Mitigation

13.3.1 If a Delay Event or any other event occurs as a result of which Non-Profit Entity considers that it is entitled to claim an extension of time, compensation or relief from performance of its obligations under this Agreement (together “**Relevant Events**”), then Non-Profit Entity shall, and shall require all NPE-Related Entities to, use and continue to use commercially reasonable efforts to:

- (a) Eliminate or mitigate the liability, Losses, schedule impact and other consequences of such event upon the performance of its obligations under this Agreement, including by re-sequencing, rescheduling, reallocating or redeploying Non-Profit Entity forces to other work, as appropriate;
- (b) Continue to perform and remain liable and responsible for its obligations under this Agreement notwithstanding the Relevant Event; and
- (c) Resume performance of its obligations under this Agreement affected by the Relevant Event as soon as practicable and in no event later than promptly after the cessation of the Relevant Event.

13.3.2 To the extent that Non-Profit Entity does not comply with its obligations under this Section 13.3 (Mitigation), then Non-Profit Entity’s entitlement to claim an extension of time, compensation or relief from performance of its obligations under this Agreement with respect to the Relevant Event will be reduced to the extent of such failure.

13.4 Deductions for Relevant Events

The compensation payable to Non-Profit Entity with respect to any Relevant Event will be reduced by:

- (a) any amount which a NPE-Related Entity recovers under any Insurance Policy, or would have recovered if it had complied with the requirements of this Agreement in respect of any Insurance Policy in respect of the Relevant Event, which amount, for greater certainty, will not include any excess or deductibles or any amount over the maximum amount insured under any such Insurance Policy; and
- (b) the amount of any Extra Work Costs, other direct costs and margins calculated in accordance with Exhibit 13 (Costs Schedule) avoided or otherwise reduced as a result of the Relevant Event.

13.5 Acts of a NPE-Related Entity

Non-Profit Entity’s entitlement to claim an extension of time, compensation or relief from performance of its obligations under this Agreement with respect to any Relevant Event will be reduced to the extent the Relevant Event arises out of, relates to or was caused or contributed to by the acts or omissions of any NPE-Related Entity or any NPE Fault.

13.6 Notification; Delay in Notification

Non-Profit Entity shall provide Notice as provided in Section 14.1.1 (Claim for Delay Event) with respect to Delay Events and as provided in accordance with this Agreement with respect to all other Relevant Events.

13.7 Multiple and Overlapping Claims

Non-Profit Entity may make multiple but not duplicative Claims with respect to a Relevant Event.

13.8 Burden of Proof and Mitigation

Non-Profit Entity bears the burden of proof in establishing (a) the occurrence of a Relevant Event and (b) the entitlement to, and amount of, relief for such Relevant Event, including demonstrating that Non-Profit Entity complied with its mitigation obligations under Section 13.3 (Mitigation).

13.9 Sole Entitlement

Non-Profit Entity acknowledges and agrees that:

- (a) Subject to the express terms of this Agreement, the Milestone Payments, Substantial Completion Development Fee and Availability Payments constitute full compensation for performance of all of the Work; and
- (b) Non-Profit Entity's sole right to claim an extension of time, compensation or relief from performance of its obligations under this Agreement or otherwise make any Claim for any liability in connection with a Delay Event is as set out in Article 13 (General Provisions Applying to Delay Events) and Article 14 (Compensation and Other Relief for Delay Events).

13.10 Compensation

City will pay the compensation due to Non-Profit Entity under Article 13 (General Provisions Applying to Delay Events) and Article 14 (Compensation and Other Relief for Delay Events) in accordance with Exhibit 13 (Costs Schedule).

13.11 Waiver

As a condition precedent to City's obligation to pay any compensation, grant an extension of time or provide any other relief to fully resolve or address a Delay Event, Non-Profit Entity shall, unless the Parties otherwise agree in writing, execute a full, unconditional, irrevocable waiver and release, in favor of and in a form reasonably acceptable to City, of any other Claims, Losses or rights to relief arising out of such Delay Event that is not the subject of a Contract Dispute.

ARTICLE 14. COMPENSATION AND OTHER RELIEF FOR DELAY EVENTS

14.1 Relief During the D&C Period

This Section 14.1 (Relief During the D&C Period) sets out Non-Profit Entity's sole entitlement to an extension of time, Extra Work Costs, Financing Delay Costs and Delay Costs (as applicable) as a result of Delay Events. Non-Profit Entity's entitlement to relief and compensation under this Section 14.1 (Relief During the D&C Period) is subject to the limitations on compensation in Section 6.3.8 (Major Approval Delay) in the case of Major Approval Delay, Section 7.6.9 (Inaccurate Utility Information) in the case of Inaccurate Utility Information, Section 7.6.13 (Major Utility Adjustments) in the case of Major Utility Adjustments, Section 7.6.16 (Claims for Unidentified Offsite Utilities) in the case of Unidentified Early Offsite Utility Delay or Unidentified Late Offsite Utility Delay (as applicable), Section 7.6.17 (PG&E Offsite Utility Delays) in the case of PG&E Offsite Utility Delays, Article 13 (General Provisions Applying to Delay Events and Relief Events), Exhibit 13 (Costs Schedule), and this Agreement.

14.1.1 Claim for Delay Event

14.1.1.1 Non-Profit Entity shall provide Notice to City's Authorized Representative within 30 days of obtaining Actual Knowledge of the occurrence of Delay Event (or, if earlier, on such date that Non-Profit Entity should have discovered such Delay Event if Non-Profit Entity was in full compliance with the terms of the Contract Documents). Failure to do so shall result in a waiver of and forfeiture of any relief, compensation or time extension related to the event or occurrence.

14.1.1.2 Non-Profit Entity shall, within 10 Business Days after such initial Notice, provide further details to City's Authorized Representative, which shall, to the extent Non-Profit Entity has obtained Actual Knowledge, include:

- (a) A summary of the provisions of this Agreement that entitle Non-Profit Entity to relief. If Non-Profit Entity seeks relief for City's alleged breach of this Agreement, then Non-Profit Entity shall identify the provisions of this Agreement which allegedly have been breached and the actions or failures to act constituting such breach;
- (b) Details of the Delay Event, the circumstances from which the Delay Event arises including its nature, the date of its occurrence, its duration (to the extent that the Delay Event and the effects thereof have ceased or estimated duration to the extent that the Delay Event and the effects thereof have not ceased), the portions of the Infrastructure Facility affected;
- (c) Details of the contemporary records which Non-Profit Entity shall maintain to substantiate its claim for extra time and the substance of any oral communications, if any, relating to the Delay Event and the name of the person or persons making such material oral communications;
- (d) Analysis of consequences (whether direct or indirect, financial or non-financial) the Delay Event may have upon achieving the Substantial Completion Date or the Final Acceptance Date, as applicable, including a TIA indicating all activities represented or affected by the change, with activity

numbers, durations, predecessor and successor activities, resources and cost, and with a narrative report, in form satisfactory to City, which compares the proposed new schedule to the Project Schedule, as appropriate. Non-Profit Entity shall reschedule activities not otherwise affected by the event, in order to take advantage of additional Float available as the result of the time extension. Any such rescheduling shall be reflected in the Project Schedule;

- (e) Where the Delay Event is also a Compensable Delay Event, an itemized estimate of all amounts claimed under Section 14.1.1 (Claim for Delay Event). Extra Work Costs and Delay Costs (as applicable) and Financing Delay Costs shall be broken down in accordance with Exhibit 13 (Costs Schedule);
- (f) Where this Agreement expressly allows for compensation for Delay Costs, an itemized estimate of all amounts claimed (and the Section of the Agreement authorizing such Delay Costs), computed using the full days of the claimed delay multiplied by the Daily Delay Cost Amount or portion of the Daily Delay Cost Amount allowed under this Agreement;
- (g) Where the Delay Event is also an Unavoidable Delay Event, an itemized estimate of any Financing Delay Costs claimed under Sections 14.1.6 or 14.1.7 (Additional Limits Relating to Force Majeure Events or Unavoidable Delay Events During D&C Period) broken down in accordance with Exhibit 13 (Costs Schedule);
- (h) The type and amount of insurance that may be applicable and amounts that have been or are anticipated to be collected under such insurance; and
- (i) Details of any measures that Non-Profit Entity has taken to date and proposes to adopt to mitigate the consequences of such Delay Event in accordance with Section 13.3 (Mitigation).

14.1.1.3 Within 7 days of Non-Profit Entity receiving, or becoming aware of, any supplemental information which may further substantiate or support Non-Profit Entity's Claim, Non-Profit Entity shall submit further particulars based on such information to City's Authorized Representative.

14.1.1.4 City's Authorized Representative shall, after receipt of details under Section 14.1.1.2, or of further particulars under Section 14.1.1.3, be entitled by Notice to Non-Profit Entity to require that Non-Profit Entity provide such further supporting particulars as City's Authorized Representative may reasonably consider necessary. Non-Profit Entity shall provide City's Authorized Representative full access and facilities for investigating and assessing the validity of Non-Profit Entity's Claim, including, on-site inspection.

14.1.1.5 Non-Profit Entity shall provide City with monthly updates, together with further details and supporting documentation, as it receives or develops additional information pertaining to the Delay Event and the matters described in Section 14.1.1.2. Without limiting the foregoing, Non-Profit Entity shall notify City as soon as the Delay Event has ceased and when performance of its affected obligations can be resumed.

14.1.2 Extension of Deadlines for Delay Events

14.1.2.1 Except as provided in Section 14.1.3, upon the occurrence of a Delay Event, Non-Profit Entity shall be entitled to an extension of the Contract Deadlines equal to the delay to the Critical Path directly caused by the Delay Event.

14.1.2.2 City's Authorized Representative shall determine revised Contract Deadlines arising out of a Delay Event, as soon as reasonably practicable and in any event within 30 days of the later of:

- (a) The date of receipt by City's Authorized Representative of Non-Profit Entity's Notice given in accordance with Section 14.1.1.1 and the date of receipt of any further particulars (if such are required under Section 14.1.1.2 or Section 14.1.1.3), whichever is later; and
- (b) The date of receipt by City's Authorized Representative of any supplemental information supplied by Non-Profit Entity in accordance with Section 14.1.1.3 (if such are required under Section 14.1.1.4), whichever is later.

14.1.3 Concurrent Delays

- (a) If Non-Profit Entity has made a Claim for an extension of time in accordance with Section 14.1.2 (Extension of Deadlines for General Delay Events) which is caused by City Fault and there is another unrelated delay to a Critical Path for which a NPE-Related Entity is responsible under this Agreement, Non-Profit Entity shall remain entitled to an extension of time to the Substantial Completion Deadline or Final Acceptance Deadline, as applicable, in accordance with, and subject to, Section 14.1.2 (Extension of Deadlines for General Delay Events), but shall not be entitled to any compensation or monetary relief associated with such extension of time or Claim.
- (b) Subject to Section 14.1.3(c), if Non-Profit Entity has made a Claim for an extension of time in accordance with Section 14.1.2 (Extension of Deadlines for General Delay Events) which is not caused by City Fault and there is another unrelated delay to a Critical Path for which a NPE-Related Entity is responsible under this Agreement, Non-Profit Entity shall not be entitled to an extension of time to the Substantial Completion Deadline or Final Acceptance Deadline, as applicable, to the extent and for so long as the Delay Event is concurrent with any other unrelated delay to a Critical Path for which any NPE-Related Entity is responsible under this Agreement.
- (c) If two PG&E Offsite Utility Delays occur that are concurrent with each other but are not concurrent with any other delay, then the period of concurrent delay shall be considered a PG&E Offsite Utility Delay. If two Major Utility Adjustment Delays occur that are concurrent with each other but are not concurrent with any other delay, then the period of concurrent delay shall be considered a Major Utility Adjustment Delay.

14.1.4 Costs Payable for Compensable Delay Events

Subject to the limitations on compensation in Article 13 (General Provisions Applying to Delay Events), this Section 14.1 (Relief During the D&C Period) and Exhibit 4 (Payment Mechanism), if a Compensable Delay Event occurs, City shall reimburse Non-Profit Entity for:

- (a) Extra Work Costs calculated in accordance with Exhibit 13 (Costs Schedule) directly attributable to the Compensable Delay Event (excluding Major Approval Delay, Major Utility Adjustment Delay and PG&E Offsite Utility Delay);
- (b) Delay Costs:
 - (i) calculated at the Daily Delay Cost Amount for each full day of delay for which an extension of time is granted under Section 14.1.2 (Extension of Deadlines for General Delay Events) for a City-Caused Delay Event;
 - (ii) calculated at 50% of the Daily Delay Cost Amount for each full day of delay for which an extension of time is granted under Section 14.1.2 (Extension of Deadlines for General Delay Events) for Inaccurate Utility Information, Unidentified Early Offsite Delay Events or Unidentified Late Offsite Utility Delay(as applicable);
 - (iii) calculated at the Daily Delay Cost Amount for each full day of delay beyond the Major Approval Deadline in the case of a Major Approval Delay for which an extension of time is granted under Section 14.1.2 (Extension of Deadlines for General Delay Events);
 - (iv) calculated at 50% of the Daily Delay Cost Amount for each full day of delay beyond the beyond the Major Utility Adjustment Deadline in the case of a Major Utility Adjustment Delay for which an extension of time is granted under Section 14.1.2 (Extension of Deadlines for General Delay Events);
 - (v) calculated at 50% of the Daily Delay Cost Amount for each full day of delay beyond the beyond the PG&E in the case of a PG&E Offsite Utility Delay for which an extension of time is granted under Section 14.1.2 (Extension of Deadlines for General Delay Events);
 - (vi) calculated at 50% of the Daily Delay Cost Amount for each full day of delay for which an extension of time is granted under Section 14.1.2 (Extension of Deadlines for General Delay Events) for an event covered by clause (p) of the definition of "Compensable Delay Event"; and
- (c) Financing Delay Costs calculated in accordance with Exhibit 13 (Costs Schedule) but only where an extension of time is granted under Section 14.1.2 (Extension of Deadlines for General Delay Events) for the Compensable Delay Event and Non-Profit Entity is unable to achieve Substantial Completion by the original Substantial Completion Deadline.

14.1.5 Additional Limits Relating to Hazardous Materials Event During D&C Period

If a Delay Event is a Hazardous Materials Event, no compensation or time relief shall be provided for ((i) once Non-Profit Entity obtains Actual Knowledge of the Hazardous Materials (or should have discovered such Hazardous Materials if Non-Profit Entity was in full compliance with the terms of the Contract Documents), any Hazardous Materials that could have been reasonably avoided by use of available construction techniques or incorporation of anticipated or minor design changes which are consistent with Good Industry Practice; (ii) once Non-Profit Entity obtains Actual Knowledge of the Hazardous Materials (or should have discovered such Hazardous Materials if Non-Profit Entity was in full compliance with the terms of the Contract Documents, including by performing a Reasonable Investigation), any Hazardous Materials encountered, to the extent Non-Profit Entity is required and failed to manage or mitigate against the risk of such Hazardous Materials in accordance with this Agreement; and (iii) once Non-Profit Entity obtains Actual Knowledge of the Hazardous Materials (or should have discovered such Hazardous Materials if Non-Profit Entity was in full compliance with the terms of the Contract Documents, including by performing a Reasonable Investigation), any Hazardous Materials encountered, to the extent a contractor, acting in accordance with Good Industry Practice, would have taken preventative measures to prevent or minimize such Hazardous Materials, and Non-Profit Entity has failed to take such preventative measures. With respect to Extra Work Costs, Non-Profit Entity's entitlement to compensation for a Hazardous Materials Event shall be limited to Extra Work performed under the City-approved plans required to be provided under Section 01 35 44 of Division 10 of the Technical Requirements, and as otherwise limited in accordance with Section 7.7 (Hazardous Materials Management; Risk Allocation).

14.1.6 Costs Payable for Force Majeure Events During the D&C Period

14.1.6.1 If a Delay Event for which an extension of time was granted under Section 14.1.2 (Extension of Deadlines for General Delay Events) is:

- (a) a Force Majeure Event; and
- (b) the Force Majeure Event is not insured against and is not required to be insured against in accordance with this Agreement,

City will reimburse Non-Profit Entity for Financing Delay Costs (if any) and any Extra Work Costs, if any, authorized pursuant to a Change Order under Section 14.6 (Loss or Damage Due to Force Majeure Termination Event).

14.1.6.2 In addition, if (i) Non-Profit Entity is unable to perform all or substantially all of its obligations under the Contract Documents for a period of 180 consecutive days or more; and (ii) such inability to perform its obligations is not attributable to a concurrent non-Force Majeure Termination Event, City will reimburse Non-Profit Entity for Delay Costs incurred after such 180 day period until 255 days after the occurrence of such Force Majeure Termination Event, after which Section 17.2 (Termination for Force Majeure Termination Events or Insurance Unavailability) applies.

14.1.6.3 In addition, if (i) the Force Majeure Event is not insured against and is not required to be insured against in accordance with this Agreement; (ii) the Force Majeure Event causes damage to the D&C Work; (iii) City issues a Change Order requiring Non-Profit Entity to repair

and reconstruct the D&C Work in light of the Force Majeure Event; and (iv) the repair and reconstruction of the D&C Work results in an extension of time under Section 14.1.2, City will reimburse Non-Profit Entity for Delay Costs incurred during the time extension.

14.1.7 Costs Payable for Unavoidable Delay Events During the D&C Period

If a Delay Event for which an extension of time was granted under Section 14.1.2 (Extension of Deadlines for General Delay Events) is an Unavoidable Delay Event, City will reimburse Non-Profit Entity for Financing Delay Costs (if any), such reimbursement to be Non-Profit Entity's sole entitlement to compensation for such Unavoidable Delay Event.

14.1.8 Impact of Delay Event on Performance of D&C Work

14.1.8.1 Any failure by Non-Profit Entity to perform the D&C Work during the D&C Period, to the extent directly arising out of any Delay Event, will:

- (a) not constitute a breach of this Agreement by Non-Profit Entity;
- (b) not result in accrual of D&C Noncompliance Points or D&C Period Deductions with respect to any Delay Event;
- (c) relieve Non-Profit Entity of its obligations to perform such directly affected D&C Work for the duration and to the extent directly prevented by such Delay Event; and
- (d) not result in a Non-Profit Entity Default or right of termination or other claim by City, other than either Party's right to terminate this Agreement under Section 17.2 (Termination for Force Majeure Events or Insurance Unavailability).

14.1.8.2 Notwithstanding Section 14.1.7 (Impact of Delay Event on Performance of D&C Work), Non-Profit Entity shall remain fully responsible for performance of all elements of the D&C Work not directly impacted or affected by any Delay Event.

14.1.9 Relief for Adverse Weather Event and AQI Event

14.1.9.1 The occurrence of Adverse Weather alone shall not be a prima facie reason for an Adverse Weather Event, and Non-Profit Entity shall use commercially reasonable efforts to continue to work under prevailing conditions. Such efforts by Non-Profit Entity shall include: providing temporary gravel roads; installing a rain dewatering system; protecting interior and exterior areas exposed to rain, wind, and extreme temperatures; and providing temporary heat where required for Work to proceed without delay.

14.1.9.2 Non-Profit Entity shall plan the D&C Work to allow for 17 days of Adverse Weather and AQI Events, in the aggregate, per year during normal working hours. The Project Schedule shall incorporate 17 days per year for the anticipated number of days of Adverse Weather and AQI Events. As used in this Section 14.1.8.2, "year" shall mean the period measured between May 1-April 30 of each calendar year during the D&C Period. If the D&C Period commences or

ends during a partial year, the foregoing 17-day period shall be prorated and rounded up to the nearest day.

14.1.9.3 Non-Profit Entity shall not be entitled to a time extension or relief from its obligations under this Agreement as an Unavoidable Delay for Adverse Weather or an AQI Event until the 18th day of occurrence of Adverse Weather and/or AQI Event in a year, or such lesser applicable amount for any prorated year, as determined pursuant to Section 14.1.8.2.

14.1.9.4 If there are years with less days of Adverse Weather or AQI Events than 17 days in the aggregate, or such lesser applicable amount for any prorated year, as determined pursuant to Section 14.1.8.2, the unused days shall be rolled into Float.

14.1.10 Relief for Tariff Event

14.1.10.1 The Parties acknowledge that one or more Tariff Materials may be subject to Tariff Events and it is the intent of the Parties that the cost impact of such Tariff Events for the Project be determined as provided for in this Section 14.1.10.

14.1.10.2 If a Tariff Event occurs before the earlier of the (i) date on which the Non-Profit Entity issues payment to the supplier of the applicable Tariff Material; or (ii) applicable Tariff Exposure Date (clause (i) and (ii) together the “Tariff Material Buyout Date”) and such Tariff Event results in an increase or decrease in the applicable Tariff Index by more than 5% (positive or negative), City shall calculate the Tariff Event Compensation Amount as part of determining the amount, if any, payable as part of Milestone Payment 2. If the Tariff Event Compensation Amount is a positive number, Milestone Payment 2 shall be increased by such amount. If the Tariff Event Compensation Amount is a negative number, Milestone Payment 2 shall be decreased by such amount (and if Milestone Payment 2 is not sufficient to offset, Non-Profit Entity shall pay any excess Tariff Event Compensation Amount owing to City within 30 days after request therefor). The Parties acknowledge that a Tariff Material may be subject to several Tariff Events prior to the Tariff Material Buyout Date. It is the intent of the Parties that the collective impact of all such Tariff Events for the Project be determined as of the Tariff Material Buyout Date as set forth above and herein.

14.1.10.3 As set forth in Section 14.1.10.1 above, a Tariff Event may result in additional compensation (through the Tariff Event Compensation Amount) to Non-Profit Entity. Non-Profit Entity shall be responsible for maintaining detailed records in connection with each Tariff Event and Tariff Material (including purchase orders, supplier quotations, freight and import invoices, tariff duty statements, and payment records) and shall submit such records monthly as part of the monthly progress reports. To the extent that Non-Profit Entity fails to maintain or submit such records, Non-Profit Entity shall irrevocably waive and forfeit its entitlement to payment of any Tariff Event Compensation Amount (but shall remain liable for payment to City of any applicable Tariff Event Compensation Amount owing). To the extent applicable, the Tariff Event Compensation Amount payable to Non-Profit Entity shall be full and complete compensation to Non-Profit Entity for a Tariff Event and no other compensation or other relief shall be available to Non-Profit Entity for such Tariff Event. No time extension or schedule relief shall be provided in connection with a Tariff Event and the only relief applicable to tariffs (including with respect to a Tariff Event) shall be as set forth in this Section 14.1.10 in connection with a Tariff Event. No

other provision of the Contract Documents shall be utilized to seek compensation, schedule relief or any other relief in connection with a Tariff Event, Tariff Materials or tariffs generally.

14.1.10.4 In addition to Non-Profit Entity's obligations to minimize and mitigate potential claims and change orders pursuant to the Contract Documents, including Section 13, in connection with a Tariff Event, Non-Profit Entity shall immediately consult with City upon the occurrence of a Tariff Event about the opportunities and options to minimize the effect of the tariffs and Tariff Event and shall take affirmative action to advance materials and supplies procurement and consider potential replacement materials and supplies and sources of affected materials and supplies.

14.1.10.5 As part of that consultation and those efforts to minimize and mitigate pursuant to Section 14.1.10.3, Non-Profit Entity shall use commercially reasonable efforts to identify and propose one or more Substitute Tariff Materials that are Manufactured or substantially produced in a jurisdiction not subject to the applicable Tariff Event (or subject to a lower tariff), and available within a timeframe and quality consistent with the Critical Path. As part of any Claim for a Tariff Adjustment Amount, Non-Profit Entity shall (i) submit written evidence demonstrating that it actively evaluated and pursued Substitute Tariff Materials from alternate sources; (ii) providing detail as to the reasons such substitutes were technically or commercially infeasible, if applicable; and (iii) affirmatively stating that no viable Substitute Tariff Materials were available that met the requirements of the Contract without material delay or cost increase. The City shall have the right to approve or reject any proposed Substitute Tariff Material based on technical compatibility, schedule impact, cost, overall Project quality and compliance with the requirements of the Contract Documents.

14.2 Relief During Warranty Period

To the extent an event falling under clauses (a)-(b), (e)-(f), (i)-(k), (n)-(o), and (q)-(u) of the definition of "Compensable Delay Event", a Force Majeure Event, or vandalism that does not arise out of or relate to NPE Fault, occurs during the Warranty Period and prevents Non-Profit Entity from undertaking certain Warranty Work, the performance of such Warranty Work shall be temporarily excused and will not trigger any contractual deadlines, breaches or defaults under this Agreement relating to a failure to perform such Warranty Work until the earlier of (i) such time as such Warranty Work can be undertaken or (ii) the cessation or resolution of the Force Majeure Event. For avoidance of doubt, and notwithstanding the preamble to the definition of "Compensable Delay Events," for purposes of the preceding sentence events otherwise falling under the definition of Compensable Delay Event shall be considered the same notwithstanding that they occur during the Warranty Period after the Final Acceptance Date. No compensation shall be payable in connection with a Force Majeure Event, any such Compensable Delay Event or any other event occurring during the Warranty Period and temporary relief from performance shall be the sole relief available to Non-Profit Entity.

14.3 Method of Payment of Compensation for Compensable Delay Events

14.3.1 Additional compensation due for a Compensable Delay Event shall be paid in accordance with the terms of this Agreement, including Section 7.0 (Form and Timing of Compensation) of Exhibit 13 (Costs Schedule).

14.3.2 City shall provide Non-Profit Entity with prompt written Notice of the method chosen for paying Non-Profit Entity for the amounts owed under this Article 14 (Compensation and Other Relief for Delay Events).

14.3.3 If City elects to pay for such amounts by periodic payments, progress payments, milestone payments or a lump sum payment, Non-Profit Entity shall submit an invoice, in a format acceptable to City, for the amount of each such payment, and City will make payment of all undisputed amounts to Non-Profit Entity within 30 Business Days of receipt of a complete and proper invoice.

14.4 Open Book Basis

Non-Profit Entity shall share with City all data, documents and information, and shall conduct all discussions and negotiations, pertaining to any claimed Delay Event on an Open Book Basis.

14.5 Excavations; Public Contract Code 7104

Information regarding site conditions included in the Technical Requirements and Reference Documents (including any information, reports, or studies about site conditions, geotechnical conditions, Utilities or structure and bridge design, and any interpretations, extrapolations, analyses and recommendations contained therein) shall not be considered "indicated" therein as such term is used in Public Contract Code section 7104. Subject to the terms and conditions of the Contract Documents, Non-Profit Entity is responsible for investigating and satisfying itself as to the site conditions affecting the Project Site and the Work. Without prejudice to, derogating from or in any way waiving or modifying the rights and obligations of the Parties under the Contract Documents, to the maximum extent permitted by Law, Non-Profit Entity knowingly, unconditionally, irrevocably and specifically waives each and every right and benefit of Public Contract Code section 7104 to the extent that it may be inconsistent with any provision of the Contract Documents. Non-Profit Entity acknowledges and agrees that this waiver and the risk allocations set forth in the Contract Documents are a material consideration for City to award and enter into this Agreement with Non-Profit Entity.

14.6 Loss or Damage Due to Force Majeure Event During the D&C Period

14.6.1 If the D&C Work is wholly or substantially destroyed or damaged by a Force Majeure Event that occurs during the D&C Period and which:

- (a) is not insured against and either (A) is not required to be insured against in accordance with this Agreement or (B) is not insured against by reason of Insurance Unavailability; or
- (b) has been insured against in accordance with this Agreement but, prior to commencing repair, replacement or rebuilding, a reasonable estimate of the Extra Work Costs that would be incurred exceed(s) the coverage limits required by this Agreement,

and City requires Principal Project Company to repair, replace or rebuild (or to continue to repair, replace or rebuild) the D&C Work, then the Parties will use reasonable efforts to negotiate and agree on how the D&C Work will be repaired, replaced or rebuilt in accordance

with Exhibit 9 (Change Procedure) and the Extra Work Costs of doing so in accordance with Exhibit 13 (Costs Schedule).

14.6.2 The Parties' attempts to negotiate must not limit City's right to issue a Change Order or Unilateral Change Order in accordance with this Agreement or the Parties' right to terminate under Section 17.2 (Termination for Force Majeure Termination of Insurance Unavailability).

ARTICLE 15. D&C PERIOD DEDUCTIONS AND D&C NONCOMPLIANCE POINTS

15.1 D&C Failure Events

15.1.1 Appendix A of Exhibit 4A (Milestone Payment Mechanism) identifies certain D&C Failure Events applicable from the Effective Date until the end of the Warranty Period.

15.1.2 Intentionally Omitted.

15.1.3 Each D&C Noncompliance Event will result in either or both:

- (a) the assessment of D&C Noncompliance Points;
- (b) the assessment of D&C Period Deductions,

in each case in accordance with Exhibit 4A (Milestone Payment Mechanism).

15.2 D&C Period Deductions

15.2.1 In accordance with Exhibit 4 (Payment Mechanism) and Section 15.4, City may assess D&C Period Deductions (i) immediately for any D&C Failure Event for which no Rectification Time is specified in the D&C Failure Events Table; (ii) at the end of each Rectification Time or any additional Rectification Time for any D&C Failure Event if Non-Profit Entity has not Rectified the D&C Noncompliance Event; and.

15.2.2 Non-Profit Entity acknowledges that any D&C Period Deductions are reasonable liquidated damages under the circumstances existing at the Effective Date, to compensate City for:

- (a) City's increased costs of administering the Contract Documents, including any obligations to pay or reimburse Governmental Entities over the Project for their increased costs of monitoring and enforcing Non-Profit Entity's compliance with applicable Regulatory Approvals;
- (b) Intentionally Omitted;
- (c) potential harm to the public; and
- (d) potential harm to the credibility and reputation of City with stakeholders, policy makers and with the general public.

15.2.3 Non-Profit Entity further acknowledges that such increased costs and loss of revenue, credibility and reputation, would be difficult and impracticable to measure and prove, because, among other things, the costs of administering the Contract Documents prior to increases in the level thereof will be variable and extremely difficult to quantify and the variety of factors that influence use of and demand for the Infrastructure Facility and associated SFMTA services generally make it difficult to sort out causation and quantify the precise revenue loss attributable to the matters that will trigger these liquidated damages.

15.2.4 Except for other remedies expressly provided in this Agreement, including City's right to assess D&C Noncompliance Points and to be indemnified for Third Party claims, any D&C Period Deduction assessed in accordance with this Agreement shall constitute City's sole remedy in respect of City's damages arising from the D&C Noncompliance Event for which such D&C Period Deduction is assessed.

15.3 D&C Failure Event and D&C Noncompliance Event Reporting, Notification and Cure Process

15.3.1 Noncompliance Database

15.3.1.1 Non-Profit Entity shall establish and maintain an electronic database for recording and tracking D&C Failure Events and D&C Noncompliance Events (the "**Noncompliance Database**"). The format and design of the database shall be subject to City's approval, in its reasonable discretion. At a minimum, the database shall:

- (a) include a description of each D&C Failure Event in reasonable detail;
- (b) provide for automatic notification to City of the entry of a D&C Failure Event in the Noncompliance Database;
- (c) identify the location of the D&C Failure Event (if applicable);
- (d) identify the date and time of each D&C Failure Event;
- (e) Intentionally Omitted;
- (f) indicate date and time of Response and Rectification for any D&C Failure Event;
- (g) indicate when a D&C Noncompliance Event has developed; and
- (h) record the number of assessed D&C Noncompliance Points, the date of each assessment, and the date when the D&C Noncompliance Event is cured.

15.3.1.2 Non-Profit Entity shall provide City with full access to the Noncompliance Database at all times, including the ability to enter D&C Failure Events into the Noncompliance Database as provided in Section 15.3.2 (Notification Initiated by City).

15.3.1.3 Notification Initiated by Non-Profit Entity

As an integral part of Non-Profit Entity's self-monitoring obligations, Non-Profit Entity shall record in the Noncompliance Database, in real time and upon discovery, the occurrence of any D&C Failure Event specified in the D&C Failure Events Table.

15.3.2 Notification Initiated by City

If City believes a D&C Failure Event has occurred that Non-Profit Entity has not recorded in the Noncompliance Database, City may enter the D&C Failure Event into the Noncompliance Database or deliver to Non-Profit Entity a Notice of Determination as provided in Section

15.3.3.2 via the Noncompliance Database, and delivery shall be deemed given upon proper entry of the information into the Noncompliance Database.

15.3.3 Performance Reports

15.3.3.1 Non-Profit Entity shall include in each Monthly Report required under Section 1.2.4.1 of Division 1 a report of all D&C Failure Events and D&C Noncompliance Events that occurred during the preceding calendar month, which reports shall include the same detailed information required to be recorded in the Noncompliance Database. Non-Profit Entity shall correct any inaccuracies in reporting of D&C Failure Events, D&C Noncompliance Events and D&C Noncompliance Points, within 10 Business Days of City's notification to Non-Profit Entity of such inaccuracies.

15.3.3.2 Within a reasonable time after receiving the Monthly Report, City will deliver to Non-Profit Entity a Notice setting forth for each D&C Failure Event City's determination whether the D&C Failure Event was Responded to or Rectified (as applicable) during the applicable Rectification Time, City's determination whether a D&C Noncompliance Event occurred, and the D&C Noncompliance Points and D&C Period Deductions to be assessed with respect to such Noncompliance Event (a "**Notice of Determination**").

15.4 Assessment of D&C Noncompliance Points

15.4.1 Without duplication, City may assess D&C Noncompliance Points in accordance with this Section 15.4 (Assessment of D&C Noncompliance Points) and Appendix A (D&C Noncompliance Points and D&C Period Deductions) of Exhibit 4A (Milestone Payment Mechanism) upon the occurrence of D&C Noncompliance Events.

15.4.2 If, at any time, the Noncompliance Database or a Monthly Report indicates, or City is notified or otherwise obtains Actual Knowledge of, a D&C Failure Event or D&C Noncompliance Event, or City provides Non-Profit Entity with a Notice of Determination, then, without prejudice to any other right or remedy available to City, City may assess D&C Noncompliance Points, subject to the following terms and conditions:

- (a) except as provided in Section 15.4.2(b), City may assess D&C Noncompliance Points at each of the following times: (i) immediately for any D&C Failure Event for which no Rectification Time is specified in the D&C Failure Events Table; (ii) the end of the Response Time (if any) if Non-Profit Entity has not Responded to the D&C Noncompliance Event; and (iii) the end of each Rectification Time if Non-Profit Entity has not Rectified the D&C Noncompliance Event;
- (b) if City initiated Notice of a D&C Failure Event that becomes a D&C Noncompliance Event entitling City to assess D&C Noncompliance Points, and to the extent City has determined to assess D&C Noncompliance Points, City may allocate the applicable D&C Noncompliance Points at the commencement of the applicable Response Time or Rectification Time. If City and Non-Profit Entity deliver concurrent written Notices of the same D&C Failure Event, or concurrently seek to enter the details of the D&C Failure Event into the Noncompliance Database, Non-Profit Entity's Notice shall prevail, if complete and compliant;

- (c) the number of points listed in Appendix A to Exhibit 4A (Milestone Payment Mechanism) for any particular D&C Noncompliance Event is the maximum number of D&C Noncompliance Points that may be assessed for each event or circumstance that is a D&C Noncompliance Event. City may, in its sole discretion, assess less than the maximum; and
- (d) if a D&C Noncompliance Event continues beyond its relevant Response Time or Rectification Time (as applicable), if any, each subsequent Response Time or Rectification Time (as applicable), shall be treated as a new and separate D&C Noncompliance Event, without necessity for further Notice and D&C Noncompliance Points will continue to accrue for every additional Response Time or Rectification Time (as applicable), shall be treated as a new and separate D&C Noncompliance Event.

15.4.3 Regardless of the continuing assessment of D&C Noncompliance Points under this Section 15.4 (Assessment of D&C Noncompliance Points), City may exercise its step-in rights under Section 16.2.5 (City Step-in Rights) and, if applicable, its Work suspension rights under Section 16.2.8 (Suspension of Work), after expiration of the applicable Rectification Time.

15.5 Performance Notice

15.5.1 In addition to other remedies available under this Agreement, City may provide Non-Profit Entity, a Notice, indicating unsatisfactory performance and establishing the matters that give rise to such Notice, if the Performance Notice Threshold is reached (“**Performance Notice**”).

15.5.2 If a Performance Notice is given by the City, then:

- (a) Non-Profit Entity shall, within 20 days of receiving the Performance Notice, submit to the City a cure plan for review and approval in accordance with Exhibit 11 (Submittals Review Process) (“**Performance Cure Plan**”). The Performance Cure Plan will include reasons for the unsatisfactory performance and specific actions (including timeframes) to be taken by Non-Profit Entity to improve its performance.
- (b) The Parties shall consult to develop and agree the Performance Cure Plan within 10 days of Non-Profit Entity’s submittal of such plan; and
- (c) Following agreement or determination of the Performance Cure Plan, Non-Profit Entity shall implement and comply with the Performance Cure Plan and any failure to do so shall result in a second Performance Notice.

15.6 Increased Oversight

15.6.1 In addition to other remedies available under this Agreement, City may provide Non-Profit Entity, a Notice for increased Oversight, if the Increased Oversight Threshold is reached.

15.6.2 In addition to other remedies available under this Agreement, City may, by Notice to Non-Profit Entity direct Non-Profit Entity to increase its own oversight or change the type and/or

increase the level of City's Oversight of the Project, in such manner and to such level considered fit, if the Increased Oversight Threshold is reached.

15.6.3 If City changes the type or increases the level of its Oversight due to Non-Profit Entity reaching the Increased Oversight Threshold, then Non-Profit Entity shall pay and reimburse City, within 30 days after receipt of written demand and reasonable supporting documentation, all reasonable increased costs and fees City incurs in connection with such action, including City's Recoverable Costs.

15.6.4 If City directs Non-Profit Entity to increase its own oversight or changes the type or increases the level of its Oversight, then:

- (a) Non-Profit Entity shall, within 30 days of Notice submit to the City a cure plan for review and approval in accordance with Exhibit 11 (Submittals Review Process) ("**Increased Oversight Cure Plan**"). The Increased Oversight Cure Plan shall include specific actions (including timeframes) to be taken by Non-Profit Entity to improve its performance; and
- (b) the Parties shall consult to develop and agree to the Increased Oversight Cure Plan within 20 days of Non-Profit Entity's submittal of the Increased Oversight Cure Plan.

15.6.5 Non-Profit Entity's obligation to pay and reimburse City for increased Oversight costs shall apply to all changes in the type or increases in the level of City's Oversight occurring until Non-Profit Entity has:

- (a) implemented and complied with the Increased Oversight Cure Plan;
- (b) fully and completely cured the breaches and failures that gave rise to the Increased Oversight;
- (c) diligently pursued cure of all other D&C Failure Events; and
- (d) has accumulated less than 40 Noncompliance Points in the subsequent 90 days following notice of Increased Oversight.

15.7 Persistent NPE Default

15.7.1 In addition to other remedies available under this Agreement including Section 15.6, City may provide NPE with a Notice of Persistent NPE Default ("**Persistent NPE Default Notice**").

15.8 Cure Plan for Persistent NPE Default

15.8.1 Upon the occurrence of a Persistent NPE Default:

- (a) Non-Profit Entity shall, within 30 days of the Persistent NPE Default, submit to City a cure plan for review and approval in accordance with Exhibit 11 (Submittals Review Process) ("**Persistent NPE Default Cure Plan**"). The Persistent NPE Default Cure Plan shall include specific actions (including timeframes) to be taken by Non-Profit Entity to improve performance

- (b) City may require, in its good faith discretion, that Non-Profit Entity's actions under this Section 15.8.1 include improving Non-Profit Entity's quality management practices, plans and procedures, revising and restating the Project Management Plan, changing organizational and management structure, increasing monitoring and inspections, changing Key Personnel and other important personnel, replacement of Subcontractors;
- (c) The Parties shall consult to develop and agree to the Persistent NPE Default Cure Plan within 20 days of Non-Profit Entity's submittal of the plan; and
- (d) Following agreement or determination of the Persistent NPE Default Cure Plan, Non-Profit Entity shall implement and comply with the cure plan and any failure to do so shall result in an additional NPE Default which shall not be subject to any additional Notice or cure period.

ARTICLE 16. DEFAULT; REMEDIES

16.1 Default by Non-Profit Entity; Cure Periods

16.1.1 NPE Default

Non-Profit Entity shall be in breach under this Agreement upon the occurrence of any one or more of the following events or conditions (each a “**NPE Default**”):

- (a) Non-Profit Entity fails to satisfy the conditions set forth in Section 7.4.3 (Commencement of Non-Construction Work) within 30 days after City’s issuance of NTP 1, to begin the D&C Work within 10 days following City’s issuance of NTP 2, or to diligently prosecute the Work to completion in accordance with the Contract Documents;
- (b) Non-Profit Entity abandons all or a material part of the Project, which abandonment is deemed to occur if (i) Non-Profit Entity demonstrates through statements, acts or omissions an intent not to continue, for any reason other than a Delay Event that materially impairs Non-Profit Entity’s ability to continue, to design or construct all or a material part of the Project, or (ii) no significant Work (taking into account the Project Schedule, if applicable, and any Delay Event) on the Project is performed for a continuous period of more than 30 days unless due to Non-Profit Entity’s compliance with a City suspension order issued under this Agreement;
- (c) Non-Profit Entity fails to achieve Substantial Completion by the Long Stop Date;
- (d) Non-Profit Entity (i) fails to make any payment owing to City under the Contract Documents when due, or (ii) fails to deposit other funds into any custodial account, trust account or other reserve or account in the amount and within the time period required by the Contract Documents;
- (e) Non-Profit Entity fails to comply with its obligations with respect to Warranty Work, including its obligations to (i) respond to warranty issues and complete the Warranty Work in the time periods and in the manner set forth in the Contract Documents; and (ii) provide Notice and diligently complete the Warranty Work during any extended time period permitted under Section 6.11.1.4 ;
- (f) (i) any representation or warranty in the Contract Documents made by Non-Profit Entity is false in any material respect, materially misleading or inaccurate in any material respect when made or omits material information when made, or (ii) any certificate, schedule, report, instrument or other document delivered by or on behalf of Non-Profit Entity, Principal Project Company, any Equity Member, Controlling Affiliate of Principal Project Company, Prime Contractor, Supplier or other NPE-Related Entity to City as part of the Implementation Proposal or under the Contract Documents is false in any material respect, materially misleading or inaccurate in any material respect when made or omits material information when made;

- (g) Non-Profit Entity fails to obtain, provide and maintain any insurance, bonds, guarantees, letters of credit or other payment or performance security as required under the Contract Documents for the benefit of relevant parties, or Non-Profit Entity fails to comply with any requirement of the Contract Documents pertaining to the amount, terms or coverage of the insurance or security or fails to pay the associated premiums, deductibles, retain self-insured retentions, co-insurance or any other such amounts as and when due;
- (h) Non-Profit Entity ceases performing a substantial portion of its business, or a substantial portion of such business is suspended or is not being performed, whether voluntarily or involuntarily, that has or will have a material adverse effect on Non-Profit Entity's ability to perform its obligations under this Agreement;
- (i) (i) Non-Profit Entity makes, attempts to make or suffers a voluntary or involuntary assignment or transfer of all or any portion of the Contract Documents, the Project or NPE's Interest in violation of the limitations on assignment or transfer under this Agreement, (ii) there occurs an Equity Transfer or a Change of Control not permitted under this Agreement, or (iii) any other violation of the limitations on assignment or transfer under this Agreement occurs;
- (j) Non-Profit Entity fails to timely observe or perform, or cause to be observed or performed any material covenant, agreement, obligation, term or condition required to be observed or performed by Non-Profit Entity under the Contract Documents, including failure to pay for or perform the Design Work, Construction Work or any portion thereof (except to the extent payment is subject to a good faith payment dispute with a subcontractor) in accordance with the Contract Documents in any material respect, provided that any failure that constitutes a D&C Noncompliance Event or D&C Failure Event is not considered a default under this clause (j) although such failure may become a NPE Default in accordance with clause (r) or (s) below;
- (k) Non-Profit Entity, Principal Project Company, any Equity Member, any Controlling Affiliate of Principal Project Company, any Prime Contractor, any Supplier, any other NPE-Related Entity, or any of their respective partners, members, officers, directors, responsible managing officers, or responsible managing employees, has been convicted in a court of competent jurisdiction of any charge of fraud, bribery, collusion, conspiracy, or any other act in violation of any state or federal antitrust law in connection with the bidding upon, award of, or performance of, any public works contract, as defined in California Public Contract Code section 1101, with any public entity, as defined in California Public Contract Code section 1100, provided that, if the conviction relates to Principal Project Company, an Equity Member, a Controlling Affiliate of Principal Project Company, a Prime Contractor, a Supplier, any other NPE-Related Entity, or any of their or Non-Profit Entity's respective partners, members, officers, directors, responsible managing officers, or responsible managing employees, (i) such Person is involved in the Project at the time of such conviction and (ii) Non-Profit Entity fails to remove such Person from the Project;

- (l) Non-Profit Entity fails to comply with City's order to suspend Work issued in accordance with Sections 9.8.6, 10.1.2.4(c), 16.2.4.5(b) or 16.2.8 (Suspension of Work) within the time reasonably allowed in such order;
- (m) A Bankruptcy Event arises with respect to:
 - (i) Non-Profit Entity or the Principal Project Company except to the extent such Bankruptcy Event is caused by a failure by City to pay Non-Profit Entity as required under this Agreement, and/or
 - (ii) Any D&C Contractor or the D&C Contractor Guarantor, unless Non-Profit Entity:
 - (A) enters into a replacement D&C Contract or D&C Contractor Guaranty (as relevant) with a reputable counterparty acceptable to City, in its good faith discretion, within 60 days of the relevant Bankruptcy Event; provided, however, that, if Non-Profit Entity has commenced and is diligently pursuing meaningful steps to secure a replacement D&C Contract or D&C Contractor Guaranty (as relevant) immediately after the Bankruptcy Event, Non-Profit Entity shall have such additional period of time, up to a maximum period of 120 days after the Bankruptcy Event;
 - (B) in the absence of entering into a replacement D&C Contract, Non-Profit Entity otherwise demonstrates to the satisfaction of City, in its good faith discretion, that Non-Profit Entity possesses the technical and financial capacity to perform all remaining D&C Work in accordance with this Agreement;
- (n) Non-Profit Entity draws against any custodial account, trust account, allowance or other reserve or account in violation of the Contract Documents or makes a false or materially misleading representation in connection with a draw against any such account, allowance or reserve;
- (o) Non-Profit Entity fails to comply with applicable Regulatory Approvals or Laws, including the Laws described in Exhibit 16 (Federal, State and City Requirements) in any material respect;
- (p) any use of the Project by any NPE-Related Entity that violates requirements of applicable Regulatory Approvals or Laws or otherwise is not permitted under the Contract Documents;
- (q) the Project Implementation Agreement or any D&C Contract is terminated (other than non-default termination on its scheduled termination date) and Non-Profit Entity has not entered into a replacement Project Implementation Agreement or D&C Contract (as relevant) with a reputable counterparty acceptable to City, in its good faith discretion, within 60 days of the termination of the Project Implementation Agreement or D&C Contract (as applicable); provided, however, that, if Non-Profit Entity has commenced and is diligently pursuing meaningful steps to secure a replacement Project Implementation

Agreement or D&C Contract (as relevant) immediately after the termination, Non-Profit Entity shall have such additional period of time, up to a maximum period of 120 days after the termination;

- (r) a Persistent NPE Default occurs, City delivers to Non-Profit Entity a Default Notice, and either (i) Non-Profit Entity fails to deliver to City, within 30 days after such Notice is delivered, a cure plan meeting the requirements for approval in Section 15.8 (Cure Plan for Persistent NPE Default) or (ii) Non-Profit Entity fails to fully comply with the schedule or specific elements of, or actions required under, the approved cure plan; and
- (s) after any rights of appeal have been exhausted, Non-Profit Entity, Principal Project Company, any NPE-Related Entity or any Subcontractor (i) is determined to be disqualified, suspended or debarred, or otherwise excluded from bidding, proposing or contracting with a federal, State, or City department or agency, or (ii) has not dismissed any Subcontractor whose work is not substantially complete and who is determined to be disqualified, suspended or debarred, or otherwise excluded from bidding, or proposing or contracting with a federal, State, or City department or agency.

16.1.2 Default Notice and Cure Periods

16.1.2.1 Non-Profit Entity shall promptly:

- (a) provide Notice to City upon the occurrence of a NPE Default; and
- (b) take steps to commence the cure of and mitigate the effects of any NPE Default.

16.1.2.2 If Non-Profit Entity notifies City of a NPE Default in accordance with Section 16.1.2.1 or City considers a NPE Default has occurred, City may give NPE a Notice (“**Default Notice**”) which contains:

- (a) details of the NPE Default;
- (b) the cure period (if any) by which Non-Profit Entity shall cure the NPE Default in accordance with Section 16.1.2.3; and
- (c) if the NPE Default is not capable of being cured or no cure period is applicable, a date by which Non-Profit Entity shall comply with any requirements of City in connection with that NPE Default.

16.1.2.3 The following list identifies Non-Profit Entity’s rights to receive Notice and opportunity to cure before City may exercise its right to terminate this Agreement or enforce its Performance Bond in accordance with Section 16.2.7 (Performance Bond), and identifies other NPE Defaults that are not subject to cure:

- (a) respecting any NPE Default under Sections 16.1.1(h) or 16.1.1(m), a period of 15 days after delivery by City to Non-Profit Entity of a Default Notice;

- (b) respecting a NPE Default under Sections 16.1.1(a), 16.1.1(b), 16.1.1(d), 16.1.1(i), 16.1.1(n), 16.1.1(o), or 16.1.1(p), a cure period of 30 days after City delivers to Non-Profit Entity a Default Notice; provided that City may effect cure, at Non-Profit Entity's expense, if a NPE Default under Section 16.1.1(g) continues beyond five days after such Notice is delivered;
- (c) respecting a NPE Default under Sections 16.1.1(f), 16.1.1(i) or 16.1.1(k), a cure period of 30 days after City delivers to Non-Profit Entity a Default Notice; provided that:
 - (i) if the nature of such NPE Default is such that the cure cannot with diligence be completed within such time period and Non-Profit Entity has commenced and is diligently pursuing meaningful steps to cure immediately after receiving the Default Notice, Non-Profit Entity shall have such additional period of time, up to a maximum cure period of 60 days after City delivers the Default Notice, as is reasonably necessary to diligently effect cure; and
 - (ii) as to Section 16.1.1(f), cure will be regarded as complete when the adverse effects of the breach are cured; and
- (d) respecting a NPE Default under Sections 16.1.1(c), 16.1.1(l), 16.1.1(q), 16.1.1(r), or 16.1.1(s) no cure period is allowed.; and
- (e) respecting a NPE Default under Section 16.1.1(e), a cure period of 7 days after City delivers to Non-Profit Entity a Default Notice.

16.1.2.4 Non-Profit Entity acknowledges and agrees that Non-Profit Entity shall not be entitled to any additional notices, cure periods or extensions arising out of, or related to, the existence of the Project Implementation Agreement and any provisions set forth therein between Non-Profit Entity and Principal Project Company.

16.1.3 Warning Notices

16.1.3.1 Without prejudice to any other right or remedy available to City, City may deliver a Notice (a "**Warning Notice**") to Non-Profit Entity, with a copy to the Collateral Agent, stating explicitly that it is a "Warning Notice" of a material NPE Default and stating in reasonable detail the matter or matters giving rise to the Warning Notice and, if applicable, amounts due from Non-Profit Entity, whenever there occurs a NPE Default.

16.1.3.2 If City issues a Warning Notice for any NPE Default after it issues a Default Notice, then the remaining cure period available to Non-Profit Entity, if any, for such NPE Default before City may terminate this Agreement on account of such NPE Default will be extended by the time period between the date the Default Notice was issued and the date the Warning Notice is issued. However, this shall not affect the time when City may exercise any remedy other than termination respecting such NPE Default.

16.1.4 Non-Profit Entity to Comply with Default Notice and Provide Cure Plan

16.1.4.1 If City gives a Default Notice to Non-Profit Entity, then:

- (a) Non-Profit Entity shall comply with the Default Notice;
- (b) Except for a NPE Default under Sections 16.1.1(b), 16.1.1(e), 16.1.1(i), 16.1.1(m), 16.1.1(q), and 16.1.1(r), and NPE Defaults for which no cure period is applicable, Non-Profit Entity shall, as soon as possible, give City a plan for review and approval in accordance with Exhibit 11 (Submittal Review Process) to cure the NPE Default and comply with any requirements of City in accordance with the terms of City's Default Notice (which plan shall also specify steps to address the underlying cause of the NPE Default and to avoid similar NPE Defaults occurring in the future);
- (c) The Parties shall consult to develop and agree to the cure plan; and
- (d) Following agreement or determination of the cure plan, Non-Profit Entity shall implement and comply with the cure plan. Any failure to implement the cure plan or comply with the agreed cure plan will result in a NPE Default which is not subject to any cure period.

16.1.4.2 In the case of a Persistent NPE Default, Non-Profit Entity shall comply with Section 15.8 (Cure Plan for Persistent NPE Default).

16.2 City Remedies for NPE Default

16.2.1 Subject to the rights of Lenders under any Direct Agreement, upon occurrence of a NPE Default that has not been cured within the applicable cure period, if any, City may:

- (a) Terminate this Agreement as provided in Section 17.3 (Termination for NPE Default);
- (b) Exercise its step-in rights in Section 16.2.5 (City Step-In Rights);
- (c) Recover any Losses on account of the occurrence of a NPE Default, regardless of when the Default Notice is given, whether the Losses accrue after the occurrence of the NPE Default or whether the NPE Default is subsequently cured;
- (d) Where such NPE Default is not cured within the applicable cure period, if any, specified in Section 16.1.2.3 make demand upon and enforce any performance security, and make demand upon, draw on and enforce and collect any letter of credit, guaranty or other payment or performance security (including City's rights to withhold payment pursuant to Section 11.6.1 and Section 11.6.3) available to City under this Agreement with respect to the NPE Default in any order, in City's sole discretion, without Notice to Non-Profit Entity. City will apply the proceeds of any such action to the satisfaction of Non-Profit Entity's obligations under this Agreement, including payment of amounts due City;
- (e) Suspend the Work in whole or part in accordance with Section 16.2.8 (Suspension of Work); or

- (f) Exercise any other remedies available under this Agreement or at law or in equity.

16.2.2 Each right and remedy of City upon the occurrence of a NPE Default is cumulative as set out in Section 16.2.10 (Cumulative, Non-Exclusive Remedies).

16.2.3 Immediate City Entry and Cure of Wrongful Use

Without Notice and without awaiting lapse of the period to cure, in the event of any NPE Default under Section 16.1.1(p), City may enter and take control of the relevant portion of the Project to restore the permitted uses until such breach is cured or City terminates this Agreement; provided, however, that the foregoing shall be subject to the rights of Lenders under any Direct Agreement except in the event of an Emergency, an imminent safety risk, an unauthorized use of the Project by Non-Profit Entity or a NPE Default that materially precludes the use of the Project by City in the manner contemplated under this Agreement. Non-Profit Entity shall pay to City on demand City's Recoverable Costs in connection with such action, which payment will be reimbursed by City if a determination is ultimately made that no NPE Default occurred, promptly following such a determination. So long as City undertakes such action in good faith, even if under a mistaken belief in the occurrence of such a NPE Default, such action shall not be deemed unlawful or a breach of this Agreement, shall not expose City to any liability to Non-Profit Entity, other than the reimbursement obligation described above, and shall not entitle Non-Profit Entity to any other remedy except if City's action constitutes gross negligence, recklessness or willful misconduct. Non-Profit Entity acknowledges that City has a high priority, paramount public interest in maintaining the authorized uses of the Project and continuous access to the Project. City's good faith determination that such action is needed shall be deemed conclusive in the absence of clear and convincing evidence to the contrary. City will promptly relinquish control and possession of the relevant portion of the Project to Non-Profit Entity once City determines that such NPE Default has been cured.

16.2.4 Remedies for Failure to Meet Safety Standards or Perform Safety Compliance

16.2.4.1 If at any time Non-Profit Entity or its Surety fails to meet any Safety Standard or timely perform Safety Compliance or if City and Non-Profit Entity cannot reach an agreement regarding the interpretation or application of a Safety Standard or the valid issuance of a Safety Compliance Order within a period of time acceptable to City, City may undertake or direct Non-Profit Entity to undertake any work required to ensure implementation of and compliance with Safety Standards as interpreted or applied by City or with the Safety Compliance Order. If at any time a condition or deficiency of the Project violates any Law respecting health, safety or right of use and access, including the Americans with Disabilities Act of 1990, 42 U.S.C. Sections 12101 et seq., and regulations of the United States Occupational Safety and Health Administration (OSHA), City may take any immediate corrective actions required.

16.2.4.2 Subject to Section 16.2.4.3, to the extent that any work done under Section 16.2.4.1 is undertaken by City and is reasonably necessary to comply with Safety Standards, perform valid previously issued Safety Compliance Orders or correct a violation of Law or a Regulatory Approval respecting health, safety or right of use and access, Non-Profit Entity shall pay to City on demand the costs of such work including City's Recoverable Costs in connection with such work. In such event, City (whether it undertakes the work or has directed Non-Profit Entity to undertake the work) shall have no obligation or liability to compensate Non-Profit Entity for any Losses Non-Profit Entity suffers or incurs arising from, resulting to or resulting from such work.

16.2.4.3 To the extent that City requires Non-Profit Entity to perform Work under Section 16.2.4.1 that is not reasonably necessary to comply with Safety Standards, perform valid previously issued Safety Compliance Orders or correct a violation of Law or Regulatory Approval respecting health, safety or right of use and access, such requirement shall be considered a City Change, and Non-Profit Entity's obligation to pay City's Recoverable Costs shall not include City's costs relating to the City Change.

16.2.4.4 Notwithstanding anything to the contrary contained in this Agreement and without limiting City's other rights and remedies under this Agreement, City shall have the rights and remedies specified in Section 16.2.4.5 if, in the good faith judgment of City:

- (a) Non-Profit Entity has failed to meet any Safety Standards or perform Safety Compliance and the failure results in an Emergency or danger to persons or property; or
- (b) Non-Profit Entity is not then diligently taking all necessary steps to rectify or deal with such Emergency or danger.

16.2.4.5 Upon the occurrence of any event described in Section 16.2.4.4, City may without Notice and without awaiting lapse of the period to cure any breach:

- (a) immediately take such action as may be reasonably necessary to rectify the Emergency or danger, in which event Non-Profit Entity shall pay to City on demand the cost of such action, including City's Recoverable Costs, which payment will be reimbursed by City if a determination is ultimately made that Non-Profit Entity did not fail to meet applicable Safety Standards or to perform Safety Compliance; or
- (b) suspend Work and/or close or cause to be closed any and all portions of Project affected by the Emergency or danger.

16.2.4.6 So long as City undertakes any action under Section 16.2.4.5 in good faith, even if under a mistaken belief in the occurrence of such failure or existence of an Emergency or danger, such action shall not be deemed unlawful or a breach of this Agreement, shall not expose City to any liability to Non-Profit Entity, other than the reimbursement obligation described in Section 16.2.4.5, and shall not entitle Non-Profit Entity to any other remedy, except if City's action was undertaken in bad faith or constitutes gross negligence, recklessness or willful misconduct (in which case, City shall retain liability therefor).

16.2.4.7 Non-Profit Entity acknowledges that City has a high priority, paramount public interest in protecting public and worker safety at the Project and adjacent areas. City's good faith determination of the existence of such a failure, Emergency or danger shall be deemed conclusive in the absence of clear and convincing evidence to the contrary. Immediately following rectification of such Emergency or danger, as determined by City, City will allow the Work to continue or such portions of the Project to reopen, as applicable.

16.2.5 City Step-in Rights

16.2.5.1 If Non-Profit Entity has not fully and completely cured a NPE Default by the expiration of the applicable cure period, if any, City may, subject to the terms of any Direct Agreement and in accordance with the terms and conditions of this Section 16.2.5 (City Step-in Rights), pay and

perform all or any portion of Non-Profit Entity's obligations under the Contract Documents that are the subject of such NPE Default. In connection with the exercise by City of its step-in rights as described herein, Non-Profit Entity acknowledges and agrees that Non-Profit Entity shall not be entitled to any additional notices, cure periods or extensions arising out of, or related to, the existence of the Project Implementation Agreement and any provisions set forth therein between Non-Profit Entity and Principal Project Company.

16.2.5.2 Upon exercising its rights pursuant to Section 16.2.5.1, City may, to the extent necessary to cure a NPE Default:

- (a) perform or attempt to perform, or cause to be performed, such Work;
- (b) employ security guards and other safeguards to protect the Project;
- (c) spend such sums as City deems reasonably necessary to employ and pay such architects, engineers, consultants and contractors and obtain materials and equipment as may be required to perform such Work, without obligation or liability to Non-Profit Entity or any Contractors for loss of opportunity to perform the same Work or supply the same materials and equipment;
- (d) in accordance with Section 16.2.7 (Performance Bond), draw on and use proceeds from the Performance Bond and any other available security or source of funds available to Non-Profit Entity for the purposes set forth in this Section 16.2.5.2 including amounts held in an operating account, to the extent such instruments provide recourse to pay such sums, provided City's right to access amounts held in an operating account shall not include a security interest in such funds nor shall the exercise of such right by City interfere with the right of the Lenders, if any, under the Security Documents and the Direct Agreement to access such funds;
- (e) execute all applications, certificates and other documents as may be required;
- (f) make decisions respecting, assume control over and continue Work as may be reasonably required;
- (g) modify or terminate any contractual arrangements in Non-Profit Entity's Contracts in City's sole discretion, without liability for termination fees, costs or other charges in accordance with the terms of those Contracts, including the requirements for each Contract listed in Section 9.3.2 (Key Contract Provisions);
- (h) meet with, coordinate with, direct and instruct Contractors and Suppliers, process invoices and applications for payment from Contractors and Suppliers, pay Contractors and Suppliers, and resolve claims of Contractors and Suppliers;
- (i) take any and all other actions it may consider necessary to effect cure and perform the Work; and
- (j) prosecute and defend any action or proceeding incident to the Work.

16.2.5.3 Non-Profit Entity shall reimburse City on demand for its Recoverable Costs incurred in connection with the performance of any act or work authorized by this Section 16.2.5 (City Step-in Rights).

16.2.5.4 In addition to its continuing ownership of the Project Site and rights to have access to the Project Site throughout the Term, including the rights described in Section 6.7 (Coordination, Cooperation and Access), City and its Authorized Representatives, contractors, subcontractors, vendors and employees shall have the right to enter onto all Temporary Areas, exercisable at any time or times without Notice, for the purpose of carrying out City's step-in rights under Section 16.2.3 (Immediate City Entry and Cure of Wrongful Use) and this Section 16.2.5 (City Step-in Rights). Non-Profit Entity grants City a perpetual, non-rescindable right of entry onto the Temporary Areas for such purpose.

16.2.5.5 If City exercises any right to pay or perform under this Section 16.2.5 (City Step-in Rights), it nevertheless shall have no liability to Non-Profit Entity for the sufficiency, adequacy or quality of any such payment or performance, or for any effect of such payment or performance on the Work or the Project, unless caused by the gross negligence, recklessness or willful misconduct of City (in which case, City shall retain liability therefor). City and its Authorized Representatives, contractors, subcontractors, vendors and employees shall have no liability to Non-Profit Entity for any inconvenience or disturbance arising out of any entry onto the Project Site or Temporary Areas as contemplated by Section 16.2.3 (Immediate City Entry and Cure of Wrongful Use) or this Section 16.2.5 (City Step-in Rights), provided that the foregoing shall not absolve any Person of liability as a matter of law for its gross negligence, recklessness or willful misconduct.

16.2.5.6 City's rights under this Section 16.2.5 (City Step-in Rights) (but not City's rights under Section 16.2.3 (Immediate City Entry and Cure of Wrongful Use) regarding City's immediate right of entry and right to cure wrongful use of the Project) are subject to the right of any Surety to assume performance and completion of all bonded work under a Performance Bond.

16.2.5.7 If City takes action described in this Section 16.2.5 (City Step-in Rights) and it is later finally determined that City lacked the right to do so because there did not occur a NPE Default or because Non-Profit Entity had previously fully cured the default in accordance with this Agreement, then City's action shall be treated as a City Change.

16.2.6 Damages; Offset

16.2.6.1 Except as limited by City's agreement to liquidate certain damages as specified in this Agreement, and subject to the limitations in Section 16.6 (Limitation on Consequential Damages), City shall be entitled to recover any and all damages available at law on account of the occurrence of a NPE Default. Non-Profit Entity shall owe any such damages that accrue after the occurrence of NPE Default regardless of when Default Notice is given or whether NPE Default is subsequently cured.

16.2.6.2 In the case of a termination for NPE Default, City may deduct and offset any damages owing to it under the Contract Documents from and against any amounts City may owe to Non-Profit Entity. If the amount of damages owing to City is not liquidated or known with certainty at the time a payment is due from City to Non-Profit Entity with respect to such termination for a NPE Default, City may deduct and offset the amount it reasonably estimates will be due, subject to City's obligation to adjust such deduction or offset when the amount of damages owing to City is liquidated or becomes known with certainty.

16.2.6.3 Damages owed to City under this Section 16.2.6 (Damages; Offset) shall bear interest at the Late Payment Rate from and after the date any amount becomes due to City until the date paid.

16.2.6.4 Without limiting Section 16.2.6.2 and without modifying City's rights to make deductions from Milestone Payment 2 in accordance with this Agreement, on or before the Substantial Completion Date, the amount of any damages attributable to Non-Profit Entity may be deducted or offset from periodic payments owing by City under Section 11.1 (Milestone Payment) (including damages attributable to any NPE Default that concerns the D&C Work and is the subject of a Notice delivered to Non-Profit Entity before the date such payments are owing), subject to Section 2.4 of Exhibit 4A (Milestone Payment Mechanism). Following the Substantial Completion Date, City may require Non-Profit Entity to pay City amounts owing under this Section 16.2.6.4, collect such amounts from the Performance Bond and/or exercise any such rights and remedies set forth in Section 11.6.3.

16.2.6.5 Subject to Section 11.6.1 and Section 11.6.3, if the amount of damages owing to City from Non-Profit Entity is not liquidated or known with certainty at the time the payment is due, City may draw upon, deduct and offset up to 105% of the amount it reasonably estimates will be due, in which case, the Parties shall adjust such draw, deduction or offset when the amount of damages owing to City becomes known with certainty, with interest at the Late Payment Rate payable by City on excess amounts withheld and interest at the same rate payable by Non-Profit Entity on any shortfall.

16.2.6.6 City's right of offset permitted under this Agreement includes all amounts paid by City to satisfy, discharge and defend against any claim of lien, stop Notice, equitable lien or any other demand for payment or security made or filed with City, City's property or the Project by any Person claiming that any NPE-Related Entity has failed to perform its contractual obligations or to make payment for any obligation incurred for or in connection with the Work, provided that no such offset shall be made if Non-Profit Entity has filed surety bonds fully releasing City and City's property from such claim or lien under applicable Law.

16.2.7 Performance Bond

16.2.7.1 Subject to Sections 10.5.3, 16.2.6.2 and 16.2.7.2, upon the occurrence of a NPE Default and expiration, without full and complete cure, of the applicable cure period, if any, under Section 16.1.2 (Default Notice and Cure Periods), without waiving or releasing Non-Profit Entity from any obligations or limiting other remedies that may be available to City, City may make demand upon and enforce any Performance Bond, and make demand upon, draw on and enforce and collect any letter of credit, guaranty or other payment or performance security available to City under this Agreement with respect to such NPE Default in any order. City will apply the proceeds of any such action to the satisfaction of Non-Profit Entity's obligations under this Agreement, including payment of amounts due to City.

16.2.7.2 If City is an additional obligee under a Performance Bond, or is a transferee beneficiary under any letter of credit or guaranty, then City will forbear from exercising remedies as additional obligee or transferee beneficiary in connection with an NPE Default so long as Non-Profit Entity, Principal Project Company or the Collateral Agent commences the good faith, diligent exercise of remedies within 10 days after City delivers Notice to Non-Profit Entity, Principal Project Company and the Collateral Agent of City's intent to make a claim under such security, letter of credit or guaranty and subsequently continues such good faith, diligent exercise of remedies until the default is cured.

16.2.7.3 Section 16.2.7.2 shall not apply where access to a bond, letter of credit, guaranty or other payment or performance security is for the purpose of satisfying damages owing to City, in which case City shall be entitled to make demand, draw, enforce and collect regardless of whether NPE Default is subsequently cured.

16.2.7.4 City will provide Notice to Non-Profit Entity at the same time or promptly after City takes any action to make demand upon, draw on, enforce or collect any Performance Bond.

16.2.8 Suspension of Work

16.2.8.1 Subject to the rights of the Lenders as provided in the Direct Agreement, in addition to any other right to suspend the Work under the Contract Documents, City may suspend all or part of the Work by Notice to Non-Profit Entity if Non-Profit Entity fails to cure and correct, within the applicable cure period available to Non-Profit Entity (if any), the following:

- (a) failure to perform the Work in compliance with the Contract Documents, where such failure is not substantially cured within 15 days after City delivers Notice thereof to Non-Profit Entity;
- (b) failure to comply with any Law or Regulatory Approval (including failure to implement protective measures for Threatened or Endangered Species, failure to handle, preserve and protect paleontological and cultural (including archaeological and historic) resources, or failure to handle Hazardous Materials, in accordance with applicable Laws and Regulatory Approvals);
- (c) performance of Design Work before achieving all conditions in Section 7.4.3 (Commencement of Non-Construction Work), or performance of Construction Work before all conditions precedent to commencement of Construction Work have been met;
- (d) discovery of Nonconforming Work not corrected within 15 days after City delivers Notice of such Nonconforming Work to Non-Profit Entity or, if correction will require more than 15 days, failure of Non-Profit Entity to deliver to City, within 15 days of said Notice, a plan acceptable to City for correction of the Nonconforming Work or to diligently execute and complete such plan;
- (e) failure to pay in full when due sums owing to any Contractor or Supplier for services, materials or equipment, except only for retainage provided in the relevant Contract and amounts in dispute, which amounts in dispute may include amounts withheld on account of damage caused by such Contractor or Supplier or arising out of such Contractor or Supplier's failure to comply with the relevant Contract;
- (f) failure to provide proof of required insurance coverage under Section 10.1.2.4 (Verification of Coverage);
- (g) failure to deliver or maintain Payment Bonds or Performance Bonds;
- (h) the existence of conditions unsafe for workers, other Project personnel or the general public, including failures to comply with Safety Standards or perform Safety Compliance in accordance with Section 16.2.4 (Remedies for Failure to

Meet Safety Standards or Perform Safety Compliance) (and in any such case the order of suspension may be issued without awaiting any cure period);

- (i) failure to carry out and comply with Unilateral Change Orders, where such failure is not substantially cured within 15 days after City delivers Notice thereof to Non-Profit Entity; and
- (j) for the reasons specified in Sections 9.8.6, 10.1.2.4(c) and 16.2.4.4.

16.2.8.2 In addition to the protections from liability under Section 16.2.4.6, City shall have no liability to Non-Profit Entity, and Non-Profit Entity shall have no right to make any Claim against City, due to any suspension under Section 16.2.8.1

16.2.8.3 City shall have the right and authority to order suspension of Work, in whole or in part, for reasons other than those in Section 16.2.8.1. If City purports to order suspension of Work under Section 16.2.8.1 but it is finally determined under the Contract Dispute Procedures that no grounds under Section 16.2.8.1 exist for such suspension, then it shall be deemed a suspension under this Section 16.2.8.3

16.2.8.4 Non-Profit Entity shall promptly comply with any such suspension order, even if Non-Profit Entity disputes the grounds for suspension. Non-Profit Entity shall promptly recommence the Work upon receipt of Notice from City directing Non-Profit Entity to resume work. City will lift the suspension order promptly after Non-Profit Entity fully cures and corrects the applicable breach or failure to perform or any other reason for the suspension order ceases to apply.

16.2.8.5 Without limiting Non-Profit Entity's rights with respect to a Compensable Delay Event under clause (g) of the definition thereof, in case of suspension of work for any cause, Non-Profit Entity shall be responsible for the Project and shall take such precautions as may be necessary to prevent loss or damage to the materials, equipment and Work, provide for normal drainage and shall erect any necessary temporary structures, signs, or other facilities at Non-Profit Entity's expense.

16.2.9 Other Rights and Remedies

Subject to the limitations of liability of Non-Profit Parent set forth in this Agreement, City shall also be entitled to exercise any other rights and remedies available under this Agreement, or available at law.

16.2.10 Cumulative, Non-Exclusive Remedies

Subject to the exception specified in Section 16.1.1(j) regarding failures that constitute a D&C Noncompliance Event or D&C Failure Event not being considered defaults under Section 16.1.1(j), each right of City under this Agreement shall be cumulative and shall be in addition to every other right provided under this Agreement or at law, and the exercise or beginning of the exercise by City of any one or more of any of such rights or remedies shall not preclude the simultaneous or later exercise by City of any or all other such rights or remedies.

16.3 Default by City; Cure Periods

16.3.1 City Default

City shall be in breach under this Agreement upon the occurrence of any one or more of the following events or circumstances (each a “**City Default**”):

- (a) City fails to make any payment due to Non-Profit Entity under this Agreement when due, provided that such payment is not subject to a Contract Dispute;
- (b) City ceases to be legally authorized to make any undisputed payment to the Non-Profit Entity under this Agreement; provided, however, that a failure to appropriate or an injunction or other legal or administrative constraint on making such payment shall not be considered a City Default; or
- (c) any representation or warranty made by City to Non-Profit Entity in the Agreement is false in any material respect, materially misleading or inaccurate in any material respect when made or omits material information when made.

16.3.2 Cure Periods

City shall have the following cure periods to cure City Defaults:

16.3.2.1 Respecting a City Default under Section 16.3.1(a), a period of 45 days after Non-Profit Entity delivers to City Notice of such City Default; and

16.3.2.2 Respecting a City Default under Section 16.3.1(c), a period of 90 days after Non-Profit Entity delivers to City Notice of such City Default; provided that:

- (a) if the City Default is of such a nature that the cure cannot with diligence be completed within such time period and City has commenced meaningful steps to cure promptly after receiving the default Notice, City shall have such additional period of time, up to a maximum cure period of 180 days, as is reasonably necessary to diligently effect cure; and
- (b) cure will be regarded as complete when the adverse effects of the breach are cured.

16.4 Non-Profit Entity Remedies for City Breach

16.4.1 Termination

Refer to Section 17.4 (Non-Profit Entity Rights to Terminate) for provisions regarding Non-Profit Entity’s right to terminate for City Default.

16.4.2 Interest on Late Payment

If City fails to make payments of undisputed Availability Payments or the Milestone Payments that are due and owing to Non-Profit Entity under this Agreement, then Non-Profit Entity shall be entitled to interest at the Late Payment Rate commencing 90 days after the due date thereof in accordance with Section 11.7 (Interest on Late Payments and Overpayments).

16.4.3 Limitations on Remedies

16.4.3.1 Non-Profit Entity shall have no right to seek, and irrevocably waives and relinquishes any right to, non-monetary relief against City, except for (a) any sustainable action for relief available in mandamus, (b) any sustainable action to stop, restrain or enjoin use, reproduction, duplication, modification, adaptation or disclosure of NPE Intellectual Property in violation of the licenses granted, or to specifically enforce City's duty of confidentiality, under Section 21.4 (Intellectual Property), (c) declaratory relief under the Contract Dispute Procedures declaring the rights and obligations of the Parties under the Contract Documents, or (d) declaratory relief under the Contract Dispute Procedures declaring specific terms that shall bind the Parties.

16.4.3.2 If City wrongfully withholds an approval or consent required under this Agreement, or wrongfully issues an objection to or disapproval of a Submittal or other matter under this Agreement, Non-Profit Entity's sole remedies against City shall be compensation and extensions of time, each to the extent provided in Articles 13 (General Provisions Applying to Delay Events) and 14 (Compensation and Other Relief for Delay Events). Non-Profit Entity shall have no right to suspend Work.

16.4.4 Remedies at Law and in Equity

Subject to Section 16.4.3 (Limitations on Remedies) and to the limitations of liability of Non-Profit Parent set forth in this Agreement, and except as specifically provided otherwise in this Agreement, upon breach of this Agreement by City, Non-Profit Entity may exercise any remedies available at law or in equity.

16.4.5 Non-Profit Entity Right to Suspend

Non-Profit Entity may suspend Work based on City's failure, after required Notice and the expiration of the applicable cure period, to pay undisputed amounts owing to Non-Profit Entity with a cumulative value of \$1,000,000 or more, subject to the following:

- (a) Non-Profit Entity shall provide City with Notice regarding its intent to suspend at least 30 days before implementing the suspension, and may implement the suspension only if the breach remains uncured as of the suspension date; and
- (b) a suspension by Non-Profit Entity under this Section 16.4.5 (Non-Profit Entity Right to Suspend) shall be deemed to be a suspension of Work order issued by City for its convenience under Section 16.2.8.2, and the suspension order shall be deemed lifted upon Non-Profit Entity's receipt of payment in full of all undisputed amounts owing.

16.5 No Duplicative Payment

Notwithstanding any other provisions of this Agreement to the contrary, neither Party shall be entitled to recover compensation or make a claim under this Agreement with respect to any loss that it has incurred to the extent that it has already been compensated with respect to that loss under this Agreement or otherwise.

16.6 Limitation on Consequential Damages

16.6.1 Except as stated here, Non-Profit Entity shall have no liability to City for any type of special, consequential, or incidental damages arising out of or connected with Non-Profit Entity's performance of the Work. This limit of liability applies under all circumstances including the breach, completion, termination, suspension or cancellation of the services under this Agreement, and negligence or strict liability of Non-Profit Entity. This limit of liability, however, shall not apply to, limit or preclude:

- (a) Non-Profit Entity's obligation to pay liquidated damages as set forth in the Contract Documents, including any credits, deductions or offsets for failure to meet performance requirements or pursuant to the noncompliance/deduction regime;
- (b) damages caused by a NPE Fault described in clause (c) of the definition of "NPE Fault";
- (c) Non-Profit Entity's obligations to indemnify, defend and hold City and other Indemnities harmless for Third Party Claims as set forth in the Contract Documents;
- (d) Non-Profit Entity's liability damages that fall within the insurance coverages required under this Agreement;
- (e) Non-Profit Entity's liability for statutory damages imposed by City as a Governmental Entity under applicable Law;
- (f) statutory fines, penalties, and statutory damages, including punitive damages, treble damages, and statutory attorney fees and costs, including those due as a result of violations of environmental regulations and laws;
- (g) amounts that Non-Profit Entity is obligated to reimburse City under the express provisions of this Agreement, including any Recoverable Costs and any express interest thereon;
- (h) damages and other liability arising under claims by Third Parties for loss or damage to property or personal injuries, including wrongful death; or
- (i) damages and other liability for infringement of any Intellectual Property right.

16.7 City Step-in Rights Under Project Implementation Agreement

16.7.1 If Non-Profit Entity has not fully and completely cured a NPE PIA Default by the expiration of the applicable cure period, if any, set forth in the Project Implementation Agreement, City may, subject to the terms of any Direct Agreement and in accordance with the terms and conditions of this Section 16.7 (City Step-in Rights Under Project Implementation Agreement), pay and perform all or any portion of Non-Profit Entity's obligations under the Project Implementation Agreement that are the subject of such NPE PIA Default.

16.7.2 Upon exercising its rights pursuant to Section 16.7.1, City may, to the extent necessary to cure a NPE PIA Default:

- (a) perform or attempt to perform, or cause to be performed, Non-Profit Entity's obligations under the Project Implementation Agreement;
- (b) Intentionally Omitted;
- (c) execute all applications, certificates and other documents as may be required under the Project Implementation Agreement;
- (d) make decisions respecting, assume control over and continue the Project Implementation Agreement as may be reasonably required;
- (e) Intentionally Omitted;
- (f) meet with, coordinate with, direct and instruct Contractors and Suppliers, process invoices and applications for payment from Contractors and Suppliers, pay Contractors and Suppliers, and resolve claims of Contractors and Suppliers;
- (g) take any and all other actions and expend any other sums it may consider necessary to effect cure and undertake Non-Profit Entity's obligations under the Project Implementation Agreement; and
- (h) prosecute and defend any action or proceeding incident to the Project Implementation Agreement.

16.7.3 Non-Profit Entity shall reimburse City on demand for its Recoverable Costs incurred in connection with the performance of any act or work authorized by this Section 16.7 (City Step-in Rights Under Project Implementation Agreement).

16.7.4 In addition to its continuing ownership of the Project Site and rights to have access to the Project Site throughout the Term, including the rights described in Section 6.7 (Coordination, Cooperation and Access), City and its Authorized Representatives, contractors, subcontractors, vendors and employees shall have the right to enter onto all Temporary Areas, exercisable at any time or times without Notice, for the purpose of carrying out City's step-in rights under this Section 16.7 (City Step-in Rights Under Project Implementation Agreement). Non-Profit Entity grants City a perpetual, non-rescindable right of entry onto the Temporary Areas for such purpose.

16.7.5 If City exercises any right to pay or perform under this Section 16.7 (City Step-in Rights Under Project Implementation Agreement), it nevertheless shall have no liability to Non-Profit Entity for the sufficiency, adequacy or quality of any such payment or performance, or for any effect of such payment or performance on the Work, the Project or the Project Implementation Agreement, unless caused by the gross negligence, recklessness or willful misconduct of City (in which case, City shall retain liability therefor). City and its Authorized Representatives, contractors, subcontractors, vendors and employees shall have no liability to Non-Profit Entity for any inconvenience or disturbance arising out of any entry onto the Project Site or Temporary Areas as contemplated by this Section 16.7 (City Step-in Rights Under Project Implementation Agreement), provided that the foregoing shall not absolve any Person of liability as a matter of law for its gross negligence, recklessness or willful misconduct.

16.7.6 Intentionally Omitted.

16.7.7 In exercising its rights under this Section 16.7 (City Step-in Rights Under Project Implementation Agreement), including determining the existence of an NPE PIA Default, City shall be entitled to fully and solely rely on a notice of NPE PIA Default received from Non-Profit Entity and/or Principal Project Company delivered pursuant to this Agreement or the Project Implementation Agreement.

ARTICLE 17. TERMINATION

17.1 Termination for Convenience; Condemnation

17.1.1 City may terminate this Agreement in whole, but not in part, if City determines in its sole discretion that termination is in City's best interest (a "**Termination for Convenience**").

17.1.2 City may exercise a Termination for Convenience by delivering to Non-Profit Entity a Notice of Termination for Convenience specifying the election to terminate and its effective date, which shall not be earlier than 30 days after the date of delivery of such Notice.

17.1.3 In the event of a Termination for Convenience, City shall pay Termination Compensation to Non-Profit Entity (or to the Collateral Agent as provided in the Direct Agreement) in an amount (without double counting) equal to:

- (a) Lenders' Liabilities; plus
- (b) NPE Employee and Contractor Breakage Costs; minus
- (c) Account Balances; minus
- (d) Insurance Proceeds; minus
- (e) any D&C Period Deductions to the extent not deducted in full from Milestone Payment 2 minus
- (f) any other payments from the Non-Profit Entity that are due and payable to the City under this Agreement, but remain unpaid.

17.1.4 If:

- (a) City confiscates, sequesters, condemns or appropriates the NPE's Interest or any material part thereof; or
- (b) as a direct result of a City ordinance Non-Profit Entity is unable to perform all or substantially all of its obligations under the Contract Documents for a period of 180 consecutive days or more,

then this Agreement shall be deemed terminated for convenience and City shall pay compensation to Non-Profit Entity in the amount described in Section 17.1.3.

17.2 Termination for Force Majeure Termination Events or Insurance Unavailability

17.2.1 Notice of Conditional Election to Terminate – Force Majeure Termination Events

17.2.1.1 Subject to Section 17.2.2, either Party may deliver to the other Party Notice of its conditional election to terminate this Agreement ("**Notice of Conditional Termination**") if a Force Majeure Event occurs prior to Substantial Completion (excluding a Force Majeure Event under clauses (i) or (j) of the definition of Force Majeure Event) ("**Force Majeure Termination Event**") has occurred and:

- (a) (i) as a direct result of the Force Majeure Termination Event, Non-Profit Entity is unable to perform all or substantially all of its obligations under the Contract Documents for a period of 255 consecutive days or more; and (ii) such inability to perform its obligations is not attributable to a concurrent non-Force Majeure Termination Event; and
- (b) Non-Profit Entity could not have mitigated or cured such result through the exercise of diligent efforts; and
- (c) such result is continuing at the time of delivery of the written Notice; and
- (d) the written Notice sets forth in reasonable detail a description of the Force Majeure Termination Event, a description of the direct result and its duration, and a statement that the notifying Party's intends to terminate this Agreement.

17.2.1.2 If a Force Majeure Event occurs after Substantial Completion, only the City shall have the right to terminate or continue this Agreement, exercisable in its sole discretion at any time.

17.2.2 No Right to Termination Election

Notwithstanding Section 17.2.1, if, following the occurrence of any Force Majeure Termination Event that occurs prior to Substantial Completion results in damage or partial destruction of the Project:

- (a) the conditions listed in Section 17.2.1.1 (Notice of Conditional Election to Terminate – Force Majeure Termination Events) are satisfied;
- (b) insurance proceeds are available to fund the work required to remedy the effects of the Force Majeure Termination Event; and
- (c) the Parties agree to a restoration plan in respect of such work required to remedy the effect of the Force Majeure Termination Event,

then neither Party shall have the right to elect to terminate this Agreement pursuant to Section 17.2.1.1 (Notice of Conditional Election to Terminate – Force Majeure Termination Events).

17.2.3 Non-Profit Entity Options Upon City Notice

17.2.3.1 For a Force Majeure Event that occurs prior to Substantial Completion, if City delivers a Notice of Conditional Termination prior to Substantial Completion, Non-Profit Entity shall have the option either to accept such Notice or to continue this Agreement in effect by delivering to City Notice of Non-Profit Entity's choice not later than 30 days after City delivers its Notice. If Non-Profit Entity does not deliver such Notice within such 30 day period or the City delivers a Notice of Conditional Termination after Substantial Completion, then Non-Profit Entity shall be deemed to have accepted City's election to terminate this Agreement.

17.2.3.2 If Non-Profit Entity delivers timely Notice under Section 17.2.3.1 choosing to continue this Agreement in effect, then:

- (a) City shall have no obligation to compensate Non-Profit Entity for any Extra Work Costs, Financing Delay Costs, Delay Costs, costs of restoration, repair or replacement arising out of the Force Majeure Termination Event and incurred after the date on which City gives written Notice of conditional election to terminate under this Section 17.2 (Termination for Force Majeure Events or Insurance Unavailability), except as provided in Section 17.2.3.2(b);
- (b) if the Force Majeure Termination Event occurred before the Substantial Completion Date and resulted in a Critical Path delay, Non-Profit Entity shall be entitled to an extension of the applicable deadlines in accordance with Section 14.1.2 (Extension of Deadlines for General Delay Events); and
- (c) this Agreement shall continue in full force and effect and City's election to terminate shall not take effect.

17.2.4 City Options Upon Non-Profit Entity Notice

17.2.4.1 For a Force Majeure Event that occurs prior to Substantial Completion, if Non-Profit Entity delivers a Notice of Conditional Termination prior to Substantial Completion pursuant to Section 17.2.1.1, including an estimate (with supporting documentation) of the compensation that would be paid or reimbursed to Non-Profit Entity under Section 17.2.4.2, City shall have the option either: (a) to accept such Notice; or (b) to continue this Agreement in effect if City in its reasonable discretion determines that the Project can be completed or re-opened, as applicable, on a commercially reasonable basis. City shall exercise such option by delivering to Non-Profit Entity written Notice of City's choice not later than 30 days after Non-Profit Entity delivers its Notice of Conditional Termination. If City does not deliver such written Notice within such 30-day period, then it shall be conclusively deemed to have accepted Non-Profit Entity's election to terminate this Agreement.

17.2.4.2 If City delivers timely written Notice under Section 17.2.4.1 choosing to continue this Agreement in effect, then:

- (a) subject to Section 13.8 (Burden of Proof and Mitigation), City shall be obligated to pay or reimburse Non-Profit Entity an amount equal to (without double-counting):
 - (i) Financing Delay Costs and the Extra Work Costs directly caused by the Force Majeure Termination Event which are incurred after the date Non-Profit Entity delivers its written Notice of conditional election to terminate; plus
 - (ii) Delay Costs which are incurred after the date Non-Profit Entity delivers its written Notice of conditional election to terminate;
- (b) From and after the date which is 255 days after the occurrence of the Force Majeure Termination Event, Non-Profit Entity shall not be subject to D&C Period Deductions or D&C Noncompliance Points with respect to such Force Majeure Termination Event; and
- (c) this Agreement shall continue in full force and effect and Non-Profit Entity's election to terminate shall not take effect for the period specified in City's

written Notice under this Section 17.2.4 (City Options Upon Non-Profit Entity Notice) or such longer period as may be mutually agreed to in writing by the Parties.

17.2.5 No Waiver

No election by Non-Profit Entity under Section 17.2.3 (Non-Profit Entity Options Upon City Notice) or by City under Section 17.2.4 (City Options Upon Non-Profit Entity Notice) to continue this Agreement in effect shall prejudice or waive such Party's right to thereafter, at any time, give a Notice of conditional election to terminate with respect to the same or any other Force Majeure Termination Event.

17.2.6 Termination for Insurance Unavailability

If it becomes apparent that insurance required under the Contract Documents is not available as a result of Insurance Unavailability, City may deliver to Non-Profit Entity Notice of its election to terminate this Agreement for Insurance Unavailability and the effective date of the termination, which shall not be earlier than 30 days after the date of delivery of such Notice. Such Notice shall include reasonable details regarding the affected coverages and associated risks, as well as the estimated cost of premiums if Commercially Reasonable Insurance Rates are not available. In the event of a termination for Insurance Unavailability, City shall pay Termination Compensation to Non-Profit Entity (or to the Collateral Agent as provided in the Direct Agreement) calculated in accordance with Section 17.2.8 (Termination Compensation for Force Majeure Termination Events and Insurance Unavailability).

17.2.7 Concurrent Notices

If City and Non-Profit Entity deliver concurrent Notices of Conditional Termination under this Section 17.2 (Termination for Force Majeure Termination Events or Insurance Unavailability), Non-Profit Entity's Notice shall prevail. Notices shall be deemed to be concurrent if each Party sends its Notice before actually receiving the Notice from the other Party. Knowledge of the other Party's Notice obtained before actual receipt of the Notice shall have no effect on determining whether concurrent Notice has occurred.

17.2.8 Termination Compensation for Force Majeure Termination Events and Insurance Unavailability

If (i) either Party accepts, or is deemed to accept, the other Party's conditional election to terminate under Section 17.2.3 (Non-Profit Entity Options Upon City Notice) or Section 17.2.4 (City Options Upon Non-Profit Entity Notice) or (ii) City exercises its unilateral right to terminate pursuant to Section 17.2.1.2 or Section 17.2.6, as applicable, then this Agreement shall be deemed terminated on an Early Termination Date that is 30 days after the date of acceptance or deemed acceptance of the conditional election to terminate; and Non-Profit Entity will be entitled to Termination Compensation calculated as follows (calculated at the Early Termination Date and without double-counting):

- (a) Lenders' Liabilities plus
- (b) NPE Employee and Contractor Breakage Costs; minus
- (c) Account Balances; minus

- (d) Insurance Proceeds; minus
- (e) any D&C Period Deductions to the extent not deducted in full from Milestone Payment 2; minus
- (f) any other payments from the Non-Profit Entity that are due and payable to the City under this Agreement, but remain unpaid.

17.3 Termination for NPE Default

17.3.1 NPE Defaults Triggering City Termination Rights

17.3.1.1 Subject to the rights of the Lenders pursuant to any Direct Agreement, in the event that:

- (a) any NPE Default occurs and has not been cured within the applicable cure period, if any, set out in Section 16.1.2 (Default Notice and Cure Periods) or (if relevant) in accordance with any cure plan accepted by City under Section 15.8 (Cure Plan for Persistent NPE Default); or
- (b) any NPE Default occurs for which there is no cure period under Section 16.1.2 (Default Notice and Cure Periods);

(each a “**Default Termination Event**”)

City may terminate this Agreement with immediate effect upon written Notice to Non-Profit Entity.

17.3.1.2 Termination of this Agreement for a Default Termination Event in accordance with this Section 17.3 (Termination for NPE Default) will take effect on the date stated in the Notice given by City to Non-Profit Entity under Section 17.3.1.1.

17.3.2 Compensation to Non-Profit Entity

17.3.2.1 Subject to Section 17.3.2.2, if City issues a Notice of termination of this Agreement due to a NPE Default:

- (a) before the Substantial Completion Date, Non-Profit Entity will be entitled to Termination Compensation in an amount equal to the lesser of:
 - (i) the D&C Work Value; and
 - (ii) the amount equal to:
 - (A) Lenders’ Liabilities; minus
 - (B) Account Balances; minus
 - (C) Insurance Proceeds (excluding proceeds of personal injury, property damage or other Third Party liability insurance payable to or for the account of a Third Party); minus

- (D) any D&C Period Deductions to the extent not deducted in full from Milestone Payment 2; minus
 - (E) any other payments from the Non-Profit Entity that are due and payable to the City under this Agreement, but remain unpaid; or
- (b) on or after the Substantial Completion Date, Non-Profit Entity will be entitled to Termination Compensation in an amount equal to:
- (i) Lenders' Liabilities; minus
 - (ii) the costs incurred by City or any party acting on City's behalf to repair unremedied /Defects that were identified and for which Notice was provided during the Warranty Period and are Defects for which Non-Profit Entity is responsible under this Agreement; minus
 - (iii) Account Balances; minus
 - (iv) Insurance Proceeds (excluding proceeds of personal injury, property damage or other Third Party liability insurance payable to or for the account of a Third Party); minus
 - (v) any D&C Period Deductions to the extent not deducted in full from Milestone Payment 2; minus
 - (vi) any other payments from the Non-Profit Entity that are due and payable to the City under this Agreement, but remain unpaid.

17.3.2.2 If the calculation described in Section 17.3.2.1 results in a negative number, the negative value shall represent damages recoverable by City in accordance with Section 16.2.6.2.

17.3.3 Finality

If City issues Notice of termination of this Agreement due to a NPE Default, termination shall be effective and final regardless of whether City is correct in determining that it has the right to terminate for NPE Default. If it is determined that City lacked such right, then such termination shall be treated as a Termination for Convenience as provided in Section 17.1 (Termination for Convenience; Condemnation) for the purpose of determining the Termination Compensation due.

17.4 Non-Profit Entity Rights to Terminate

17.4.1 Termination for City Default

17.4.1.1 If a City Default under Section 16.3.1 (City Default) remains uncured following (a) Notice and expiration of the applicable cure period under Section 16.3.2 (Cure Periods), and (b) Non-Profit Entity's compliance with the warning requirements set forth in Section 17.4.1.2, Non-Profit Entity shall have the right to terminate this Agreement, effective immediately upon delivery of written Notice of termination to City. In the event of such termination, City shall pay Termination Compensation to Non-Profit Entity equal to the amount described in Section 17.1.3.

17.4.1.2 Non-Profit Entity shall provide a warning Notice to City at least 15 Business Days before terminating, which Notice may not be delivered until 30 Business Days after delivery of the Notice under Section 16.3.2.1 Non-Profit Entity shall provide a second warning Notice to City at least five Business Days before terminating, which Notice may not be delivered until 10 Business Days after delivery of the first warning Notice. If City fails to effect cure within five Business Days after the date of delivery of the second warning Notice, Non-Profit Entity shall have the right to terminate this Agreement in accordance with Section 17.4.1.1

17.4.2 Termination for Suspension of Work

17.4.2.1 If City issues a suspension order under Section 16.2.8.3 that suspends the Work for a period of 270 days or more, and provided that (a) such suspension is not the result of any NPE Fault; and (b) Non-Profit Entity has delivered a warning Notice to City at least 15 days before terminating, Non-Profit Entity shall have the right to terminate this Agreement, effective immediately upon delivery of written Notice of termination to City. In the event of such termination, Non-Profit Entity will be entitled to Termination Compensation equal to the amount described in Section 17.1.3.

17.4.2.2 Non-Profit Entity may not terminate under this Section 17.4.2 (Termination for Suspension of Work) if, at the time Non-Profit Entity's right to terminate would arise, circumstances exist entitling either Party to terminate under Sections 17.2 (Termination for Force Majeure Termination Events or Insurance Unavailability), 17.3 (Termination for NPE Default), 17.4.3 (Termination Due to Court Ruling) or 17.5 (Termination if Financial Close Fails to Occur).

17.4.3 Termination Due to Court Ruling

Termination Due to Court Ruling means, and becomes effective upon: (a) issuance of a final order by a court of competent jurisdiction after exhaustion of all appeals to the effect that this Agreement is void, voidable, and/or unenforceable or impossible to perform in its entirety for reasons beyond the reasonable control of Non-Profit Entity; or (b) issuance of a final order by a court of competent jurisdiction after exhaustion of all appeals upholding the binding effect on Non-Profit Entity and/or City of a Change in Law that causes impossibility of performance of a fundamental obligation by Non-Profit Entity or City under the Contract Documents or impossibility of exercising a fundamental right of Non-Profit Entity or City under the Contract Documents. The final court order shall be treated as the Notice of termination. In the event of such termination, Non-Profit Entity will be entitled to compensation in an amount equal to the amount described in Section 17.2.8 (Termination Compensation for Force Majeure Termination Events and Insurance Unavailability); provided that if the Termination Due to Court Ruling is caused solely and directly by a City Default or a City Fault, Non-Profit Entity will be entitled to Termination Compensation in the amount described in Section 17.1.3.

17.5 Termination if Financial Close Fails to Occur

Sections 3.6 (No-Fault Termination) and 3.7 (Non-Profit Entity's Failure to Achieve Financial Close) set forth the terms applicable to termination before Financial Close.

17.6 Transition Procedures and Duties

The provisions of this Section 17.6 (Transition Procedures and Duties) shall apply upon the achievement of Substantial Completion, and on termination of this Agreement. Non-Profit Entity

shall timely comply with such provisions independently of, and without regard to, the timing for determining, adjusting, settling and paying any amounts due Non-Profit Entity or City on account of termination. If City determines that Non-Profit Entity has failed to comply with the provisions of this Section 17.6 (Transition Procedures and Duties) in connection with a termination, then upon Notice from City to Non-Profit Entity making reference to this Section 17.6 (Transition Procedures and Duties), Non-Profit Entity acknowledges and agrees it shall be deemed to have surrendered its access rights in accordance with the Contract Documents.

17.6.1 Performance of Work Pending Early Termination Date

In any case where Notice of termination precedes the effective Early Termination Date, Non-Profit Entity shall continue performing the Work in accordance with all the standards, requirements and terms of the Contract Documents.

17.6.2 Transition Plan

17.6.2.1 Within 90 days before the achievement of Substantial Completion, or, if applicable, within three days after Non-Profit Entity receives or delivers a Notice of termination, Non-Profit Entity shall meet and confer with City for the purpose of developing a transition plan for: (a) in the case of termination, the orderly transition of remaining Work and demobilization; or (b) in the case of the achievement of Substantial Completion, demobilization (other than in respect of the achievement of Final Acceptance and the performance of Warranty Work) and, in the case of both achievement of Substantial Completion or termination, transfer of Project management, care, custody and control to City. The Parties shall use diligent efforts to complete preparation of the transition plan within 30 days before the achievement of Substantial Completion or, if applicable, within 15 days after the date Non-Profit Entity receives or delivers the Notice of termination, as the case may be.

17.6.2.2 The transition plan shall include a plan to promptly deliver to City or its designee possession of all the property, data and documents described in Sections 17.6.5.1 and 17.6.5.2.

17.6.2.3 The transition plan shall include an estimate of costs and expenses to be incurred by both Parties in connection with implementation of the transition plan. Neither Party shall be liable for the other Party's transition costs and expenses, regardless of the reason for termination.

17.6.2.4 The transition plan shall:

- (a) be in form and substance acceptable to City and shall include and be consistent with the other provisions and procedures in this Section 17.6 (Termination Procedures and Duties);
- (b) in the case of achievement of Substantial Completion, for the calendar month after Substantial Completion, provide, in connection with City's operation of the systems, technical support and other necessary management support from Non-Profit Entity similar to the demonstration tests performed by Non-Profit Entity before Substantial Completion; and
- (c) if required by City, provide for Non-Profit Entity to continue to perform specified Work during the period between the Termination Date and the

effective date of the release and discharge, following payment of Termination Compensation.

17.6.3 Relinquishment and Possession of Project

17.6.3.1 On or as soon as possible after the Termination Date or the Substantial Completion Date as provided in the approved transition plan, Non-Profit Entity shall, subject to its obligations to achieve Final Acceptance and to perform Warranty Work hereunder, relinquish and surrender care, custody and control of the Project, to City, and shall cause all persons and entities claiming under or through Non-Profit Entity to do likewise (except as may be set forth in any Direct Agreement).

17.6.3.2 On the later of the Termination Date or the date Non-Profit Entity relinquishes all care, custody and control as provided in the transition plan, City shall have the exclusive right to, and shall assume responsibility at its expense for, care, custody and control of the Project and the Project Site, subject to Non-Profit Entity's obligations to achieve Final Acceptance and to perform Warranty Work hereunder, if applicable, and any rights to damages against Non-Profit Entity where the termination is due to a Termination for NPE Default.

17.6.3.3 In the context of a termination of this Agreement prior to the expiry of the Term, if the transition plan developed under Section 17.6.2 (Transition Plan) requires Non-Profit Entity to perform any obligations under this Agreement after the Termination Date, this Agreement will remain in full force and effect only to the extent necessary for Non-Profit Entity to perform such obligations. On: (a) the Substantial Completion Date, for certainty, the Non-Profit Entity's rights of access to the Site and the Infrastructure Facility shall remain in full force and effect for purposes of the achievement of Final Acceptance and the performance of Warranty Work; and (b) the Termination Date, or such later date provided in the approved transition plan, City grants to Non-Profit Entity a right to access the Project Site for the limited purpose of carrying out Non-Profit Entity's obligations contemplated by this Section 17.6 (Termination Procedures and Duties), including execution of the transition plan contemplated in Section 17.6.2 (Transition Plan). This right of access described in clause (b) above is subject to rescission by City for Non-Profit Entity's failure to perform any of its obligations under this Agreement after the Termination Date, and shall automatically expire upon Non-Profit Entity's fulfillment of such obligations.

17.6.4 Continuance or Termination of Key Contracts Before Work Completion

17.6.4.1 If, as of the Termination Date, Non-Profit Entity has not completed the Work, in whole or in part, City may elect, by written Notice to Non-Profit Entity to continue in effect some or all of the Key Contracts or to require their termination. If City elects to continue any Key Contracts, then Non-Profit Entity shall execute and deliver (or shall cause the relevant Key Contractor(s) to execute and deliver) to City a written assignment, in form and substance acceptable to City, acting reasonably, of all Non-Profit Entity's (or Key Contractor's) right, title and interest in and to such Key Contracts, and City shall assume in writing Non-Profit Entity's (or such Key Contractor's) obligations thereunder that arise from and after the Termination Date.

17.6.4.2 If City elects (or is deemed to elect) to require termination of any Key Contracts, then Non-Profit Entity shall:

- (a) take such steps as are necessary to terminate the relevant Key Contracts, including providing Notice to each Key Contractor that its Key Contract is

being terminated and that each of them is to stop Work on the date and to the extent specified in the Notice of termination and stop and cancel orders for materials, services or facilities, unless otherwise approved by City;

- (b) promptly and orderly demobilize and secure in a safe manner the Project Site in a manner satisfactory to City, remove all debris and waste materials and complete any Hazardous Materials Management Work already in process, except as otherwise approved by City;
- (c) take such other actions as are necessary or appropriate to mitigate further costs;
- (d) subject to City's reasonable prior approval, settle all outstanding liabilities and all claims arising out of, relating to or resulting from such Key Contracts;
- (e) as a condition to City's obligation to make payments to Non-Profit Entity under this Article 17 (Termination) and under the requirements of the transition plan, cause each of the Key Contractors to execute and deliver to City a written assignment, in form and substance acceptable to City, of all of their interest in (i) all Regulatory Approvals, Third Party agreements and permits pertaining to the Project or the Work (excluding Subcontracts), provided that City assumes in writing all of the Key Contractor's obligations under said approvals, agreements and permits that arise after the Termination Date; and (ii) all warranties, to the extent assignable, claims and causes of action held by each of them against Subcontractors and other Third Parties pertaining to the Project or the Work, provided that Non-Profit Entity shall retain the right to pursue any cause of action against the Subcontractor or other Third Parties for damages incurred by Non-Profit Entity; and
- (f) as a condition to City's obligation to make payments to Non-Profit Entity under this Article 17 (Termination) and under the requirements of the transition plan, carry out such other reasonable directions as City may give for termination of the Work in accordance with the transition plan.

17.6.5 Other Close-Out Activities

17.6.5.1 Within 30 days after the Substantial Completion Date, or within 30 days after any earlier Notice of termination is delivered, Non-Profit Entity shall deliver to City a true and complete list of all materials, goods, machinery, equipment, hardware, parts, supplies and other tangible property in inventory or storage (whether then held by Non-Profit Entity or any Person on behalf of or for the account of Non-Profit Entity) for use in or respecting the Work or the Project, or on order or previously completed but not yet delivered from Suppliers for use in or respecting the Work or the Project. In addition, on or as soon after the Substantial Completion Date or Termination Date, as applicable, as is possible or as is provided in the approved transition plan, Non-Profit Entity shall transfer title through bills of sale or other documents of title, as directed by City, and deliver to City's Authorized Representative, all such materials, goods, machinery, equipment, hardware, parts, supplies and other property, provided City assumes in writing all of Non-Profit Entity's obligations under any contracts relating to the foregoing that arise after the later of the Termination Date or the effective date of the transfer.

17.6.5.2 Within (y) 30 days after the Substantial Completion Date; or (z) 30 days after any earlier Notice of termination is delivered, Non-Profit Entity shall provide City with a true and complete list of all the data and documents identified in this Section 17.6.5.2. Subject to Sections 21.4 (Intellectual Property) and 21.5 (Intellectual Property Escrows), Non-Profit Entity shall execute and deliver to City an executed bill of sale or other written instrument, in form and substance reasonably acceptable to City, assigning and transferring to City the following:

- (a) all completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, designs, Design Documents, Record Documents, plans, surveys, and other documents and information pertaining to the design or construction of the Project or the Utility Adjustments;
- (b) all samples, borings, boring logs, geotechnical data and similar data and information relating to the Project or the Project Site;
- (c) all Books and Records, reports, test reports, studies and other documents of a similar nature relating to the Work, the Project or the Project Site; and
- (d) all Intellectual Property, and IP Materials, documents evidencing licenses of NPE Intellectual Property and Third Party IP to City, other work product and other materials relating to all such Intellectual Property and NPE Intellectual Property.

Such bill of sale or other instrument shall be delivered to City as provided in the approved transition plan (or if not specified in the transition plan, shall be delivered on the Termination Date or as soon thereafter as possible), and shall be accompanied by originals or copies, as appropriate, of all of the materials described therein.

17.6.5.3 Non-Profit Entity shall take all action that may be necessary, or that City may direct, for the protection and preservation of the Project, the Work and such materials, goods, machinery, equipment, hardware, parts, supplies, data, documentation and other property.

17.6.5.4 On or as soon as possible after the Termination Date or as provided in the approved transition plan, Non-Profit Entity shall execute and deliver to City a written assignment, in form and substance acceptable to City, all of Non-Profit Entity's interest in any IP Escrows or similar arrangements for the protection of Source Code and Source Code Documentation of others used for or relating to the Project or the Work.

17.6.5.5 On or as soon as possible after the Termination Date or as provided in the approved transition plan, Non-Profit Entity shall execute and deliver to City a written assignment, in form and substance acceptable to City, of all Non-Profit Entity's interest in all warranties, claims and causes of action held by Non-Profit Entity against Third Parties in connection with the Project or the Work, including claims under casualty and business interruption insurance, except to the extent that City has already received credit for such matters in calculating Termination Compensation amounts, in which case they may be pursued by Non-Profit Entity for its own account.

17.6.5.6 Non-Profit Entity shall otherwise assist City in such manner as City may require before and for a reasonable period following the Termination Date to ensure the orderly transition of management, care, custody and control of the Project, to City, and shall, if

appropriate and if requested by City, take all steps as may be necessary to enforce the provisions of the Key Contracts pertaining to the surrender of Project management, care, custody and control.

17.6.5.7 For a period of four years following the Termination Date, Non-Profit Entity shall maintain a secure archive copy of all electronic data transferred to City.

17.6.6 Calculation of Compensation

17.6.6.1 Within 30 days after the Early Termination Date for termination pursuant to Section 17.3 (Termination for NPE Default), and within 15 days after the Early Termination Date for termination pursuant to Section 17.1 (Termination for Convenience; Condemnation), Section 17.2 (Termination for Force Majeure Termination Events or Insurance Unavailability) or Section 17.4 (Non-Profit Entity Rights to Terminate), Non-Profit Entity shall:

- (a) provide City with a written statement prepared by the Collateral Agent as to (i) the Lenders' Liabilities (ii) the Account Balances, to the extent such accounts are controlled by the Collateral Agent, with documentation reasonably required by City to support such statement and the Collateral Agent's certification that such amounts are true and correct;
- (b) provide a written statement as to the following amounts (without duplication of any Account Balances verified by the Collateral Agent under Section 17.6.6.1(a)(ii)), together with documentation reasonably required by City to support such statement and a certification that such amounts are true and correct:
 - (i) for termination pursuant to Section 17.1 (Termination for Convenience; Condemnation) or Section 17.4 (Non-Profit Entity Rights to Terminate), amounts described in Sections 17.1.3(b) through 17.1.3(e);
 - (ii) for termination pursuant to Section 17.2 (Termination for Force Majeure Termination Events or Insurance Unavailability), amounts described in Sections 17.2.8(b) through 17.2.8(e); or
 - (iii) for termination pursuant to Section 17.3 (Termination for NPE Default), (A) the amounts described in clauses (a)-(b) of Section 17.3.2.1, and (B) the Insurance Proceeds (excluding proceeds of personal injury, property damage or other Third Party liability insurance payable to or for the account of a Third Party); and
- (c) for termination pursuant to Section 17.1 (Termination for Convenience Condemnation), Section 17.2 (Termination for Force Majeure Termination Events or Insurance Unavailability), or Section 17.4 (Non-Profit Entity Rights to Terminate), an estimate of any interest and fees that will accrue (on a daily basis) on the outstanding principal due to Lenders at the rate due (excluding default interest), under the Financing Documents over the period between the Early Termination Date and the anticipated date that the Termination Compensation will be paid by City.

17.6.6.2 From and after the Termination Date, except as otherwise stated in this Article 17 (Termination), Non-Profit Entity shall cease to have any right to (a) Availability Payments except for those accrued and owing before the Early Termination Date and (b) any other compensation, except as provided under Section 17.8.2.

17.7 Payment of Termination Compensation

17.7.1 For termination under Section 17.1 (Termination for Convenience; Condemnation) or Section 17.4 (Non-Profit Entity Rights to Terminate), provided Non-Profit Entity has timely provided to City the statements and information required under Section 17.6.6.1, City shall, within 120 days of the Early Termination Date, pay to Non-Profit Entity an amount equal to the:

- (a) Termination Compensation; plus
- (b) interest and fees that accrued on the outstanding principal due to Lenders (excluding default interest) under the Financing Documents over the period between the Early Termination Date and such payment date.

17.7.2 For termination under Section 17.2 (Termination for Force Majeure Termination Events or Insurance Unavailability), provided Non-Profit Entity has timely provided to City the statements and information required under Section 17.6.6.1, City shall, within 120 days of the Early Termination Date, pay to Non-Profit Entity an amount equal to the:

- (a) Termination Compensation; plus
- (b) interest and fees that accrued on the outstanding principal due to Lenders (excluding default interest) under the Financing Documents over the period between the Early Termination Date and such payment date.

17.7.3 For termination pursuant to Section 17.3 (Termination for NPE Default), provided Non-Profit Entity has timely provided to City the statements and information required under Section 17.6.6.1, City shall, within 120 days of the Early Termination Date, pay to Non-Profit Entity an amount equal to the Termination Compensation.

17.7.4 If as of the date that City is required to tender payment of Termination Compensation under Sections 17.7.1, 17.7.2 or 17.7.3, as applicable, the Parties have not agreed upon the amount of Termination Compensation due, then:

- (a) City shall proceed to make payment to Non-Profit Entity of the undisputed portion of the Termination Compensation;
- (b) Within 30 days after receiving such payment Non-Profit Entity shall deliver to City written Notice of the additional amount of Termination Compensation that Non-Profit Entity in good faith determines is still owing (the **“disputed portion”**); and
- (c) City shall pay the disputed portion of the Termination Compensation to Non-Profit Entity in immediately available funds after the disputed portion is agreed to by the Parties or otherwise determined to be payable pursuant to Article 18 (Partnering; Contract Dispute Procedures), as the case may be.

17.8 Effect of Termination

17.8.1 Except to the extent set out in Section 17.6.3.3, and regardless of City's prior Actual Knowledge or constructive knowledge thereof:

- (a) no Contract or agreement to which Non-Profit Entity is a party as of the Termination Date shall bind City, unless City elects to assume such Contract or agreement; and
- (b) except in the case of City's express written assumption, no such Contract or agreement shall entitle the contracting party to continue performance of work or services respecting the Project following Non-Profit Entity's relinquishment to City of Project care, custody and control, or to any claim, legal or equitable, against City.

17.8.2 Termination of this Agreement shall not:

- (a) relieve Non-Profit Entity or any Surety of its obligation for any claims arising before the Termination Date;
- (b) excuse either Party from any liability arising out of, related to or resulting from any default as provided in this Agreement that occurred before the Termination Date; and
- (c) relieve City of claims of Non-Profit Entity to payment of Compensation Amounts for adverse cost and revenue impacts accruing before the Termination Date due to Compensable Delay Events that occurred before the Termination Date.

17.9 Liability after Termination; Final Release

Notwithstanding the foregoing, any termination of this Agreement under Sections 17.2 (Termination for Force Majeure Termination Events or Insurance Unavailability), 17.3 (Termination for NPE Default), 17.4.3 (Termination Due to Court Ruling) or 17.5 (Termination if Financial Close Fails to Occur) shall automatically extinguish any claim of Non-Profit Entity to payment of Compensation Amounts for adverse cost and revenue impacts accruing after the Early Termination Date due to Delay Events that occurred before termination. Except as otherwise expressly provided in this Agreement (other than Section 16.2.10 (Cumulative, Non-Exclusive Remedies)), if this Agreement is earlier terminated for any reason, then City's payment to Non-Profit Entity of the amounts required under this Agreement (if any) shall constitute full and final satisfaction of, and upon payment City shall be forever released and discharged from, any and all claims, causes of action, suits, demands and Losses, known or unknown, suspected or unsuspected, that Non-Profit Entity may have against City arising out of, relating to or resulting from this Agreement or termination thereof, the other Contract Documents, or the Project, excluding any proceedings that are pending as of 30 days after the Termination Date, remain unresolved at the time of such payment, and are not related to termination or Termination Compensation. Upon such payment, Non-Profit Entity shall execute and deliver to City all such releases and discharges, including a release pursuant to Civil Code Section 1542, as City may reasonably require to confirm the foregoing, but no such written release and discharge shall be necessary to give effect to the foregoing satisfaction and release.

17.10 Exclusive Termination Rights

This Article 17 (Termination) contain the entire and exclusive provisions and rights of City and Non-Profit Entity regarding termination of this Agreement, and each Party waives, to the maximum extent permitted by Law, any and all other rights to terminate at law.

17.11 Access to Information

Non-Profit Entity shall conduct all discussions and negotiations to determine any Termination Compensation, and shall share with City all data, documents and information pertaining to the termination, on an Open Book Basis.

ARTICLE 18. PARTNERING; CONTRACT DISPUTE PROCEDURES

18.1 Introduction

18.1.1 The Parties acknowledge fostering a collaborative working relationship during the entire Term is critical to early identification and resolution of issues, claims, and Contract Disputes. This Article 18 provides a structured approach for the Parties to address issues, claims, and Contract Disputes within the framework of informal project-level partnering and formal Contract Dispute procedures.

18.1.2 The procedures in this Article 18 (Partnering; Contract Dispute Procedures) are necessary for the City to address potential and actual Contract Disputes. Prior knowledge of potential Contract Disputes before Non-Profit Entity starts disputed Work, and proper documentation from Non-Profit Entity during that Work, are critical for the City to make informed decisions affecting the Project's budget and schedule.

18.2 Partnering

18.2.1 Collaborative Partnering

The Parties will engage in a partnering process to foster effective communication, enhance cooperation, and proactively address issues and claims to prevent them from escalating into Contract Disputes. The requirements for the partnering process are set forth in Part 3 of Section 01 31 33 (Partnering Procedures) of Division 10 of the Technical Requirements.

18.2.2 Confidentiality

In accordance with California Evidence Code sections 1119 and 1152, and Federal Rule of Evidence 408, and similar prohibitions, statements made during the partnering process, including the workshops and informal negotiations within the framework of the Issue Resolution Ladder, are confidential and not admissible or discoverable in any proceeding to resolve a Contract Dispute.

18.3 Contract Dispute Procedures

18.3.1 Disputes Generally

18.3.1.1 Outline of Dispute Process

The following is an outline of the sequential process for submitting and resolving Contract Disputes, with each step serving as a condition precedent for Non-Profit Entity to proceed to subsequent steps, beginning with the Notice of Potential Dispute. These steps must be completed prior to submission by Non-Profit Entity of any Contract Dispute to litigation in San Francisco Superior Court.

- (a) Non-Profit Entity must submit a timely Notice of Contract Dispute in compliance with Section 18.3.2 before Non-Profit Entity can file a Contract Dispute.

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- (b) Non-Profit Entity must submit a timely Contract Dispute in compliance with Section 18.3.3 before Non-Profit Entity can participate in the Issue Resolution Ladder.
- (c) Non-Profit Entity must timely comply with the Issue Resolution Ladder provisions in compliance with Section 18.3.3.5 before Non-Profit Entity can participate in mediation.
- (d) Non-Profit Entity must timely comply with the mediation provisions in Section 18.3.3.6 in order to exhaust its administrative remedies under this Agreement.
- (e) Non-Profit Entity must complete all steps outlined in this Section 18.3.1.1 above prior to commencing litigation against the City for disputes arising out of or related to this Agreement that are not expressly excluded from the Contract Dispute process by Section 18.3.1.3. The Non-Profit Entity must also submit a timely Government Code Claim in order to commence litigation against the City for disputes arising out of or related to this Agreement pursuant to Section 18.3.3.7.

18.3.1.2 Disputed issues not timely raised and properly documented by Non-Profit Entity in conformance with this Section 18.3 will be deemed waived by Non-Profit Entity and may not be asserted in any subsequent litigation, or legal action. Furthermore, by executing this Agreement, Non-Profit Entity waives any and all claims or defenses of waiver, estoppel, or any other type of excuse of non-compliance with the Contract Dispute submission requirements.

18.3.1.3 The Contract Dispute procedures specified in this Section 18.3 (Contract Dispute Procedures) do not apply to the following:

- (a) claims respecting penalties for forfeitures prescribed by statute or regulation that a government agency is specifically authorized to administer, settle, or determine;
- (b) claims respecting personal injury, death, reimbursement, or other compensation arising out of or resulting from personal injury of death;
- (c) claims by the City;
- (d) stop notices.
- (e) any matters that this Contract expressly states are final, binding, or not subject to Dispute resolution (including any Person's exercise of sole discretion);
- (f) disputes regarding compliance with applicable Law, the rights of City to terminate this Contract, or indemnification;
- (g) any claim for injunctive relief;
- (h) claims arising solely in tort;
- (i) any claim against an insurance company, including any Contractor Dispute that is covered by insurance;

- (j) Disputes regarding matters under the jurisdiction of OSHA;
- (k) issues regarding SBE participation;
- (l) any claim for, or Dispute based on, remedies expressly created by statute;
- (m) any Dispute that is actionable only against a Surety;
- (n) any claim arising out of or relating to the Work where a third party is a necessary or appropriate party (excluding any NPE-Related Entity); and
- (o) any claim or dispute that does not arise under the Contract.

18.3.2 Notice of Contract Dispute

18.3.2.1 Timely Submission

Non-Profit Entity must submit a Notice of Contract Dispute to the City within seven-Days of the event, activity, occurrence, or other cause that gives rise to the Contract Dispute. If the Contract Dispute pertains to a Change or the rejection of a Delay Event by the City, the seven-Day period starts when the City's Authorized Representative issues a final written decision denying, in whole or in part, the corresponding NPE Change Request or Relevant Event claim.

18.3.2.2 Content Requirements

Notices of Contract Dispute must include:

- (a) description of the Contract Dispute's nature and circumstances;
- (b) reasons Non-Profit Entity believes additional compensation or time may be due, including Contract Document references and citations supporting its position;
- (c) good faith estimates of the potential cost and/or time impacts; and
- (d) for Contract Disputes related to a disputed Relevant Event, identification of items in the Implementation Proposal that form the basis for Non-Profit Entity's performance the affected Work.

18.3.3 Contract Dispute

18.3.3.1 Timely Submission

- (a) Non-Profit Entity must submit a Contract Dispute to the City no later than 30 Days after the City's receipt of the corresponding Notice of Contract Dispute.

18.3.3.2 Content Requirements of all Contract Disputes

Contract Disputes must include:

- (a) cover letter;

- (b) certification, signed by Non-Profit Entity's Authorized Representative, stating, under penalty of perjury, that:
 - (i) the Contract Dispute is made in good faith;
 - (ii) supporting data are accurate and complete, to the best of their knowledge and belief; and
 - (iii) the amount requested accurately reflects adjustment in compensation or time for which Non-Profit Entity believes the City is liable;
- (c) narrative summary of Contract Dispute's merits and amount, and the specific provisions of Contract Documents under which the Contract Dispute is made;
- (d) list and copy of documents relating to Contract Dispute:
 - (i) Contract Documents;
 - (ii) correspondence; and
 - (iii) Agreement Exhibits;
- (e) detailed chronology of events and correspondence;
- (f) analysis of Contract Dispute merit; and
- (g) analysis of Contract Dispute cost (money and time).

18.3.3.3 Additional Requirements for Contract Disputes Relating to Delay Events Impacting the Critical Path

- (a) In addition to the contents required under Section 18.3.3.3 (Content Requirements of all Contract Disputes), Contract Disputes related to Delay Events prior to Substantial Completion and seeking time extensions or challenging the assessment of delay or liquidated damages shall include a written analysis of all changes and all delays impacting the Critical Path, including a TIA.
- (b) The TIA shall be updated to include the most recent information about the Project Schedule and the TIA shall include all activities represented or affected by the change, with activity numbers, durations, predecessor and successor activities, resources and cost, and with a narrative report, in form satisfactory to City, which compares the proposed new schedule to the Project Schedule, as appropriate. Non-Profit Entity shall reschedule activities not otherwise affected by the event, in order to take advantage of additional Float available as the result of the time extension. Any such rescheduling shall be reflected in the Project Schedule.
- (c) The TIA shall account for all Delay Events in the relevant time frame with actual logic ties.

18.3.3.4 Procedure for City Review and Determination

- (a) The City will review only a timely, certified, and properly documented Contract Dispute.
- (b) The City will respond to a Contract Dispute in writing, within 45 days of receipt of such Contract Dispute. In its response, City will either grant or deny the Contract Dispute in whole or in part. If City does not respond to a Contract Dispute within the 45-day period, the Contract Dispute is deemed denied in its entirety.

18.3.3.5 Issue Resolution Ladder

After the City issues its written decision under Section 18.3.3.4 or the Contract Dispute is deemed denied in its entirety, the Parties shall utilize the Issue Resolution Ladder to negotiate and attempt to resolve the Contract Dispute in a timely and efficient manner before proceeding to mediation in accordance with Section 18.3.3.6. The requirements for the Issue Resolution Ladder are set forth in Part 3 of Section 01 31 33 (Partnering Procedures) of Division 10 of the Technical Requirements.

18.3.3.6 Non-binding Mediation

If the Parties are unable to resolve a Contract Dispute during the Issue Resolution Ladder process, either Party may submit the dispute to mediation, by written notice to the other, that a mutually acceptable third-party mediator shall be selected for the purpose of facilitating a negotiated resolution of the Contract Dispute. The Contract Dispute shall be submitted to mediation within 10 Days of the conclusion of the Issue Resolution Ladder process. The Parties will share the costs of the mediation equally. If the mediation is unsuccessful, the Non-Profit Entity shall submit a Government Claims Act claim pursuant to Section 18.3.3.7, Government Code Claim Requirement.

18.3.3.7 Government Code Claim

The timely submittal of a complete and proper NPE Change Request or Relevant Event claim and compliance with the procedures specified in this Article 18 (Partnering; Contract Dispute Procedures) shall operate to toll Non-Profit Entity's compliance with the Government Code dispute requirements under California Government Code section 900, et seq., and Administrative Code Chapter 10 until the Parties complete mediation. The Non-Profit Entity must comply with California Government Code section 900, et seq. and Administrative Code Chapter 10 prior to submitting a Contract Dispute to litigation in San Francisco Superior Court.

18.3.3.8 Joinder of Disputes

If any Contract Dispute arising under this Agreement raises issues which relate to any dispute raised by Principal Project Company under the Project Implementation Agreement, then Non-Profit Entity may join Principal Project Company's issues as part of any Contract Dispute to be resolved under and in accordance with this Agreement and Principal Project Company may be permitted to participate directly in any such dispute resolution process as provided under this Article 18; provided, however, that if it is determined pursuant to the dispute resolution process under Article 18 that there only remains a dispute under the Project Implementation Agreement,

such dispute shall be removed from the process set forth by this Agreement and resolved between Non-Profit Entity and Principal Project Company pursuant to the Project Implementation Agreement. Any submissions made by Principal Project Company shall be made within the time limits applicable to the delivery of submissions by Non-Profit Entity and concern only those matters which relate to the dispute between City and Non-Profit Entity under this Agreement.

ARTICLE 19. REPRESENTATIONS AND WARRANTIES**19.1 Non-Profit Entity Representations and Warranties**

Non-Profit Entity represents and warrants to City, as of the Effective Date, as follows:

19.1.1 The Financial Model (a) was prepared by or on behalf of Non-Profit Entity in good faith, (b) uses financial formulas that, as of the Effective Date are mathematically and formulaically correct and suitable for making reasonable projections, (c) was audited and verified by an independent recognized model auditor immediately before the Effective Date, (d) fully discloses all cost, revenue and other financial assumptions and projections that Non-Profit Entity has used or is using in making its decision to enter into this Agreement and in making disclosures to potential equity investors and Lenders under the Initial Financing Agreements and (e) as of the Effective Date represents the projections that Non-Profit Entity believes in good faith are the most realistic and reasonable for the Project; subject to the understanding that such projections are based upon a number of estimates and assumptions and are subject to significant business, economic and competitive uncertainties and contingencies, and that Non-Profit Entity's stated belief regarding the projections does not constitute a representation that any of the assumptions are correct, that such projections will be achieved or that the forward-looking statements expressed in such projections will correspond to actual results.

19.1.2 Non-Profit Entity and Principal Project Company have evaluated the feasibility of performing the Work by the Contract Deadlines and for the Milestone Payments, Substantial Completion Development Fee and Availability Payments, and have reasonable grounds for believing and do believe, subject to the express terms of this Agreement, that such performance is feasible and practicable.

19.1.3 Non-Profit Entity and Principal Project Company have reviewed all applicable Laws relating to Taxes, and has taken into account all requirements imposed by such Laws in preparing the Financial Model.

19.1.4 Based upon the work undertaken by NPE-Related Entities pursuant to the Predevelopment Agreement, review of information provided by City, and other Reasonable Investigations undertaken by NPE-Related Entities, Non-Profit Entity and Principal Project Company have evaluated the constraints affecting the development, design, and construction of the Project, including the Project Site, surface and subsurface conditions discoverable through such investigation, the terms of the CEQA Approval, the terms of the NEPA Approval and requirements of applicable Laws, and, based on the foregoing, Non-Profit Entity and Principal Project Company have reasonable grounds for believing and does believe that the Project can be developed, designed, and constructed.

19.1.5 Non-Profit Entity and Principal Project Company have conducted a Reasonable Investigation of property to which it had access and other available information regarding conditions at the Project Site, and as a result of such investigation, Non-Profit Entity and Principal Project Company are familiar with and accept the physical requirements of the Work, subject to Non-Profit Entity's rights regarding Delay Events. Non-Profit Entity and the NPE-Related Entities shall undertake and complete the Work and the Project at their respective sole cost and without any additional compensation, any extension of time, excuse from compliance or other relief on account of such compliance, regardless of whether such compliance would require additional time for performance or additional design, construction, financing, labor,

equipment, supplies and/or materials not expressly provided for in the Contract Documents or would have an adverse effect on costs, subject only to Non-Profit Entity's rights regarding Delay Events.

19.1.6 Non-Profit Entity and Principal Project Company have familiarized themselves with the requirements of all applicable Laws and the conditions of any required Regulatory Approvals.

19.1.7 Non-Profit Entity and Principal Project Company have no reason to believe that any Regulatory Approval required to be obtained by Non-Profit Entity will not be granted in due course and thereafter remain in effect so as to enable the Work to proceed in accordance with the Contract Documents.

19.1.8 All Work furnished by or on behalf of Non-Profit Entity and any NPE-Entity will be performed by or under the supervision of Persons who hold all necessary licenses, certifications, registrations, permits or approvals to practice in the State, by personnel who are experienced, competent and skilled in their respective trades or professions, who are professionally qualified to perform the Work in accordance with the Contract Documents and who shall assume professional responsibility for the accuracy and completeness of the Design Documents, Construction Documents and other documents prepared or checked by them.

19.1.9 Non-Profit Entity is a limited liability company duly organized and validly existing under the laws of Delaware, has the requisite power and all required licenses to carry on its present and proposed activities, and has full power, right and authority to execute, and deliver this Agreement and to perform each and all of the obligations of Non-Profit Entity provided for under this Agreement. Non-Profit Entity is duly qualified to do business and is in good standing in the State as of the Effective Date, and will remain duly qualified and in good standing throughout the Term and for as long as any obligations remain outstanding under the Contract Documents.

19.1.10 The execution, delivery and performance of this Agreement has been duly authorized by all necessary action of Non-Profit Entity's governing body, each person executing this Agreement has been duly authorized to execute and deliver each such document on behalf of Non-Profit Entity and this Agreement has been duly executed and delivered by Non-Profit Entity.

19.1.11 No default under, violation of, or conflict with the governing instruments of Non-Profit Entity or any agreement, judgment or decree to which Non-Profit Entity is a party or is bound will result from (a) the execution and delivery by Non-Profit Entity of this Agreement, or (b) performance by Non-Profit Entity of its obligations under this Agreement.

19.1.12 The execution and delivery by Non-Profit Entity of this Agreement, and the performance by Non-Profit Entity of its obligations under this Agreement will not conflict with any Laws applicable to Non-Profit Entity that are valid and in effect on the date of execution and delivery. As of the Effective Date, Non-Profit Entity is not in breach of any applicable Law that would have a material adverse effect on the Work or the performance of any of its obligations under the Contract Documents.

19.1.13 This Agreement constitutes the legal, valid and binding obligation of Non-Profit Entity, enforceable against Non-Profit Entity in accordance with its terms, subject only to applicable

bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.

19.1.14 There is no action, suit, proceeding, investigation or litigation pending and served on Non-Profit Entity which challenges Non-Profit Entity's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement or which challenges the authority of the representative of Non-Profit Entity executing this Agreement; and Non-Profit Entity has disclosed to City any pending and un-served or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which Non-Profit Entity is aware. No current, pending or outstanding criminal, civil, or enforcement actions have been initiated against Non-Profit Entity by City or the State, and Non-Profit Entity agrees that it will immediately provide Notice to City if any such action is initiated during the Term.

19.1.15 Non-Profit Entity has disclosed to City in writing all organizational conflicts of interest of Non-Profit Entity and its Contractors of which Non-Profit Entity was actually aware, which have not been approved in writing by City.

19.1.16 As of the effective date of the relevant Key Contract, (a) each Key Contractor is duly organized, validly existing and in good standing under the laws of the state of its organization and is duly qualified to do business, and is in good standing, in the State, (b) the ownership interests (including options, warrants and other rights to acquire ownership interests) of each Key Contractor that is a single purpose entity formed for the Project are held by those Persons identified in a written certification delivered by or on behalf of Non-Profit Entity to City before such effective date; (c) each Key Contractor has the power and authority to do all acts and things and execute and deliver all other documents as are required to be done, observed or performed by it in connection with its engagement by Non-Profit Entity or Principal Project Company, as applicable; (d) each Key Contractor has (i) obtained and will maintain all required registrations, licenses, certifications, permits and approvals required under applicable Law as of such date and (ii) expertise, qualifications, experience, competence, and skills and is qualified to perform the Work for which it is responsible; (e) each Key Contractor will be required by the applicable Key Contract to comply with all health, safety and Environmental Laws in the performance of any work activities for, or on behalf of, Non-Profit Entity for the benefit of City; and (f) no Key Contractor is in breach of any applicable Law that would have a material adverse effect on any aspect of the Work.

19.1.17 Non-Profit Entity has not employed or retained, and Non-Profit Entity shall not employ or retain, any Person other than employees, agents, attorneys, consultants and advisors of a NPE-Related Entity, to solicit or secure this Agreement, and that it has not paid or agreed to pay any Person any fee or any other consideration contingent on the making of this Agreement.

19.1.18 Non-Profit Entity warrants that it owns, or will own, and has, or will have, good and marketable title and sufficient rights to all materials, Intellectual Property, equipment, tools and supplies furnished, or to be furnished, by any NPE-Related Entity that become part of the Project or are purchased for City for the development, operation, maintenance or repair of the Project, free and clear of all liens, royalties, fees or other charges of any kind or nature. All such materials, Intellectual Property, equipment, devices, or processes shall be delivered free of any claim of any Third Party for infringement of any Intellectual Property rights or ownership. Refer to Section 2.4.3 (Passage of Title) for provisions regarding transfer of title to City.

19.1.19 Non-Profit Entity warrants that the individual signing this Agreement on behalf of Non-Profit Entity is the properly authorized representative, agent, member or officer of Non-Profit Entity, that he/she has not, nor has any other member, employee, representative, agent or officer of Non-Profit Entity, directly or indirectly, to the best of the undersigned's knowledge, entered into or offered to enter into any combination, collusion or agreement to receive or pay, and that he/she has not received or paid, any sum of money or other consideration for the execution of this Agreement other than that which appears upon the face of this Agreement.

19.1.20 Principal Project Company is a limited liability company, duly organized and validly existing under the laws of the State of Delaware, has the requisite power and all required licenses to carry on its present and proposed activities, and has full power, right and authority to perform each and all of the obligations under the Project Implementation Agreement.

19.1.21 The activities under this Agreement and the Project Implementation Agreement are within the charitable purposes and mission of Non-Profit Entity and will not adversely affect Non-Profit Entity's tax exempt status.

19.2 City Representations and Warranties

City represents and warrants to Non-Profit Entity as follows:

19.2.1 The City and County of San Francisco is a charter city and municipal corporation duly organized and validly existing under the Constitution of the State of California. As of the Effective Date, City has full power, right and authority to execute, deliver this Agreement and City has full power, right and authority to perform its obligations under this Agreement.

19.2.2 Each person executing this Agreement on behalf of City is duly authorized to execute and deliver this Agreement, and this Agreement has been duly executed and delivered by City.

19.2.3 This Agreement has each been duly authorized by City, and constitutes a legal, valid and binding obligation of City enforceable against City in accordance with its terms.

19.2.4 As of the Effective Date, there is no action, suit, proceeding, investigation or litigation pending and served on City which challenges City's authority to execute, deliver and perform this Agreement, or which challenges the validity or enforceability of, this Agreement or which challenges the authority of City officials executing this Agreement; and City has disclosed any pending action, suit, proceeding, investigation or litigation against City (including filed but unserved complaints of which City has Actual Knowledge) relating to this Agreement or the Project.

19.2.5 Neither the execution and delivery by City of this Agreement, nor the consummation of the transactions contemplated under this Agreement, is in conflict with or has resulted or will result in a default under or a violation of any agreement, judgment or decree to which City is a party or is bound.

19.2.6 The execution and delivery by City of this Agreement, and the performance by City of its obligations under this Agreement, will not conflict with any Laws applicable to City that are valid and in effect on the date of execution and delivery. City is not in breach of any applicable Law that would have a material adverse effect on the performance of any of its obligations under the Contract Documents.

19.2.7 City's execution and delivery of this Agreement is not subject to any requirement to obtain consent or approval of any other Person (including Governmental Entities), other than consents and approvals already obtained.

19.3 Special Remedies for Mutual Breach of Warranty

Notwithstanding any other provision of this Agreement, if any circumstance or event occurs that constitutes or results in a concurrent breach by both Non-Profit Entity and City of similar warranties referenced in Section 16.1.1(f) or 16.3.1(c) but does not also constitute or result in any other breach or default by either Party, then the only remedies shall be for the Parties to take action to rectify or mitigate the effects of such circumstance or event, to pursue severance and reformation of the Contract Documents in accordance with Section 23.11 (Severability), or Termination Due to Court Ruling in accordance with Section 17.4.3 (Termination Due to Court Ruling).

ARTICLE 20. ASSIGNMENT AND TRANSFER

20.1 Restrictions on Equity Transfers and Change of Control

20.1.1 Except as provided in Section 20.1.3, any:

- (a) Change of Control of Non-Profit Entity or the Principal Project Company; or
- (b) Equity Transfer that results in any Equity Member ceasing to own (directly or indirectly) the same percentage of the issued share capital, partnership or membership interests, as applicable, in Non-Profit Entity or Principal Project Company that it owned (directly or indirectly) as of the Financial Close Date,

shall be subject to City's prior written approval in accordance with Section 20.2 (Standards and Procedures for City Approval). The Non-Profit Entity acknowledges and agrees that the Change of Control limitations applicable to Non-Profit Entity herein shall be equally made applicable to the Principal Project Company under the Project Implementation Agreement and Non-Profit Entity shall not consent to any Change of Control of Principal Project Company without the prior written consent of City, which consent shall be given or withheld in a manner consistent with the terms and conditions of this Agreement as applies to Non-Profit Entity.

20.1.2 Neither an Equity Transfer to a Prohibited Person, nor a Change of Control to a Prohibited Person, is permitted at any time. Further, none of the events described in clauses (b) through (g) of the definition of Change of Control are permitted at any time if it would result in the direct or indirect ownership by a Prohibited Person of any interest in Non-Profit Entity.

20.1.3 Transfers and transactions within any of the exceptions described in clauses (a) through (g) of the definition of Change of Control are allowed at any time without necessity for City's approval, provided that:

- (a) for an exception described in clause (a) (with respect to any initial public offering), or clause (b), (c) or (d), Non-Profit Entity shall deliver to City, on or before 10 Business Days before the effectiveness of the transfer or transaction, written Notice describing the transfer or transaction and (if applicable) the names of the transferor and transferee, together with documentation demonstrating that the transfer or transaction is within such an exception; and
- (b) for an exception described in clause (a) (other than with respect to an initial public offering), Non-Profit Entity shall deliver to City, within five days after the effectiveness of the transfer or transaction, written Notice describing the transfer or transaction and (if applicable) the names of the transferor and transferee, together with documentation demonstrating that the transfer or transaction is within such an exception.

20.1.4 In the event the Internal Revenue Service notifies Non-Profit Entity, that (a) the construction of the Project; or (b) the execution and delivery of this Agreement, places Non-Profit Parent's qualification as a 501(c)(3) tax-exempt entity in jeopardy, Non-Profit Entity, in consultation with the Principal Project Company and City, shall use commercially reasonable efforts to identify a Substituted Entity with the approval of the City. If Non-Profit Entity, in

consultation with Principal Project Company and City, is unable to identify a Substituted Entity within sixty (60) days, then Non-Profit Entity shall be entitled to (i) assign, convey and transfer all of the Non-Profit Entity Interest to a newly formed special purpose entity, formed at the direction and in the discretion of the Non-Profit Entity, and approved by City, and to have all of the obligations of the Non-Profit Entity under this Agreement assumed by such newly formed entity, and (ii) assign, convey and transfer all of the right, title and interest of Non-Profit Entity in and to this Agreement and the other Financing Documents to such newly formed entity, and to have all of the obligations of Non-Profit Entity under this Agreement and the Financing Documents assumed by such newly formed entity, so as to minimize any adverse tax consequences to Non-Profit Parent and to allow Non-Profit Parent to preserve its tax-exempt status as a 501(c)(3) organization; provided, however, that any such assignment, conveyance and transfer shall only be permitted to an entity that is taking assignment of, and assuming, the Non-Profit Entity's rights and obligations under this Agreement in accordance with the terms herein and under the Financing Documents in accordance with the terms thereof. Any costs of expenses incurred in connection with the identification of and assignment to the Substituted Entity including those of the City shall be paid by the Non-Profit Entity.

20.2 Standards and Procedures for City Approval

20.2.1 Where City's prior written approval is required for a proposed sale, assignment, conveyance, transfer, pledge, mortgage, encumbrance, grant of right of entry, or grant of other special use, management or control, or for any proposed Equity Transfer or Change of Control (each, a "**Transaction**"), and such Transaction is proposed at any time during the period ending two years after the Substantial Completion Date, City may withhold or condition its approval in its sole discretion. Any such decision of City to withhold consent shall be final, binding and not subject to the Contract Dispute Procedures.

20.2.2 After the second anniversary of the Substantial Completion Date, City shall not unreasonably withhold its approval of a Transaction.

20.2.3 Among other factors and considerations, it shall be reasonable for City to withhold its approval if:

- (a) Non-Profit Entity fails to demonstrate to City's reasonable satisfaction that: (i) the proposed Transaction that would amount to a Change of Control of Non-Profit Entity or Principal Project Company will not have any adverse effect on (x) Non-Profit Entity's ability to timely perform its obligations under the Contract Documents and the Principal Project Documents and (y) Principal Project Company's ability to timely perform its obligations under the Project Implementation Agreement, taking into account the financial resources, qualifications and experience of the proposed assignee, grantee or transferee; and (ii) the proposed assignee, grantee or transferee is in compliance with City's rules, regulations, and adopted written policies regarding organizational conflicts of interest; or
- (b) at the time of the proposed Transaction, there exists any uncured NPE Default or any event or circumstance that with the lapse of time, the giving of Notice or both would constitute a NPE Default, unless City receives from the proposed transferee assurances of cure and performance acceptable to City in its reasonable discretion.

20.2.4 For Transactions subject to City's prior reasonable approval, City will approve or disapprove in writing within 60 days after it receives from Non-Profit Entity:

- (a) a request for approval;
- (b) a reasonably detailed description of the proposed Transaction;
- (c) such information, evidence, and supporting documentation as City may request concerning the identity, financial resources, qualifications, experience, and potential conflicts of interest of the proposed transferee and its proposed contractors; and
- (d) such evidence of organization and authority, and such incumbency certificates, certificates regarding debarment or suspension, and other certificates, representations, and warranties as City may reasonably request.

20.2.5 For Transactions subject to City's prior reasonable approval, City will evaluate the identity, financial resources, qualifications, experience, and potential conflicts of interest using the same standards and criteria that it is then currently applying, or if there is no current application, then the same standards and criteria it most recently applied, to the evaluation of Persons responding to City's requests for qualifications for similar agreements for comparable projects and facilities.

20.2.6 If for any reason City does not act within such 60 day period, or any extension thereof by mutual agreement of the Parties, then the proposed Transaction shall not be permitted, subject to Non-Profit Entity's right, in the case of a proposed Transaction governed by Section 20.2.2, to submit a Contract Dispute for resolution according to the Contract Dispute Procedures.

20.3 Restrictions on Assignment, Subletting and Other Transfers of NPE's Interest or the Project

20.3.1 Non-Profit Entity shall not voluntarily or involuntarily sell, assign, convey, transfer, pledge, mortgage or otherwise encumber NPE's Interest or any portion thereof without City's prior written approval, in its sole discretion, except:

- (a) to Lenders for security as permitted by this Agreement, provided Non-Profit Entity retains responsibility for the performance of Non-Profit Entity's obligations under the Contract Documents; or
- (b) to any Substituted Entity approved by City in accordance with the Direct Agreement, provided that such Substituted Entity assumes in writing full responsibility for performance of the obligations of Non-Profit Entity under this Agreement, the other Contract Documents, the Project Implementation Agreement and the other Key Contracts and Financing Documents arising from and after the date of assignment.

20.3.2 Subject to Section 20.3.1, assignments and transfers of the NPE's Interest permitted under this Section 20.3 (Restrictions on Assignment, Subletting and Other Transfers of NPE's Interest or the Project), or otherwise approved in writing by City, shall be effective only upon City's receipt of a written instrument executed by the transferee of NPE's Interest, including any

Person who acquires NPE's Interest through foreclosure, transfer in lieu of foreclosure or similar proceeding, in form and substance acceptable to City, in which the transferee, without condition or reservation, (i) assumes all of NPE's Interest then in effect, (ii) agrees to perform and observe all of NPE's Interest, and (iii) agrees to be bound by, the Project Management Plan, the Project Implementation Agreement, the other Key Contracts, the Regulatory Approvals, all agreements between the transferor and Third Parties related to or arising out of the Work and/or the Project, and all agreements between the transferor and Governmental Entities with jurisdiction over the Project or the Work, except to the extent otherwise approved by City, in its sole discretion.

20.3.3 Non-Profit Entity shall not grant any right of entry onto, use of, or right to manage and control the Project to any other Person except as expressly contemplated in this Agreement without City's prior written approval, in its sole discretion. Any purported voluntary or involuntary sale, assignment, subletting, conveyance, transfer, pledge, mortgage, encumbrance or grant of other special use, management or control of the Project in violation of this provision shall be null and void ab initio and City, at its option, may declare any such attempted action to be a material NPE Default.

20.4 Assignment by City

City may assign all or any portion of its right, title and interest in the Contract Documents, Payment Bonds and Performance Bonds, guarantees, letters of credit and other security for payment or performance:

- (a) in its sole discretion and without Non-Profit Entity's consent, to any other Person that succeeds to the powers and authority of SFMTA under the San Francisco City Charter and San Francisco Administrative Code, has the legal authority to perform its obligations and has sources of funds to perform the payment obligations of the City that are at least as adequate and secure as the City's as of the time of the assignment; and
- (b) to others with the prior written consent of Non-Profit Entity, which consent cannot be unreasonably withheld if City's assignee has a credit rating equal to or better than City's senior lien rating at the time of the assignment as measured by a Rating Agency.

20.5 Change of Organization or Name

20.5.1 Non-Profit Entity shall not change the legal form of its organization in a manner that adversely affects City's rights, protections and remedies under the Contract Documents without the prior written approval of City.

20.5.2 If either Party changes its name, such Party agrees to promptly furnish the other Party with Notice of change of name and appropriate supporting documentation.

ARTICLE 21. RECORDS AND AUDITS; INTELLECTUAL PROPERTY

21.1 Maintenance and Inspection of Records

21.1.1 Non-Profit Entity shall undertake the following with respect to its Books and Records:

- (a) keep and maintain Books and Records, including copies of all original documents delivered to City, in San Francisco, California, or in another location approved by City in writing, and provide Notice to City where the Books and Records are kept;
- (b) keep and maintain Books and Records in accordance with applicable provisions of the Contract Documents, including the Technical Requirements, applicable provisions of the Project Management Plan, and in accordance with Good Industry Practice;
- (c) make all Books and Records available for inspection by City and its representatives in Non-Profit Entity's principal offices in San Francisco, California, or in accordance with each IP Escrow, at all times during normal business hours, or at other reasonable times during the Term;
- (d) provide to City, or make available to City for review in accordance with each IP Escrow, copies of any Books and Records as and when reasonably requested by City. City may inspect upon 48 hours' prior Notice or without prior Notice where there is good faith suspicion of fraud. City's right of inspection includes the right to make extracts and take notes and shall not be construed as a waiver by Non-Profit Entity of the attorney-client privilege;
- (e) retain all Books and Records related to the D&C Work until five years after the expiration of the Warranty Period, provided that all records which are being audited or which relate to Claims and Contract Disputes being processed or actions brought under the Contract Dispute Procedures shall be retained and made available until any later date that such audits, Claims, Contract Disputes and actions are finally resolved; and
- (f) permit City, upon 10 days' prior Notice to Non-Profit Entity (which Notice shall identify the persons City requests to be present for an interview and describe with reasonable specificity the subject matter to be raised in the interview), to discuss the obligations of Non-Profit Entity under this Agreement with any of the directors, chief executive officer and chief financial officer of Non-Profit Entity or its representatives, for the purpose of enabling City to determine whether Non-Profit Entity is in compliance with this Agreement and applicable Law. The interviewees and their employers may have counsel present at the interviews.

21.1.2 Non-Profit Entity shall cause the Project Implementation Agreement and each other Key Contract to include the provisions of Section 21.1.1, to the extent applicable, modified as appropriate to apply to the Contractor's Books and Records.

21.1.3 Exhibit 16 (Federal, State and City Requirements) includes additional requirements regarding maintenance and inspection of Books and Records.

21.2 Audits

21.2.1 City may review and audit Non-Profit Entity, its Contractors and their respective Books and Records as and when City deems necessary for purposes of verifying compliance with the Contract Documents and applicable Law and verifying Claims.

21.2.2 Without limiting Section 21.2.1:

- (a) City may audit the Project Management Plan and compliance therewith, including the right to inspect Work and/or activities and to verify the accuracy and adequacy of the Project Management Plan and its component parts, plans and other documentation;
- (b) the audits may be performed by employees or consultants of City, City or the City's Controller, or by an auditor under contract with City, City or the City's Controller;
- (c) Non-Profit Entity shall provide adequate and appropriate work space for City or its representative(s) to conduct audits;
- (d) Non-Profit Entity shall: allow auditor(s) access to such Books and Records during normal business hours; provide to City copies thereof, in any physical and/or digital medium, as and when reasonably requested by City; allow interviews of any employee who might have information related to such Books and Records; and otherwise cooperate with the auditors including furnishing a management representation letter upon request of the auditor; and
- (e) Non-Profit Entity shall cause each Contract to include a similar right of City to audit records and interview staff of the Contractor, and a similar covenant to cooperate with the auditors.

The foregoing shall not be deemed to waive the right of Non-Profit Entity or Contractor to have counsel or other appropriate representatives present at the interview.

21.2.3 If any City audit results in a material correction to the Books and Records, as determined by City in its reasonable discretion, Non-Profit Entity shall pay the reasonable costs of City in conducting the audit, but if not, City will bear the costs of the audit.

21.2.4 Failure of Non-Profit Entity, Contractors or their agents to maintain and retain sufficient Books and Records to allow the auditors to verify all or a portion of a Claim or to permit the auditor access to its Books and Records to verify a Claim shall be sufficient basis for City to deny recovery by Non-Profit Entity of the Claim to the extent of such failure.

21.2.5 Full compliance by Non-Profit Entity with the provisions of Section 21.2 (Audits) is a contractual condition precedent to Non-Profit Entity's right to seek relief on a Claim.

21.2.6 City's rights of audit include the right to observe the business operations of Non-Profit Entity and its Contractors to confirm the accuracy of Books and Records.

21.2.7 Non-Profit Entity shall include in the Project Management Plan internal procedures to facilitate review and audit by City and, if applicable, City representatives and the City's Controller or their employees and consultants.

21.2.8 Non-Profit Entity represents and warrants the completeness and accuracy of all information it or its agents provides in connection with City audits, and shall cause all Contractors to represent and warrant the completeness and accuracy of all information such Contractors provide in connection with City audits.

21.2.9 Non-Profit Entity's internal and Third Party quality and compliance auditing responsibilities shall be identified in the Project Quality Plan, in accordance with Section 1.4 of Division 1 of the Technical Requirements and other related provisions concerning QA and compliance auditing.

21.2.10 Nothing in the Contract Documents shall in any way limit the constitutional and statutory powers, duties and rights of elected officials, including the independent rights of the City's Controller, in carrying out his or her legal authority.

21.3 Public Records Act and San Francisco Sunshine Ordinance

21.3.1 Non-Profit Entity acknowledges and agrees that all Submittals, records, documents, drawings, plans, specifications and other materials in City's possession, including any Books and Records submitted by Non-Profit Entity to City, may be considered public information subject to disclosure under the California Public Records Act (the "PRA") and San Francisco Sunshine Ordinance.

21.3.2 If Non-Profit Entity believes any Books and Records submitted to City constitute trade secrets, proprietary information or other information that is not subject to or excepted from disclosure under the PRA, Non-Profit Entity shall be solely responsible for specifically and conspicuously designating that information by placing "CONFIDENTIAL" in the center header of each such page affected, as it determines to be appropriate. Any such designation of trade secret or other basis for exemption shall be accompanied by a concise statement of reasons supporting the claim including the specific Law that authorizes the exemption from disclosure under the PRA.

21.3.3 If City receives a request for public disclosure of information or materials that have been designated by Non-Profit Entity as "CONFIDENTIAL," City will use reasonable efforts to provide Notice to Non-Profit Entity of the request and may request advice from City's counsel before disclosing any such documents in accordance with applicable Law. Non-Profit Entity shall then have the opportunity to either consent to the disclosure or assert its basis for non-disclosure and claimed exception under the PRA or other applicable Law to City within the time period specified in the Notice issued by City (if any) and before the deadlines for release in the PRA and other applicable Law. However, it is the responsibility of Non-Profit Entity to monitor requests for disclosure and proceedings and make timely filings. City may make filings of its own concerning possible disclosure; however, City is under no obligation to support Non-Profit Entity's positions. By entering into this Agreement, Non-Profit Entity consents to, and expressly waives any right to contest, provision by City to City's counsel of all, or representative samples of, information or materials designated as "CONFIDENTIAL" by Non-Profit Entity, in accordance with the PRA. City shall have no responsibility or obligation for a failure of Non-Profit Entity to respond or to respond timely to any request for disclosure of information or materials designated as "CONFIDENTIAL" by Non-Profit Entity, in accordance with the PRA, and City shall not be

required to wait for a response before making a disclosure or otherwise taking action under the PRA or other applicable Law. Under no circumstances will City be responsible or liable to Non-Profit Entity or any other party as a result of disclosing any such materials, including materials marked “CONFIDENTIAL”, whether the disclosure is deemed required by Law or by an order of court or City’s general counsel or occurs through inadvertence, mistake or negligence on the part of City or its officers, employees, contractors or consultants.

21.3.4 Nothing contained in this Section 21.3 (Public Records Act and San Francisco Sunshine Ordinance) shall modify or amend requirements and obligations imposed on City by the PRA or other applicable Law, and the provisions of the PRA or other Laws shall control to the extent of a conflict between the procedures under this Agreement and applicable Law. City will not advise a submitting party or Non-Profit Entity as to the nature or content of documents entitled to protection from disclosure under the PRA or other applicable Laws, as to the interpretation of such Laws, or as to definition of trade secret. Non-Profit Entity is advised to contact its own legal counsel concerning the effect of applicable Laws to Non-Profit Entity’s Books and Records and actions to be taken to preserve confidentiality.

21.3.5 In the event of any proceeding or litigation concerning the disclosure of any Books and Records to Third Parties, City’s sole involvement will be as a stakeholder retaining the material until otherwise ordered by a court or other authority having jurisdiction. Non-Profit Entity shall be responsible for prosecuting or defending any action, acting on its own behalf, concerning such materials at its sole expense and risk; provided, however, that City may intervene or participate in the litigation in such manner as it deems necessary or desirable. Non-Profit Entity shall indemnify and hold harmless Indemnitees from and against any and all claims, causes of action, suits, legal or administrative proceedings, damages, losses, liabilities, response costs, costs and expenses, including any injury to or death of persons or damage to or loss of property (including damage to utility facilities), and including attorneys’ and expert witness fees and costs, arising out of, relating to or resulting from City’s refusal to disclose any material that Non-Profit Entity has designated as a trade secret.

21.4 Intellectual Property

21.4.1 Developed IP

21.4.1.1 Non-Profit Entity acknowledges and agrees that all Developed IP, in any medium, is either owned by City or specially ordered or commissioned by City, including works made for hire pursuant to 17 U.S.C. § 101 (the U.S. Copyright Act of 1976), and shall be owned by City upon authorship, creation, development or invention. Non-Profit Entity hereby assigns to City all rights, title and interest in and to the Developed IP including any and all Software, Work Product and designs. If any Developed IP is not the proper subject matter or is determined not to be a work-made-for-hire pursuant to the U.S. Copyright Act, Non-Profit Entity hereby assigns, and shall cause all NPE-Related Entities to assign, to City all rights, title and interest in and to the Developed IP including any deliverable. Non-Profit Entity agrees to execute, and shall cause all NPE-Related Entities to execute, such further documents and to do such further acts as may be necessary to perfect, register, or enforce City’s ownership of such rights, in whole or in part. If any NPE-Related Entity fails or refuses to execute any such documents, Non-Profit Entity, for itself and on behalf of any NPE-Related Entity, hereby appoints City as the necessary NPE-Related Entity’s attorney-in-fact (this appointment is irrevocable and is coupled with an interest) to act on NPE-Related Entity’s behalf and to execute such documents. Non-Profit Entity hereby forever waives and agrees never to assert, and shall cause any NPE-Related Entity to waive and never to assert, against City, its successors or licensees any and all “moral rights”

(including claims based on 17 U.S.C. §§ 101-810 (the Copyright Act of 1976, as modified), specifically including 17 U.S.C. § 106A(a) (the Visual Artists Rights Act of 1990, “VARA”)) that such NPE-Related Entity may have in any Intellectual Property or deliverable even after expiration or termination of this Agreement.

21.4.1.2 All deliverables authored, created or developed under or for the purpose of this Agreement, the Work or the Project shall be owned by City immediately upon creation or generation, physically or digitally, and whether or not such deliverable and/or work product have been delivered to City under the terms of this Agreement.

21.4.1.3 Non-Profit Entity shall deliver to City all deliverables and/or other work product authored, created or developed under or for the purpose of this Agreement (i) at time(s)/date(s) pursuant to this Agreement, or (ii) as soon as reasonably practicable after such creation or generation, but in no event later than the effective date of termination of this Agreement.

21.4.2 Non-Profit Entity IP

21.4.2.1 Non-Profit Entity hereby grants to City an irrevocable, perpetual, non-exclusive, transferable (solely to a permitted City’s assignee), fully paid-up right and license to use, execute, perform, sublicense, exploit, manufacture, distribute, reproduce, adapt, display, and prepare derivative works (“**Base License Rights**”) of Non-Profit Entity IP in connection with the Work or the Project. The rights granted herein shall survive the termination, expiration or cancellation of this Agreement or any rights related thereto.

21.4.2.2 Non-Profit Entity shall identify and disclose to City all Non-Profit Entity IP required by, incorporated in, or combined with the Work or the Project.

21.4.3 Third Party IP

21.4.3.1 Non-Profit Entity shall use commercially reasonable efforts to secure Base License Rights in the name of City to license Third Party IP in connection with the Project or Work, and shall pay any and all royalties and license fees required to be paid for any Intellectual Property required by, incorporated in, or combined with the Project IP.

21.4.3.2 Subject to Section 21.4.3.3, if the owner of Third Party IP refuses to grant Base License Rights pursuant to Section 21.4.3.1, Non-Profit Entity shall:

- (a) obtain City’s prior written approval, which shall not to be unreasonably withheld, of the terms and conditions of Third Party IP licenses;
- (b) identify and disclose to City all Third Party IP required by, incorporated in, or combined with the Project IP; and
- (c) obtain from each owner of the Third Party IP prior consent to have the relevant Third Party IP deposited into an IP Escrow in accordance with Section 21.5 (Intellectual Property Escrows), or, to the extent the owner of the relevant Third Party IP has not provided such consent, obtain City’s prior written approval for a waiver of this requirement, not to be unreasonably withheld.

21.4.3.3 COTS. Only if the owner of Third Party IP refuses to grant Base License Rights pursuant to Section 21.4.3.1 and the subject Third Party IP is COTS, Non-Profit Entity shall secure license(s) in the name of City, based on commercially available terms for the COTS, including any standard end user license Contract. Non-Profit Entity shall provide (i) an outline of license deficiencies vs. Base License Rights and (ii) the identification of at least one (1) other COTS available for the same purpose, function or design. Non-Profit Entity shall identify and disclose to City all COTS required by, incorporated in, or combined with the Work and/or the Project.

21.4.4 City IP and City Data

21.4.4.1 City hereby grants to NPE-Related Entities a limited, non-exclusive license to use, exploit, manufacture, distribute, reproduce, adapt and display the Project IP, City IP, and City Data, and any deliverable and/or other work product incorporating such Intellectual Property, solely in connection with and limited to the Allowed Uses. All rights not specifically granted in this Section 21.4.4.1 are reserved to City. For the avoidance of doubt, no rights to City trademarks, whether or not the subject of a trademark state or US application or registration, (“City Marks”) are granted to Non-Profit Entity and Non-Profit Entity may not incorporate, refer to, or otherwise use City Marks for any marketing, promotional or advertising purposes.

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

21.4.4.3 Notwithstanding any other term or condition of this Agreement, the rights and permissions granted under this Section 21.4.4 (City IP and City Data) shall terminate (i) upon the effective date of termination of this Agreement or (ii) upon 24-hour written Notice by City to Non-Profit Entity, whichever is earlier.

21.4.4.4 Except as, and to the limited extent, required by applicable Laws, Non-Profit Entity shall keep and maintain, and shall cause all NPE-Related Entities to keep and maintain, all City IP and City Data strictly confidential. Before any release of any City IP or CTIP Data pursuant to applicable Laws, Non-Profit Entity must consult with City and the City Attorney’s Office regarding such release and obtain consent to such release. Any release shall be limited to the minimum required to satisfy the applicable Law.

21.4.5 Delivery of IP Materials

Non-Profit Entity shall deliver to City all IP Materials related to Non-Profit Entity IP and Third Party IP, or deposit such IP Materials into IP Escrow(s) in accordance with Section 21.5 (Intellectual Property Escrows), as soon as reasonably practicable following incorporation of the relevant Intellectual Property into the Project or Work.

21.4.6 Payments Inclusive

Non-Profit Entity acknowledges and agrees that the payments provided for in Article 11 (Payments to Non-Profit Entity) include all royalties, fees, costs and expenses arising from or related to the Project IP, including any fees pursuant to Section 21.5 (Intellectual Property Escrows).

21.5 Intellectual Property Escrows

21.5.1 City and Non-Profit Entity acknowledge that Non-Profit Entity or other NPE-Related Entities may deliver IP Materials pursuant to Section 21.4.5 (Delivery of IP Materials) that include Software, Source Code and Documentation or other Intellectual Property and may not wish to deliver the applicable IP Materials directly to City as public disclosure could deprive such Person of commercial value. Non-Profit Entity further acknowledges that City nevertheless must be ensured access to such IP Materials at any time, and must be assured that the IP Materials are delivered to City pursuant to Section 21.4.5 (Delivery of IP Materials).

21.5.2 In lieu of delivering the IP Materials directly to City, Non-Profit Entity may elect to deposit the IP Materials with a neutral depository. In such event, City and Non-Profit Entity shall: (a) mutually select one or more escrow companies or other neutral depositories (each an “**IP Escrow Agent**”) engaged in the business of receiving and maintaining escrows of software source code and/or other Intellectual Property; (b) establish one or more escrows (each an “**IP Escrow**”) with the IP Escrow Agent on terms and conditions reasonably acceptable to City and Non-Profit Entity for the deposit, retention, upkeep, authentication, confirmation and release of IP Materials to City pursuant to this Agreement; (c) determine the date(s) for Non-Profit Entity’s deposit of the IP Materials into the IP Escrow; and (d) determine a process for releasing from escrow the IP Materials to be delivered to City pursuant to this Agreement. IP Escrows also may include Affiliates as parties and may include deposit of their Intellectual Property. Non-Profit Entity shall be responsible for the fees and costs of the IP Escrow Agent(s).

21.5.3 The IP Escrows shall survive expiration or earlier termination of this Agreement regardless of the reason.

21.5.4 The IP Materials shall be released and delivered to City in any of the following circumstances:

- (a) this Agreement expires or is terminated prior to expiration for any reason;
- (b) voluntary or involuntary bankruptcy of Non-Profit Entity, NPE-Related Entity or the owner of Third Party IP, as to Non-Profit Entity IP or Third Party IP respectively; or
- (c) Non-Profit Entity, NPE-Related Entity or the owner of Third Party IP is dissolved or liquidated or otherwise ceases to engage in the ordinary course of the business of manufacturing, supplying, maintaining, and servicing the Software, product, part, or other item containing the relevant Intellectual Property.

21.6 City's Use of IP Materials

21.6.1 City may exercise all rights, including the Base License Rights, granted to City pursuant to Section 21.4 (Intellectual Property) for the purposes of the Project, including any subsequent expansion or additions, except that City's ownership or assigned rights pursuant to Section 21.4.1 (Developed IP) shall not be limited in any way, for any purpose. For the avoidance of doubt, City's rights include the right to sublicense any City rights to a future vendor. City's rights under this clause shall survive the termination, expiration or cancellation of this Agreement.

21.6.2 City shall maintain the confidentiality of any IP Materials released pursuant to Section 21.5 (Intellectual Property Escrows) pursuant to Section 21.4 (Intellectual Property) and shall enter into a non-disclosure agreement with any third party to whom City, in its sole discretion, grants access to such IP Materials to the extent that such IP Materials contain Confidential Information.

ARTICLE 22. ADVERTISING AND OTHER BUSINESS OPPORTUNITIES

22.1 Rights and Interests in the Project and Project Site

Non-Profit Entity's rights and interests in the Project and Project Site under this Agreement are limited to such rights and interests that are required for performing the Work and Non-Profit Entity's timely fulfillment of its obligations under the Contract Documents. Non-Profit Entity's rights and interests exclude any Airspace or other real property interest.

22.2 Advertising and Business Opportunities

22.2.1 City reserves all rights and opportunities concerning:

- (a) advertising on the Infrastructure Facility and, as between Non-Profit Entity and City, within the Project Site, including use of Infrastructure Facility physical assets for advertising purposes; and
- (b) entrepreneurial, commercial and business activities that are ancillary or collateral to the use and operation of the Infrastructure Facility and Project Site, whether developed or pursued by City or through others worldwide. The rights and opportunities reserved to City under this Section 22.2.1(b) include the rights described in Section 22.2.1(a) and any sponsorships, naming rights, etc. (collectively, "**Business Opportunities**").

22.2.2 Non-Profit Entity shall cooperate and, during the D&C Period, grant all necessary access to the Project Site to City and any Third Party designees, including tenants and vendors, authorized by City in connection with City's exercise of its rights relating to the Project Site and any advertising and Business Opportunities. After the D&C Period, in the performance of any Warranty Work, Non-Profit Entity shall not interfere with access to the Infrastructure Facility by City and any Third Party designees, including tenants and vendors, authorized by City in connection with City's exercise of its rights relating to its operations at the Project Site and any advertising and Business Opportunities. Unless otherwise agreed to by the Parties, City shall be entitled to all revenues generated by business opportunities arising out of, relating to or resulting from the Infrastructure Facility or in the Project Site's Airspace, except rents paid by any Housing and Commercial Component tenants. To the extent requested to be performed by City prior to the Final Acceptance Date, Non-Profit Entity shall install, and be compensated for reasonable costs and expenses incurred directly by Non-Profit Entity for installing, facilities for advertising or Business Opportunities through a Change Order.

22.2.3 Except as authorized by City, Non-Profit Entity shall not engage in, and shall not permit:

- (a) any advertising within the Project Site or within or on the exterior of the Infrastructure Facility;
- (b) use or occupation of the Project for any Business Opportunities; and
- (c) operation of any business at the Project Site or the Infrastructure Facility, including (i) the sale of products or services (including any newsstand or concession stand for the sale of food, beverages or gifts or other retail or

rental services); or (ii) the sale or rental of any wire, cable, transmission or receiving device or any other utility on, or transmission or receipt of any electronic communication to or from, any part of the Project.

22.2.4 Non-Profit Entity may request City to consider Business Opportunities. If City, in its sole discretion, consents, the Parties shall execute an amendment to the Contract Documents memorializing the agreement reached, including any agreement as to any revenue and cost attribution. Notwithstanding the foregoing, Non-Profit Entity shall be compensated pursuant to a City Change for Non-Profit Entity's reasonable costs and expenses that are directly attributable to implementation of such Business Opportunities as well as any support efforts the City Change requires Non-Profit Entity to provide.

22.2.5 Unless expressly approved by City, Non-Profit Entity may not permit any Person to use or occupy the Project for any ancillary or collateral purpose.

22.3 Remedies

If a NPE Default concerns a breach of the provisions of Section 22.2 (Advertising and Business Opportunities), then, in addition to any other remedies available to City under this Agreement or applicable Law, City shall be entitled to receive from Non-Profit Entity an amount equal to all profits from the prohibited activity, together with interest thereon at the Late Payment Rate from the date of collection until the date payment is made. In addition, City may require Non-Profit Entity to restore the Project Site and the Infrastructure Facility to its original condition or to transfer to City all of Non-Profit Entity's interest in the prohibited assets and improvements and revenues derived therefrom, or any combination of the foregoing.

ARTICLE 23. MISCELLANEOUS

23.1 Standard for Approvals

In all cases where approvals, acceptances or consents are required to be provided by City or Non-Profit Entity hereunder, such approvals, acceptances or consents shall not be withheld unreasonably except in cases where a different standard (such as sole discretion) is specified. Any authorization by City shall be in writing. Any approval required by the SFMTA Board or Board of Supervisors will be at their respective sole discretion. In cases where sole discretion is specified, the decision shall not be subject to Contract Dispute Procedures hereunder.

23.2 Amendments

The Contract Documents may be amended only by a written instrument duly executed by or on behalf of the Parties, except to the extent expressly provided otherwise in this Agreement.

23.3 Waiver

23.3.1 The failure of a Party to exercise or delay in exercising any right under this Agreement shall not:

- (a) constitute a waiver of such right or any other right under the Contract Documents; or
- (b) relieve the other Party from performance of its obligations under the Contract Documents except as otherwise provided in the Contract Documents.

23.3.2 No waiver of any right under this Agreement shall be effective unless made in a writing duly executed by a duly authorized representative of the Party charged with the waiver.

23.3.3 Any waiver under Section 23.3.2 shall be limited to the specific instance and shall not constitute a waiver of such right in the future or of any other right under this Agreement.

23.3.4 If the Parties make and implement any interpretation of the Contract Documents without documenting such interpretation by an instrument in writing signed by both Parties, such interpretation and implementation thereof will not be binding in the event of any future Contract Disputes.

23.3.5 No waiver of any right under this Agreement shall be deemed to have occurred as the result of any acceptance by City, any payment for or acceptance of the whole or any part of the Work, any extension of time, or any possession taken by City.

23.4 Independent Contractor; No Joint Venture or Partnership

23.4.1 Non-Profit Entity is an independent contractor. Neither Non-Profit Entity nor any of its employees or agents is or shall be deemed to be an employee or agent of City, and in no event shall the relationship between City and Non-Profit Entity be construed as creating any relationship whatsoever between City and Non-Profit Entity's employees or agents. Except as otherwise provided in the Contract Documents, Non-Profit Entity has sole authority and responsibility to employ, discharge and otherwise control its employees and has complete and

sole responsibility as a principal for its agents, for all Contractors and for all other Persons that Non-Profit Entity or any Contractor hires to perform or assist in performing the Work.

23.4.2 Nothing in the Contract Documents is intended or shall be construed to create any partnership, joint venture or similar relationship between City and Non-Profit Entity; and in no event shall either Party take a position in any tax return or other writing of any kind that a partnership, joint venture or similar relationship exists.

23.4.3 Non-Profit Entity shall not have, or be deemed to have, power or authority to make any commitments on City's behalf or to execute agreements in the name of or on behalf of City. Non-Profit Entity shall not enter into any agreement with any Governmental Entity, Utility Owner, property owner or other Third Party having regulatory jurisdiction over any aspect of the Project or Work or having any property interest affected by the Project or the Work that in any way purports to obligate City, or states or implies that City has an obligation to the Third Party, to undertake any activity, unless City otherwise approves.

23.5 Successors and Assigns

The Contract Documents shall be binding upon and inure to the benefit of City and Non-Profit Entity and each of their permitted successors, assigns and legal representatives.

23.6 Designation of Representatives; Cooperation with Representatives

23.6.1 City and Non-Profit Entity shall each designate an individual or individuals who shall be authorized to make decisions and bind the Parties on matters relating to the Contract Documents. Exhibit 10 (Initial Designation of Authorized Representatives) provides the initial Authorized Representative designations. A Party may change such designations by written Notice in accordance with Section 23.10 (Notices and Communications).

23.6.2 Non-Profit Entity shall cooperate with City and all representatives of City designated as described above in performance of their obligations under the Contract Documents.

23.7 Survival

The following provisions shall survive the expiration or earlier termination of this Agreement and/or the completion of the Work:

- (a) Non-Profit Entity's and City's representations and warranties;
- (b) the Contract Dispute Procedures;
- (c) the indemnifications, limitations and releases contained in Section 10.6 (Indemnities);
- (d) the limitations on remedies contained in Section 16.6 (Limitation on Consequential Damages);
- (e) the express obligations of the Parties following termination (including those in Articles 17 (Termination) and 20 (Assignment and Transfer));
- (f) the Direct Agreement); and

- (g) all other provisions which by their inherent character should survive expiration or earlier termination of this Agreement and/or completion of the Work.

23.8 Limitation on Third Party Beneficiaries

Except to the extent that specific provisions (such as the warranty and indemnity provisions, and the provisions for the protection of certain Lenders under any Direct Agreement) identify Third Parties and state that they are entitled to benefits, (a) it is not intended by any of the provisions of the Contract Documents to create any third party beneficiary to this Agreement or to authorize anyone not a Party to maintain a suit for personal injury or property damage under this Agreement, and (b) the duties, obligations and responsibilities of the Parties with respect to third parties shall remain as imposed by Law. The Contract Documents shall not be construed to create a contractual relationship of any kind between City and a Contractor or any Person other than Non-Profit Entity.

23.9 Governing Law; Venue

The Contract Documents shall be governed by and construed in accordance with the laws of the State, any applicable federal law, the San Francisco City Charter and Municipal Code, and the ordinances, regulations, codes, and Executive Orders enacted and/or promulgated pursuant thereto. The venue for any litigation arising from a Contract Dispute shall be in San Francisco, California to the extent that a court located in San Francisco has subject matter jurisdiction.

23.10 Notices and Communications

23.10.1 All notices, requests, demands, instructions, certificates, consents, explanations, agreements, approvals and other communications (each being a “**Notice**”) required or permitted under this Agreement must be in writing (whether or not “written notice” or “notice in writing” is specifically required by the applicable provision of this Agreement) and (a) delivered in person, (b) sent by commercial courier, next business day delivery requested, or (c) by registered, certified mail or express mail, return receipt requested, with postage prepaid, to the mailing addresses below. All Notices under this Agreement will be deemed given, received, made or communicated on the date personal receipt actually occurs or, if mailed, on the delivery date or attempted delivery date shown on the return receipt. For the convenience of the Parties, copies of Notices may also be given by email to the email address given below but the emailed copy will not be binding on either Party.

23.10.2 The effective time of a Notice will not be affected by the receipt of the email copy of the Notice.

23.10.3 Any mailing address, or email address, may be changed at any time by giving written Notice of the change in the manner provided above at least ten (10) days before the effective date of the change.

- (a) All Notices to Non-Profit Entity shall be delivered to the following address or as otherwise directed by Non-Profit Entity's Authorized Representative:
-

Attention: PRG – Potrero Properties LLC
c/o Provident Resources Group Inc.
5565 Bankers Avenue
Baton Rouge, LA 70808
President and Chief Executive Officer
Telephone: 225-766-3977
E-mail: 

- (b) All Notices to City shall be marked as regarding the Project and shall be delivered to the following address or as otherwise directed by City's Authorized Representative:

San Francisco Municipal Transportation Agency
1 South Van Ness, 8th Floor
San Francisco, CA 94103
Attn: Chris Lazaro
Email: Chris.Lazaro@sfmta.com

With a copy to: Office of the City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Attn: Real Estate & Finance Group
Re: Potrero Yard Modernization Project
[Email: isidro.jimenez@sfcityatty.org](mailto:isidro.jimenez@sfcityatty.org)

23.10.4 Non-Profit Entity has provided an email address for Notices and other communications as set forth in Section 23.10.3 and represents and warrants that both Non-Profit Entity and Principal Project Company has full, concurrent and complete access to all Notices and communications sent to such email address. Notices and communications sent by City to such email address shall be considered to be immediately delivered to both Non-Profit Entity and Principal Project Company for all purposes under the Contract Documents and Project Implementation Agreement.

23.10.5 Any technical or other communications pertaining to the Work shall be conducted by Non-Profit Entity's Authorized Representative and City's Authorized Representative.

23.10.6 Non-Profit Entity shall promptly provide to City a copy of each communication received from any Lender relating to any default or event of default under any Financing Agreement or Security Document.

23.11 Severability

23.11.1 If any provision or part of the Contract Documents is ruled invalid (including invalidity due to any statutory change or other change in Law) by a court having proper jurisdiction, then the Parties shall: (a) promptly meet and negotiate a substitute for such provision or part, which shall, to the greatest extent legally permissible, effect the original intent of the Parties, including

an equitable adjustment to the Financial Model Update (or, if there has been no Update, the original Financial Model) and Non-Profit Entity's compensation to account for any change in the Work resulting from such invalidated portion; and (b) if necessary or desirable, apply to the court or other decision maker (as applicable) which declared such invalidity for an interpretation of the invalidated portion to guide the negotiations. The invalidity or unenforceability of any such provision or part shall not affect the validity or enforceability of the balance of the Contract Documents, which shall be construed and enforced as if the Contract Documents did not contain such invalid or unenforceable provision or part.

23.11.2 If after the efforts required by Section 23.11.1, no interpretation or reformation of the Contract Documents can reasonably be adopted that will return the Parties to the benefits of their original bargain, then the court order shall be treated as a Termination Due to Court Ruling under Section 17.4.3 (Termination Due to Court Ruling).

23.12 Construction and Interpretation of Agreement

23.12.1 The Contract Documents shall be construed simply, as a whole and in accordance with the fair meaning of the language used and not strictly for or against any Party.

23.12.2 The Parties acknowledge and agree that: (a) the Contract Documents are the product of an extensive and thorough, arm's-length exchange of ideas, questions, answers, information and drafts during the Implementation Proposal preparation process; (b) each Party has been given the opportunity to independently review the Contract Documents with legal counsel; and (c) each Party has the requisite experience and sophistication to negotiate, understand, interpret and agree to the particular language of the provisions of the Contract Documents. Accordingly, in the event of a conflict, ambiguity or inconsistency in or Contract Dispute regarding the interpretation of the Contract Documents, the Contract Documents shall not be interpreted or construed against the Party preparing it, and instead the Contract Dispute resolver shall consult other customary rules of interpretation and construction.

23.12.3 City's final answers to the questions posed during the Implementation Proposal preparation process for the Contract Documents shall in no event be deemed part of the Contract Documents and shall not be relevant in interpreting the Contract Documents except as they may clarify provisions otherwise considered ambiguous.

23.12.4 The captions of the articles, sections and subsections in the Contract Documents are for convenience only and are not to be treated or construed as part of this Agreement.

23.12.5 Unless otherwise expressly stated in the Contract Documents, words that have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meaning.

23.12.6 Wherever the word "including", "includes" or "include" is used in the Contract Documents, it is deemed to be followed by the words "without limitation." Wherever reference is made in the Contract Documents to a particular Governmental Entity, it includes any public agency succeeding to the powers and authority of such Governmental Entity.

23.12.7 References to "days" contained in the Contract Documents shall mean calendar days unless otherwise stated.

23.12.8 Subject to Section 23.12.9, if the day on or by which any thing is to be done in accordance with this Agreement is not a Business Day, that thing must be done on the next Business Day.

23.12.9 If the Contract Documents require action to be taken in the event of an emergency and otherwise where it is clear that performance is intended to occur on a non-Business Day, Non-Profit Entity shall be required to perform such obligations, even though the date in question may fall on a non-Business Day.

23.12.10 As used in this Agreement and as the context may require, the singular includes the plural and vice versa, and the masculine gender includes the feminine and vice versa.

23.12.11 All monetary amounts and obligations in the Contract Documents are expressed and payable in U.S. dollars.

23.12.12 Each party must perform its obligations in accordance with this Agreement at its own cost, unless expressly provided otherwise.

23.12.13 If this Agreement requires calculation of an amount payable to a party there must be no double counting in calculating that amount.

23.13 Further Assurances

Each Party shall promptly execute and deliver to the other Party all such instruments and other documents and assurances as are reasonably requested by the second Party to further evidence its obligations hereunder, including, specifically with respect to Non-Profit Entity, assurances regarding the validity of (a) the assignments of Contracts contained herein, and (b) any instruments securing performance hereof.

23.14 Entire Agreement

City and Non-Profit Entity agree and expressly intend for the Contract Documents to constitute a single, non-severable, integrated agreement whose terms are interdependent and non-divisible. The Contract Documents contain the entire understanding of the Parties with respect to the subject matter of this Agreement and supersede all prior agreements, understandings, statements, representations and negotiations, in each case oral or written, between the Parties with respect to the subject matter of this Agreement.

23.15 Counterparts

This instrument may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

23.16 City Tax Covenants

23.16.1 General. The covenants of City set forth in this Section 23.16 shall survive payment in full or defeasance of the Tax-Exempt Bonds. Notwithstanding any provisions of this Section 23.16, if City shall provide to the Non-Profit Entity and the Principal Project Company an opinion of nationally recognized bond counsel to the effect that any specified action required under this Section 23.16 is no longer required or that some further or different action is required to maintain the exclusion from federal income tax of interest on the Tax-Exempt Bonds (an

“**Opinion of Counsel**”), the Non-Profit Entity and the Principal Project Company may conclusively rely on such opinion in complying with the requirements of this Section 23.16, and the covenants hereunder shall be deemed to be modified to that extent.

23.16.2 One Issue. Except as disclosed by City to the Non-Profit Entity and the Principal Project Company on the Financial Close Date, City is not aware of any governmental obligations, other than the Tax-Exempt Bonds, that are expected to be paid from substantially the same source of funds as the Tax-Exempt Bonds and have been or are expected to be sold within 15 days before or after the date the Tax-Exempt Bonds are sold.

23.16.3 Ownership. City does not expect to sell or otherwise dispose of, and will not sell or otherwise dispose of, its interest in the Project, in whole or in part, except due to normal wear, tear, and obsolescence, before payment in full of the Tax-Exempt Bonds. City will notify the Non-Profit Entity and the Principal Project Company prior to the sale of the Tax-Exempt Bonds if City’s expectations with respect to sale or disposition of the Project change.

23.16.4 Not Private Activity Bonds. The amount of Private Use (defined below) that can be made of the Project is limited. Private Use is any use of any portion of the Project pursuant to a lease, Service Contract (defined below) or similar arrangement by an entity other than a state or local government.

- (a) Except as provided in the Contract Documents, City does not expect to and shall not perform any act, enter into any agreement, or use or permit more than 3% of the Project to be used in any Private Use, unless the City provides prior Notice to the Non-Profit Entity and the Principal Project Company of the proposed act, agreement or use and City delivers to the Non-Profit Entity and the Principal Project Company an Opinion of Counsel with respect to such act, agreement or use.
- (b) Except as provided in the Contract Documents, as noted above, and excluding this Agreement, if City has entered into or enters into any arrangement with any person or organization (other than a state or local governmental unit) which provides for such person or organization to manage, operate, or provide services with respect to any portion of the Project (a “**Service Contract**”), such Service Contract can give rise to Private Use. The guidelines set forth in Revenue Procedure 2017-13 (the “**Guidelines**”) describe situations in which the Internal Revenue Service will rule that a Service Contract does not give rise to Private Use. Service Contracts that relate to the use or operation of the Project by “service providers,” as that term is used in the Guidelines (the “**Service Providers**”) and that do not satisfy the requirements Guidelines will constitute Private Use of the Project.
- (c) Obligations the interest on which is excluded from gross income for federal income tax purposes under Section 103 of the Code (“**Tax-Exempt Bonds**”) are expected to pay for only a portion of the total capital cost of the Project. City will contribute \$315,000,000 of total milestone payments toward the capital cost of the Project, and \$65,000,000 of such amount will not be proceeds of Tax-Exempt Bonds. The total amount of such City funds that are not proceeds of Tax-Exempt Bonds is referred to herein as “**Qualified Equity**.” The Qualified Equity will be allocated to any Private Use of the

Project before proceeds of the Tax-Exempt Bonds are allocated to any Private Use of the Project, pursuant to Treasury Regulations Section 1.141-6.

23.16.5 Bona Fide Debt Service Funds. The payments made by City under this Agreement will be paid from revenues received by City during the then-current budgetary period, as opposed to City reserves.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first written above.

APPROVED AS TO FORM

David Chiu, City Attorney

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

By: _____

Isidro Jimenez
Deputy City Attorney

By: _____

Julie Kirschbaum
Director of Transportation

Date: _____

Date: _____

APPROVED BY:

San Francisco Municipal Transportation Agency
Board of Directors

Resolution No: _____

Adopted: _____

Attest: _____

Secretary, SFMTA Board of Directors

PRG – POTRERO PROPERTIES LLC
a Delaware limited liability company

By: Provident Resources Group Inc.,
a Georgia non-profit corporation,
its sole member

By: _____

Chris Hicks
President and Chief Executive Officer

EXHIBIT 1
ABBREVIATIONS AND DEFINITIONS

EXHIBIT 1**ABBREVIATIONS AND DEFINITIONS**

Unless otherwise specified, whenever the following abbreviations or terms are used in this Agreement and the other Contract Documents, they have the meanings given below. References in this Exhibit 1 (Abbreviations and Definitions) to Sections and Exhibits shall mean sections of and exhibits to this Agreement.

ACI	American Concrete Institute
ACM	Asbestos Containing Material
ADA	Americans with Disabilities Act
ADAAG	Americans with Disabilities Act Accessibility Guidelines
AED	Automatic Electronic Defibrillator
AHA	Activity Hazard Analysis
AHJ	Authority(ies) Having Jurisdiction
AISC	American Institute of Steel Construction
ANSI	American National Standards Institute
APTA	American Public Transportation Association
AQMD	Air Quality Management District
ARI	Air Conditioning and Refrigerator Institute
ASCE	American Society of Civil Engineers
ASHRAE	American Society of Heating, Refrigerating and Air-Conditioning Engineers
ASME	American Society of Mechanical Engineers
ASTM	ASTM International (formerly known as the American Society for Testing and Materials)
AW	Assigned Weight
AWS	American Welding Society
BCI	Buildings Cost Index
BEB	Battery Electric Bus
BAS	Building Automation System
BIL	Basic Insulation Level
BIM	Building Information Modeling
BOCC	Building Operations Control Center
BTU	British Thermal Unit
CADD	Computer Aided Design and Drafting
CALM	Coordination and Logistics Management Program
CAP	Compliance Action Plan
CARPP	Capital Asset Replacement Program Plan
CBC	California Building Code
CCTV	Closed-Circuit Television
CDRL	Contract Data Requirements List
CEC	California Electrical Code
CEI	Construction Engineering and Inspection
CEL	Certifiable Elements List
CEQA	California Environmental Quality Act, California Public Resources Code § 21000 et seq., as it may be amended
CFA	Certificate of Final Acceptance
CFR	Code of Federal Regulations
CIB	Communications Infrastructure Backbone
CIDH	Cast In Drilled Hole
CIH	Central Instrument House

CIL	Certifiable Items List
CIR	Committed Information Rate
CIS	Customer Information System
CL	Checklist
CM	Construction Management
CO	Carbon Monoxide
CPESEC	Customer Premises Equipment
CPI	Consumer Price Index
CPM	Critical Path Method
CPT	Cone Penetrometer Test
CPTED	Crime Prevention through Environmental Design
CPU	Central Processing Unit
CPUC	California Public Utilities Commission
CQCM	Construction Quality Control Manager
CS	Construction/Installation Supervisor
CSEMS	Construction Site Environmental Management Supervisor
CSP	Construction Security Plan
CWA	Clean Water Act
D&C	Design and Construction
D/CID	Design Construction Integration Documents
DC	Direct Current
DTS	Data Transmission System
DVD	Digital Video Disc
DVMS	Digital Video Management System
EA	Environmental Assessment
ECI	Environmental Compliance Inspector
ECP	Environmental Compliance Plan
EEO	Equal Employment Opportunity
EIA	Electronic Industries Association
EMP	Emergency Management Panel
EMS	Emergency Medical Services
EP	Extraction Procedure (toxicity)
EPA	Environmental Protection Agency
EPS	Electrical Power System
ER	Equipment Room
ERRS	Electricity Rate Risk Share
ESC	Erosion and Sediment Control
ESD	Environmental Site Design
ET	Environmental Team
ETEL	Emergency Telephone
EVP	Emergency Vehicle Preemption
FA	Forced Air
FAS	Fire Alarm System
FC	Footcandle
FDC	Fire Department Connections
FEIR	Final Environmental Impact Report
FF&E	Furniture, Fixtures and Equipment
FMP	Fire Management Panel
FMS	Fire Management System
FOD	Foreign Object Debris
FONSI	Finding of No Significant Impact
FOV	Field of View
FTA	Federal Transit Administration

GDR	Geotechnical Data Report
GER	Geotechnical Engineering Reports
GIS	Geographical Information System
GPM	Gallons per Minute
GPR	Geotechnical Planning Report
GRS	Galvanized Rigid Steel
GSD	General System Display
HCF	Hundred Cubic Feet
HVAC	Heating, Ventilation, and Air Conditioning
ICEA	Insulated Cable Engineers Association
ID	Identifier
IDF	Intermediate Distribution Frame
IDO	Interdepartmental Order
IEC	International Electrotechnical Commission
IEEE	Institute of Electrical and Electronics Engineers
IESNA	Illuminating Engineer Society of North America (also known as IES)
IF	Infrastructure Facility
IMP	Incident Management Plan
IPMVP	International Performance Measurement and Verification Protocol
IAQ	Indoor Air Quality
ISO	International Organization for Standardization
LAN	Local Area Network
LCD	Liquid Crystal Display
LED	Light Emitting Diode
LEED	Leadership in Energy & Environmental Design
LEED NC	LEED New Construction
LFMC	Liquidtight Flexible Metallic Conduit
LiDAR	Light Detecting and Ranging
LOE	Level of Effort
LRFD	Load and Resistance Factor Design
LRU	Lowest Replaceable Unit
LTA	Lenders' Technical Advisor
MAC	Media Access Control
MDE	Maximum Design Earthquake
MDF	Main Distribution Frame
MEP	Mechanical, Electrical and Plumbing
MMIS	Maintenance Management Information System
MMRP	Mitigation Monitoring and Reporting Program
MOT	Maintenance of Traffic
MOU	Memorandum of Understanding
MPH	Miles Per Hour
MSD	Major Service Degradation
MSDS	Material Safety Data Sheets
MSI	Master Systems Integrator
MTBHE	Mean Time Between Hazard Events
MUTCD	Manual on Uniform Traffic Control Devices
MW	Megawatt
NACE	National Association of Corrosion Engineers
NCE	Noncompliance Event
NCEER	National Center for Earthquake Engineering Research
NCHRP	National Cooperative Highway Research Program
NCR	Non-Conformance Report
NEC	National Electrical Code

NEMA	National Electrical Manufacturers Association
NEPA	National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq., as it may be amended
NESC	National Electrical Safety Code
NETA	International Electrical Testing Association
NFPA	National Fire Protection Association
NIST	National Institute of Standards and Technology
NOI	Notice of Intent
NPDES	National Pollutant Discharge Elimination System
NPE	Non-Profit Entity
NPECQP	Non-Profit Entity's Construction Quality Plan
NPEDQP	Non-Profit Entity's Design Quality Plan
NPEQP	Non-Profit Entity's Quality Program
NPEECP	Non-Profit Entity's Environmental Compliance Plan
NPEQPP	Non-Profit Entity's Quality Program Plan
NPESE	Non-Profit Entity's Safety Engineer
NPESH	Non-Profit Entity Safety & Health Plan
NPESS	Non-Profit Entity's Safety Supervisor
NPESSSP	Non-Profit Entity Site Specific Safety Plan
NRC	Noise Reduction Coefficient
NRCS	Natural Resource Conservation Service
NRHP	National Register of Historic Places
NSC	National Safety Council
NVR	Network Video Recorder
OA	Other Adjustments
O&SHA	Operating and Support Hazards Analysis
O/S-SSPP	Operating System Safety Program Plan
OCC	Operations Control Center
OCR	Optical Character Recognition
OCS	Overhead Catenary System
ODE	Operating Design Earthquake
OEM	Original Equipment Manufacturer
OH	Overhead
OSHA	Occupational Safety and Health Administration
PA	Public Address
PAB	Private Activity Bond
PABX	Private Automatic Branch Exchange
PCB	Polychlorinated Biphenyl
PCI	Precast/Prestressed Concrete Institute
PDF	Portable Document Format
PDM	Precedence Diagram Method
PDS	Power Distribution System
PHA	Preliminary Hazards Analysis
PICO	Post-Installation Checkout
PM	Project Management
PMP	Project Management Plan
PNC	Potrero Neighborhood Collective LLC
PoE	Power over Ethernet
POH	Point of Handoff
PQM	Program Quality Manager
PRA	California Public Records Act
P-S	P-S Suspension Loggings
PSTN	Public Switched Telephone Network

PTZ	Pan, Tilt, Zoom
PVC	Polyvinyl Chloride
QA	Quality Assurance
QC	Quality Control
QM	Quality Management
QMP	Quality Management Plan
QMS	Quality Management System
QoS	Quality of Service
QPM	Quality Program Manager
QSD	Qualified SWPPP Developer
QT	Qualification Test
RAMS	Reliability, Availability, Maintainability, and Safety/Security/Service
RDE	Restorable Design Earthquake
RFC	Request for Comments
RFCCD	Release for Conformed Construction Documents
RFCD	Release for Construction Documents
RFP	Request for Proposals
RGS	Rigid Galvanized Steel
RTLS	Real-Time Location System
SBE	Small Business Enterprise
SC	Safety Certification
SC Plan	Safety Certification Plan
SCADA	Supervisory Control and Data Acquisition
SCI	System Condition Index
SCS	Structured Cabling System
SCVM	System Compliance Verification Matrix
SCVR	Safety Certification Verification Report
SF	Square Feet
SF6	Sulfur Hexafluoride
SFMTA	San Francisco Municipal Transportation Agency
SHA	System Hazards Analysis
SHPO	State Historic Preservation Officer
SLP	Service Loss Percentage,
SMARTS	Stormwater Multi-Application and Report Tracking System
SNMP	Simple Network Management Protocol
SOP	Standard Operating Procedure
SOQ	Non-Profit Entity's Statement of Qualification
SPCCP	Spill Prevention Control and Countermeasures Plan
SPFMA	System Performance and Failure Management Analysis
SQAP	Software Quality Assurance Plan
SSEPP	System Security Emergency Preparedness Plan
SSHA	System Subsystem Hazards Analysis
SSI	Sensitive Security Information
SSO	State Safety Oversight
SSP	System Security Plan
SSPP	System Safety Program Plan
SSPWC	Standard Specifications for Public Works Construction
SSRC	Safety and Security Review Committee
SUE	Subsurface Utility Engineering
SUSMP/LID BMP	Standard Urban Stormwater Mitigation Plan/Low Impact Development Best Management Practices
SWP	Safe Work Plan
SWPPP	Storm Water Pollution Prevention Plan

SWRCB	State Water Resources Control Board
TIA	Time Impact Analysis
TMP	Transportation Management Plan
TR	Technical Requirements
TRB	Transportation Research Board
TRO	Temporary Restraining Order
TSC	Traffic Signal Coordination
TVC	Terminal Vertical Core
U.S.C.	United States Code
UL	Underwriters Laboratory
UPS	Uninterruptable Power Supply
USDOT	United States Department of Transportation, or its successor entity
USO	United Service Organizations Inc.
VAR	Volt-Amp Resistance
VLAN	Virtual Local Area Network
VMS	Variable Message Sign
VoIP	Voice over Internet Protocol
VRLA	Valve-Regulated, Lead Acid
VSS	Video Surveillance System
VT	Verification Test
WAN	Wide Area Network
WBS	Work Breakdown Structure

Access Date has the meaning set forth in Section 2.2 (Right of Entry).

Account Balances means all amounts standing to the credit of any bank account held by or on behalf of Non-Profit Entity (excluding the Allowance Accounts), or the value of any letter of credit issued in lieu of any bank account held or required to be held by or on behalf of Non-Profit Entity (excluding the Allowance Accounts), at the Early Termination Date.

Active Service Line(s) means a Service Line (other than those that have been de-energized, shut down and/or abandoned, including those Service Lines that are to be de-energized, shut down and/or abandoned as part of the D&C Work).

Actual Knowledge means (i) as to Non-Profit Entity, facts and information actually known to Non-Profit Entity or Non-Profit Entity’s Authorized Representative (in each case, as applicable), after reasonable consultation with other personnel of each NPE-Related Entity that are involved with the performance of the Work or this Agreement, as applicable; and (ii) as to City, City’s Authorized Representative, facts and information actually known to City’s Authorized Representative.

Additional Property(ies) has the meaning set forth in Section 7.5.1.2.

Adverse Event means:

- (a) an Affordability Event, with the understanding that an Affordability Event occurring before the Effective Date shall be deemed to occur the day after the Effective Date;
- (b) either or both of the CEQA Approval or the NEPA Approval is invalidated for a reason other than NPE Fault;

- (c) a temporary restraining order, injunction or other form of legal order by a court prohibiting City or Non-Profit Entity from performing any of their respective material obligations under this Agreement or materially delaying the critical path;
- (d) the occurrence of exceptional circumstances in the financial markets in one or more of Europe, the United States of America, Japan/Asia Pacific and Canada that, in City's opinion determined in City's reasonable discretion, (i) results in material and substantial cessation of lending activity in national or relevant international capital or interbank markets and (ii) adversely affects access by Non-Profit Entity to such markets preventing Financial Close by the Scheduled Financial Close Date;
- (e) any action, litigation or proceeding pending against City or affecting the Project, which, in each case, has a material likelihood of success and if determined adversely would have the effect of (i) preventing Financial Close; or (ii) prohibiting or materially impairing City from performing any of its material obligations under the Principal Project Documents;
- (f) a downgrade to City's credit rating by a Rating Agency that has a material negative impact on the credit rating of any bond financing included in the Finance Plan when compared to the indicative investment grade rating(s) of such bonds included in the Finance Plan as of the Effective Date;
- (g) the approval of this Agreement by the SFMTA Board or the Board of Supervisors is invalidated for any reason other than NPE Fault;
- (h) failure of City to timely provide the deliverables set forth in Section 3.2.2 (City Deliverables);
- (i) any event set forth in clauses (b), (e)-(f), (h), (l)-(m), (o), and (s)-(t) of the definition of Compensable Delay Event; or
- (j) any event set forth in clauses (a)-(h) of the definition of "Force Majeure Event".

Adverse Event Notice has the meaning set forth in Section 3.4.2.

Adverse Weather means heavy rain, windstorm, flood, or any severe atmospheric condition that: (i) occurs at the Project Site during the D&C Period; and (ii) prevents Non-Profit Entity from proceeding with at least 75 percent of the scheduled labor, material, and equipment resources for at least five hours per Day on activities shown in the Critical Path on the Project Schedule).

Adverse Weather Event means Adverse Weather that exceeds the anticipated number of Days of Adverse Weather specified per year in Section 14.1.8 (Relief for Adverse Weather Event).

Affiliate means:

- (a) solely in relation to Principal Project Company, any Equity Member;
- (b) any Person which directly or indirectly through one or more intermediaries controls, or is controlled by, or is under common control with, Non-Profit Entity or, solely in relation to Principal Project Company, any Equity Member; and

- (c) any Person owned in whole or in part by (i) Non-Profit Entity, (ii) solely in relation to Principal Project Company, any Equity Member or (iii) any Affiliate of Non-Profit Entity under clause (b) of this definition, whether the ownership interest is direct or indirect, beneficial or of record, provided that ownership of less than 10% of the equity interest in a Person shall not give rise to Affiliate status.

For purposes of this definition, the term “control” means the possession, directly or indirectly, of the power to cause the direction of the management of a Person, whether through voting rights or securities, by contract, family relationship or otherwise.

Affordability Event means the occurrence of a fluctuation in the Base Interest Rates and/or Baseline Credit Spreads during the Bank Debt Rate Protection Period or Bond Rate Protection Period that results, or in the good faith opinion of City is likely to result, in an increase to the APC of 10% or greater.

Agreement means the Project Agreement to which this Exhibit 1 (Abbreviations and Definitions) is attached, including all exhibits, appendices and attachments, as such agreement may be modified from time to time.

Airspace means any and all real property, including the surface of the ground, within the vertical column extending above and below the surface boundaries of the Project Site and not necessary or required for the Infrastructure Facility or developing, permitting, designing, financing, constructing, installing or equipping the Infrastructure Facility or Non-Profit Entity’s timely fulfillment of its obligations under the Contract Documents. If the Project Site is a separate legal parcel with specific vertical limits, then the Airspace shall only mean the area within those vertical limits.

Allowance means the Undergrounding Existing PG&E Power Lines Allowance, New PG&E Service Allowance, Exterior OCS Work Allowance, Interior OCS Work Allowance, Office/Admin and Training Spaces FF&E Allowance, the City-Furnished IT/Comms Allowance and the Partnering Allowance, and **Allowances** means all of them as the context requires.

Applicable Law and Standards means applicable Law and all applicable Standards and Specifications.

AQI Event means unhealthy air quality (AQI exceeding 150) where, under applicable Law, Non-Profit Entity is required to shut down all D&C Work at the Project Site.

APC means the capital portion of the Availability Payment as set out in Exhibit 4B (Availability Payment Mechanism), as adjusted from time to time in accordance with this Agreement. The APC includes APC_{Base} and APC_{DC}.

API means the index-linked portion of the Availability Payment as set out in Exhibit 4B (Availability Payment Mechanism), as adjusted from time to time in accordance with this Agreement.

As-Built Documents means, collectively, the documents referred to in Section 1.6.4 of Division 1 of the Technical Requirements, as well as the following items referred to in Division 1 of the Technical Requirements: As-Built Schedule, As-Built Drawings, and LOD 500 As-Built Model (Section 1.10.1.2).

As-Built Drawings means, revised sets of drawings submitted to reflect any changes made during the construction process, depicting the actual conditions, dimensions, and locations of installed elements as opposed to the originally planned design.

As-Built Schedule means has the meaning set forth in Section 1.2.5 of Division 1 of the technical Requirements.

As-Built Schedule Analysis has the meaning set forth in Section 18.3.5 (Additional Requirements for Contract Disputes Relating to Delay Events Impacting the Critical Path).

Authority(ies) Having Jurisdiction means an organization, including City acting in its regulatory capacity, office or individual responsible for enforcing the requirements of a code or standard, or for approving equipment, materials, an installation, or a procedure. The term “Authorities Having Jurisdiction” refers to more than one such organization, office or individual.

Authorized Representative means the authorized representative for either Party identified in Exhibit 10 (Initial Designation of Authorized Representatives) or otherwise designated in accordance with this Agreement.

Availability Payment means the payments to be made by City to Non-Profit Entity under Section 11.2 (Availability Payments), determined on an annual basis in accordance with Exhibit 4B (Availability Payment Mechanism) and payable quarterly.

Bank Debt means any debt financing, other than Bond Financing, provided by a bank or similar financial institution.

Bank Debt Pricing Date means with respect to any Bank Debt proposed in the Finance Plan, the earliest to occur of:

- (a) the date of Financial Close;
- (b) the date at which the Bank Debt is fixed or hedged by Non-Profit Entity; and
- (c) such other date as is mutually agreed to by Non-Profit Entity and City.

Bank Debt Rate Protection Period means the period beginning at 3:00 p.m. Pacific Time on December 11, 2025 and ending on, with respect to any Bank Debt, the Bank Debt Pricing Date.

Bankruptcy Event means any of the following events:

(a) a receiver, receiver manager or other encumbrance holder taking possession of or being appointed over, or any distress, execution or other process being levied or enforced upon, the whole or any material part of the assets of an entity;

(b) any proceedings with respect to the entity being commenced under the Bankruptcy Law and if such proceedings are commenced against and are disputed by the entity, such proceedings are not discontinued, withdrawn, dismissed or otherwise remedied within 60 days of such proceedings being instituted;

(c) the entity making an assignment for the benefit of its creditors, being declared bankrupt or committing an act of bankruptcy, becoming insolvent, making a proposal or

otherwise taking advantage of provisions for relief under the Bankruptcy Law or similar legislation in any jurisdiction, or any other type of insolvency proceedings being commenced by or against the entity under the Bankruptcy Law or otherwise and, if proceedings are commenced against the entity and are disputed by the entity, such proceedings are not stayed, dismissed or otherwise remedied within 60 days of such proceedings being instituted;

(d) in any voluntary or involuntary case seeking liquidation, reorganization or other relief with respect to the entity or its debts under any bankruptcy Law or foreign bankruptcy, insolvency or other similar law now or hereafter in effect, this Agreement or any of the other Contract Documents is rejected, including a rejection under 11 U.S.C. § 365 or any successor statute; or

(e) the entity ceasing to carry on business.

Bankruptcy Law means the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* as amended from time to time and any successor statute thereto. “Bankruptcy Law” also includes any similar state law relating to bankruptcy, insolvency, the rights and remedies of creditors, the appointment of receivers or the liquidation of companies and estates that are unable to pay their debts when due.

Base Case Financial Model means the Financial Model as approved by the Parties as of the Effective Date.

Base Interest Rate means the following:

- (a) Municipal Market Data yield curve.
- (b) Interest earnings rate(s) on deposits during the D&C Period; and
- (c) set of applicable base rates included in Non-Profit Entity’s Implementation Proposal.

The Base Interest Rates do not include any additional credit spread, margin or fee components.

Baseline Credit Spreads means the set of credit spreads included in Non-Profit Entity’s Implementation Proposal.

Best Management Practices (BMP) has the meaning set forth in Storm Water Management For Construction Activities: Developing Pollution Prevention Plans and Best Management Practices (EPA Document 832 R 92-005).

BIM Project Execution Plan means Non-Profit Entity’s plan describing BIM-enabled workflows and systems to successfully deliver, design and construct the Project, prepared and submitted by Non-Profit Entity in accordance with Section 1.10.2 of Division 1 of the Technical Requirements, as updated and approved by the City in accordance with this Agreement.

Board of Supervisors means the Board of Supervisors of the City and County of San Francisco.

Bond Financing means any debt financing comprising of bonds, which includes tax-exempt bonds issued by a Conduit Issuer or taxable capital market instruments.

Bond Pricing Date means with respect to any Bond Financing proposed in the Finance Plan, the earliest to occur of (a) the date of Financial Close, (b) the date at which any Bond Financing is priced, and (c) the date at which any Bond Financing is fixed or hedged.

Bond Rate Protection Period means the period beginning at 3:00 p.m. Pacific Time on December 11, 2025 and ending on, with respect to any Bond Financing, the Bond Pricing Date.

Books and Records means any and all documents, books, records, papers, or other information of any NPE-Related Entity or Affiliate relating to the Project, the Work, the NPE-Furnished FF&E and the Project Site, including (a) all design and construction documents (including drawings, specifications, Submittals, Contracts, invoices, schedules, meeting minutes, budgets, forecasts, requests for change proposals, change responses, change requests, plans (including the Project Management Plan), reports and manuals), (b) daily time sheets and supervisor's daily reports, union agreements, insurance, welfare and benefits records, payroll registers, earning records, payroll tax forms, invoices and requisitions, equipment records, payment certificates, cancelled checks, job cost reports, job payroll ledges, general ledger, cash disbursement journal; (c) income statements, balance sheets, statements of cash flow and changes in financial position, details regarding expenses and capital expenditures; (d) all budgets, certificates, claims, correspondence, data (including test data), documents, expert analyses, facts, files, information, investigations, materials, notices, plans, projections, proposals, records, reports, requests, samples, schedules, settlements, statements, studies, surveys, tests, test results, vehicular traffic information analyzed, categorized, characterized, created, collected, generated, maintained, processed, produced, prepared, provided, recorded, stored or used by Non-Profit Entity or its Contractors or any of their representatives in connection with the Project, (e) the Base Case Financial Model, Financial Model, subsequent Financial Model Updates and Financial Modeling Data, (f) records of the expenditure and investment of the Milestone Payments including records identifying expenditures for D&C Work and debt service payments, and (g) with respect to all of the above, any information that is stored electronically or on computer-related media (in its original source and not converted to PDF or other format). For purposes of the requirements of the Contract Documents to maintain Books and Records, the term "Books and Records" includes documents or information that are subject to the attorney-client privilege, but for purposes of requirements of the Contract Documents to provide access to Books and Records, the term specifically excludes the disclosure by any Party of Books and Records that are protected by the attorney-client or other legal privilege based upon an opinion of counsel reasonably satisfactory to the other Party.

Breakage Costs means any commercially reasonable prepayment premiums or penalties (including documented SOFR breakage fees, customary and reasonable trustee, Collateral Agent and Lender fees but excluding any fees related to legal or other consulting costs), make-whole payments or other prepayment amounts, including costs of early termination of interest rate and inflation rate hedging, swap, collar or cap arrangements, payable by or on behalf of, or credited against payments owing to, Non-Profit Entity, under any Financing Agreement or Security Document or otherwise as a result of the payment (including pre-payment), redemption or acceleration of all or any portion of the principal amount of Project Debt prior to its scheduled payment date (less any breakage benefits), excluding, however, any such amounts included in the principal amount of any Refinancing.

Building Automation System or **BAS** means the computer-based control system installed in buildings that controls, monitors and integrates the buildings' systems, including HVAC, lighting,

security, fire alarm and elevator control. The BAS controls building environmental conditions including temperature, humidity, CO2, illumination, heating and cooling and air flow distribution.

Building Occupant(s) means City Personnel, City Parties, Visitors, NPE-Related Entities and third party members of the public lawfully present on or using the Infrastructure Facility including, or each of them as the context requires.

Buildings Cost Index (BCI) means the “Buildings Cost Index” in San Francisco, as published by Engineering News-Record. If the BCI is discontinued or substantially altered, a suitable replacement will be determined by the Parties in accordance with general market practice at the time.

Business Day means any weekday (i.e., Monday through Friday) except for those weekdays on which (a) City is officially closed for business or (b) banks are not required or authorized by Law to be open in the State.

Business Opportunity(ies) has the meaning set forth in Section 22.2.1(b).

CEQA Approval means the Final Environmental Impact Report for the Potrero Yard Modernization Project at 2500 Mariposa Street (Planning Department Case No. 2019-021884ENV), certified by the Planning Commission on January 11, 2024 and available at <https://sfplanning.org/environmental-review-documents?title=Potrero+Yard+Modernization+Project>.

CEQA Event means:

- (a) any new or modified CEQA Approval necessitated solely by a City Change or a Delay Event;
- (b) legal action being taken in respect of the CEQA Approval that results in a temporary restraining order, preliminary injunction or other form of interlocutory relief by a court of competent jurisdiction that prohibits prosecution of, or by complying with such temporary restraining order, preliminary injunction or other form of interlocutory relief by a court of competent jurisdiction results in prohibiting the prosecution of, a material portion of the Work;
- (c) review or revocation or material change to, the CEQA Approval; or
- (d) any review or revocation of, or change to, a CEQA Approval directly resulting from the circumstances specified in clauses (b) and (c),

except, in each case, to the extent resulting, in whole or in part, from Non-Profit Entity’s design, Work or from any NPE Fault.

Certificate of Final Acceptance means the certificate issued by City as contemplated in Section 7.9 (Final Acceptance).

Certificate of Substantial Completion means the certificate issued by City as contemplated in Section 7.8 (Substantial Completion).

Change means any acceleration, addition, decrease, omission, deletion, removal or modification from or to the Work.

Change in Law means:

- (a) any repeal (in whole or in part) of, or amendment or modification to, any applicable Law by, any Governmental Entity or any written change in interpretation or application of, any applicable Law, in each case, after the Setting Date; and
- (b) the adoption or enactment of any new applicable Law by any Governmental Entity after the Setting Date,

which, in either case, is materially inconsistent with any existing applicable Law or any existing interpretation or application of, any such applicable Law previously in effect prior to the Setting Date; but excluding, (i) any repeal of, or amendment or modification to, a written change in interpretation or application of, and applicable Law, or any new applicable Law, in each case, that is pending, passed or adopted but not yet effective as of the Setting Date, (ii) any repeal of, or amendment or modification to, or written change in interpretation or application of, or the adoption or enactment of, state or federal tax laws of general application, and (iii) any repeal of, or amendment or modification to, or written change in interpretation or application of, or adoption or enactment of, state labor laws.

Change of Control means any Equity Transfer, transfer of an interest, direct or indirect, in a Person (including, solely in relation to Principal Project Company, an Equity Member), or other assignment, sale, financing, grant of security interest, hypothecation, conveyance, transfer of interest or transaction of any type or description, including by or through voting securities, asset transfer, contract, merger, acquisition, succession, dissolution, liquidation, bankruptcy or otherwise, that results, directly or indirectly, in a change in possession of the power to direct or control or cause the direction or control of the management of Non-Profit Entity or Principal Project Company, as the case may be, or a material aspect of its business. A change in possession of the power to direct or control or cause the direction or control of the management of (y) Non-Profit Parent may constitute a Change of Control of Non-Profit Entity or (z) of an Equity Member may constitute a Change of Control of Principal Project Company if Non-Profit Parent or such Equity Member, as applicable, possesses, immediately prior to such Change of Control, the power to direct or control or cause the direction or control of the management of Non-Profit Entity or Principal Project Company, as applicable. Notwithstanding the foregoing, the following shall not constitute a Change of Control:

- (a) a change in possession of the power to direct or control the management of Non-Profit Entity, an Equity Member or Principal Project Company, or a material aspect of its respective business, due solely to bona fide open market transactions in securities effected on a recognized public stock exchange, including such transactions involving an initial public offering;
- (b) an upstream reorganization or transfer of indirect interests in Non-Profit Entity, an Equity Member or Principal Project Company (including, for greater certainty, in connection with the issuance or redemption of interests pursuant to any employee ownership program) so long as no change occurs in the entity with ultimate power to direct or control or cause the direction or control of the management of Non-Profit Entity, such Equity Member or Principal Project

Company;

- (c) a change in possession of the power to direct or control the management of Non-Profit Entity, an Equity Member or Principal Project Company, or a material aspect of its respective business, due solely to a bona fide transaction involving a beneficial interest in the ultimate parent organization of Non-Profit Entity or such Equity Member (but not if such person is the ultimate parent organization), provided, however, that this exception shall not apply if at the time of the transaction the transferee is suspended or debarred from bidding, proposing or contracting with the City or any federal or State department or agency, or is subject to a suspension or debarment proceeding;
- (d) an Equity Transfer, where the transferor and the transferee are under the same ultimate parent organization ownership, management and control before and after the transfer;
- (e) a transfer of interests (i) between managed funds that are under common ownership, management or control or (ii) solely in relation to Principal Project Company, by an Equity Member to a fund, investment vehicle or other entity managed by or under common control of such Equity Member, except, in each case, a change in the management or control of a fund, investment vehicle or other entity, as applicable, that manages or controls;
- (f) the exercise of minority veto or voting rights (whether pursuant to applicable Law, by Non-Profit Entity's, an Equity Member's or Principal Project Company's organizational documents, or by related member or shareholder agreements or similar agreements) over major business decisions of Non-Profit Entity, an Equity Member or Principal Project Company, provided that if such minority veto or voting rights are exercised pursuant to shareholder or similar agreements, City received copies of such agreements on or before the date of this Agreement; and
- (g) the grant of Security Documents, including the Initial Security Documents, in compliance with the Direct Agreement or the exercise of lender remedies under such Security Documents, including foreclosure.

Change Order has the meaning set forth in Section 1.4.3 of Exhibit 9 (Change Procedures).

Change Proposal has the meaning set forth in Section 1.3.1 of Exhibit 9 (Change Procedures).

City has the meaning set forth in the Preamble.

City Access Period has the meaning set forth in Section 7.13.5.1.

City Additional Insured(s) means any (and all) of the City and County of San Francisco, and its respective successors, assigns, officeholders, officers, directors, agents, representatives, consultants and employees.

City-Caused Delay Event means any event falling under clauses (a)-(e), (k), (n), (q)-(s) and (u) of the definition of Compensable Delay Event.

City Change has the meaning set forth in Section 12.2.1.

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

City Default has the meaning set forth in Section 16.3.1 (City Default).

City Fault means:

- (a) a breach by City of any of its obligations or any representation or warranty under this Agreement;
- (b) City’s violation of any applicable Law; or
- (c) fraud, criminal conduct, intentional misconduct, recklessness, bad faith or gross negligence of the City.

City-Furnished Equipment means all FF&E classified as City-Furnished Equipment (or City-furnished) in the Technical Requirements (including items marked OP in the Equipment List, Table 5 and Table 6 of Division 1 of the Technical Requirements) or otherwise required to be included as such under Section 7.13.2 (Selection of City-Furnished Equipment).

City-Furnished Equipment List means the list of equipment identified as being City-Furnished Equipment in the Equipment List and Tables 5 and 6 of Division 1 of the Technical Requirements, as updated or amended in accordance with Section 7.13.2 (Selection of City-Furnished Equipment).

City-Furnished IT/Comms Allowance means the Allowance to be used pursuant to Section 11.11.3 (City-Furnished IT/Comms Allowance) by City for City-Furnished IT/Comms Equipment. The initial City-Furnished IT/Comms Allowance amount is identified in Section 11.11.3.

City-Furnished IT/Comms FF&E means all FF&E classified as City-Furnished IT/Comms FF&E in the Technical Requirements, all additional FF&E identified as City-furnished “IT/Comms FF&E” in Table 5 and Table 6 of Division 1 of the Technical Requirements and all additional IT/Comms Equipment selected by City under Section 7.13.1 (Selection and Procurement of NPE-Furnished FF&E).

City IP means all Intellectual Property owned by, or sufficiently licensed to, City including, without limitation, all rights, grants and interests pursuant to the Predevelopment Agreement.

City Personnel means every person employed, engaged, or hired by City or every person employed, engaged, or hired by City Contractors to carry out any of the responsibilities or any of the services provided by City with respect to the Infrastructure Facility.

City Ready for Move Condition means the following state of condition of the Project Site:

- (a) With respect to Utilities, the City has turned off the Utilities;
- (b) With respect to Utilities (other than City's obligations under clause (a), all Utility infrastructure will remain in place and will not be sealed, capped, disconnected, and/or controlled prior to vacation of the Project Site by City;
- (c) The buildings, grounds and existing structures will remain in their current state as of the Access Date, including all furniture, equipment, materials and supplies; and
- (d) All furniture, equipment, materials and supplies that are to be moved by Non-Profit Entity shall be boxed or otherwise prepared so they may be moved.

City Relocation Plan means the plan developed pursuant to the Predevelopment Agreement, and approved by City, that describes the scope of Work to be undertaken by Non-Profit Entity to fully relocate the applicable City equipment, supplies and materials from the Project Site, as described in Division 7 of Exhibit 18 (Technical Requirements).

City Relocation Scope means the scope of Work undertaken by Non-Profit Entity to fully relocate the applicable City equipment, furniture, supplies and materials from the Project Site, as more particularly described in the approved City Relocation Plan.

Claim means any claim, proceeding, action, cause of action, investigation, demand or suit (including by way of contribution or indemnity) made:

- (a) in connection with this Agreement or the Infrastructure Facility; and
- (b) at law or for specific performance, in equity, restitution, payment of money (including damages), increase in the Milestone Payments or Availability Payments and extension of time or other form of relief.

Code has the meaning set forth in Section 23.16.1.

Collateral Agent means (a) the Institutional Lender listed or otherwise designated in the Security Documents as trustee or agent and authorized to act on behalf of or at the direction of the other Lenders, or (b) the Institutional Lender designated to act as trustee or agent on behalf of or at the direction of the other Lenders in an intercreditor agreement or other document executed by all Lenders to whom Security Documents are outstanding at the time of execution of such document, a copy of which shall be delivered by Non-Profit Entity to City. For any Project Debt issued and held by a single Lender, Collateral Agent means such Lender. The bond trustee, if an Institutional Lender, may also be the Collateral Agent.

Commercial Close means the execution and delivery of this Agreement by Non-Profit Entity and City on the Effective Date.

Commercially Reasonable Insurance Rates means insurance premiums that are less than or equal to the greater of (a) rates that a reasonable and prudent risk manager for a Person seeking to insure comparable risks would conclude are justified by the risk protection afforded, and (b) 200% of the rates indicated for the period in question in the Base Case Financial Model and related Financial Modeling Data.

Compensable Delay Event means any of the following events or circumstances to the extent, in each case, that it directly and adversely impacts (i) the D&C Work during the D&C Period or (ii) Non-Profit Entity's completion of Punch List items between the Substantial Completion Date and the Final Acceptance Date:

- (a) the implementation of a City Change, excluding any Change following a NPE Change Request, with regard to which the terms of this Agreement relating to Change Orders, including Exhibit 13, shall govern;
- (b) City Fault;
- (c) failure by City to (i) provide Non-Profit Entity with access to the Project Site on the Access Date; or (ii) leave the Project Site in the City Ready for Move Condition as of 90 days after the issuance of NTP 1;
- (d) failure by City to issue NTP 1 or NTP 2, as applicable, within 10 Business Days after full and complete satisfaction of the conditions precedent to the relevant NTP under this Agreement;
- (e) a Hazardous Materials Event caused by City;
- (f) a Relevant Change in Law;
- (g) discovery of an Unidentified Utility within the Project Site;
- (h) a CEQA Event or a NEPA Event;
- (i) compliance by Non-Profit Entity with an order or direction of an Emergency service provider in an Emergency (except for Emergencies that are or arise out of Force Majeure Termination Events);
- (j) any condemnation or other taking by eminent domain of any material portion of the Project Site or the D&C Work;
- (k) except with respect to Regulatory Approvals under the jurisdiction of the City acting in its regulatory capacity, failure of City to provide responses to proposed schedules, plans, design documents, and other Submittals and matters submitted to City after the Commercial Close for which response is required under this Agreement as an express prerequisite to Non-Profit Entity's right to proceed or act, within the time periods indicated in this Agreement, or if no time period is indicated, within a reasonable time, taking into consideration the nature, importance and complexity of the Submittal or matter; provided, however, that the foregoing shall apply only following delivery of Notice after the expiration of the applicable time period from Non-Profit Entity requesting such action in accordance with the terms and requirements of this Agreement;

- (l) discovery at, near or on the Project Site of any archeological, paleontological or cultural resources (including historic properties), excluding any such substance or resources known or disclosed to Non-Profit Entity as of the Setting Date (or which should have been known to Non-Profit Entity pursuant to a Reasonable Investigation);
- (m) discovery at, near or on the Project Site of any threatened or endangered species, excluding any such presence of species known or disclosed to Non-Profit Entity as of the Setting Date (or which should have been known to Non-Profit Entity pursuant to a Reasonable Investigation);
- (n) loss or damage to the Work directly caused by City Fault;
- (o) issuance of a temporary restraining order, preliminary injunction or other form of interlocutory relief by a court of competent jurisdiction that prohibits prosecution of, or by complying with such temporary restraining order, preliminary injunction or other form of interlocutory relief by a court of competent jurisdiction results in prohibiting the prosecution of, any material portion of the D&C Work;
- (p) discovery of:
 - (i) actual subsurface or latent physical conditions that differ materially from the baseline subsurface conditions indicated in the Geotechnical Baseline Report, excluding any such conditions (w) that are not defined in the Geotechnical Baseline Report; (x) known or disclosed to Non-Profit Entity prior to the Setting Date; or (y) that could have been reasonably anticipated as potentially present by an experienced global civil works contractor based on the information contained in such Geotechnical Baseline Report; or
 - (ii) discovery of actual subsurface physical conditions within the Project Site of an unusual nature, differing materially from those ordinarily encountered in the area and generally recognized as inherent in the type of work provided for in this Agreement, excluding any such conditions known or disclosed to Non-Profit Entity prior to the Setting Date;
- (q) any order of City to suspend for convenience under Section 16.2.8.3 exceeding 24 hours in total for a single suspension or 144 cumulative hours in total across multiple suspensions;
- (r) subject to Non-Profit Entity complying with its obligations for coordination set forth in this Agreement, actions of the City (including its employees) or Other Contractors (other than any NPE-Related Entities and HCC-Related Entities), that materially and directly disrupts, damages or interferes with the D&C Work;
- (s) a change in Standards and Specifications materially impacting the D&C Work or the Project with which City directs Non-Profit Entity to comply under this Agreement;
- (t) a Hazardous Materials Event caused by Third Parties or which exists prior to the Access Date;

- (u) issuance by City of a Safety Compliance Order for a reason other than to comply with Safety Standards, perform valid previously issued Safety Compliance Orders or correct a violation of Law or Regulatory Approval respecting health, safety or right of use and access;
- (v) Subject to Section 14.1.10, a Tariff Event;
- (w) Unidentified Early Offsite Utility Delay and Unidentified Late Offsite Utility Delay;
- (x) a Major Approval Delay;
- (y) a PG&E Offsite Utility Delay;
- (z) a Major Utility Adjustment Delay; and
- (aa) Inaccurate Utility Information.

Conditions to Assistance has the meaning set forth in Section 7.6.12.2.

Conduit Issuer means the California Municipal Finance Authority.

Confidential Information means, subject to Section 21 and without limiting applicable Law, all confidential and proprietary information that a party has designated as confidential and which is supplied, or to which access is granted, to or on behalf of the other party (whether before or after the date of this Agreement), either in writing, or in any other form, directly or indirectly pursuant to discussions with the other party and includes all analyses, compilations, studies and other documents whether prepared by or on behalf of a party which contain or otherwise reflect or are derived from such designated information.

Construction Documents means all shop drawings, working drawings, fabrication plans, material and hardware descriptions, specifications, construction quality control reports, construction quality assurance reports and samples necessary or desirable for construction of the Project included in the Construction Work, in accordance with the Contract Documents.

Construction Management Plan means Non-Profit Entity's plan describing its approach to undertake and achieve the requirements in Section 1.11 of Division 1 of the Technical Requirements, prepared and submitted by Non-Profit Entity in accordance with Section 1.1.7.2 of Division 1 of the Technical Requirements, as updated and approved by the City in accordance with this Agreement.

Construction Work means all Work to build or construct, make, form, manufacture, furnish, install, supply, deliver, landscape, equip, test and commission or demolish any structure, building, or other improvement to real property included in the Project, but excluding:

- (a) Design Work, professional environmental services and similar services;
- (b) preparing and processing applications for Regulatory Approvals; and
- (c) coordinating with adjacent property owners and Utility Owners.

Consumer Price Index (CPI) means the Consumer Price Index for the City of San Francisco, as published by US Bureau of Labor Statistics from time to time, or failing such publication, such other index as the Parties (acting reasonably) may agree, or as may be determined in accordance with Article 18 (Partnering; Contract Dispute Procedures), which most closely resembles such index.

Contract means any agreement, and any modification of such agreement, by Non-Profit Entity with any Person to perform any part of the Work or provide any materials, equipment or supplies for any part of the Work, or any such agreement, supplement or amendment at a lower tier, between a Contractor and its lower tier Contractor or a Supplier and its lower tier Supplier, at all tiers. The term “Contract” does not include agreements with Utility Owners.

Contract Deadline means the Substantial Completion Deadline, the Final Acceptance Deadline or the Long Stop Date, as the context may require, and “Contract Deadlines” means the Substantial Completion Deadline, the Final Acceptance Deadline and the Long Stop Date, collectively.

Contract Dispute(s) means any dispute, disagreement or controversy between City and Non-Profit Entity concerning their respective rights and obligations under the Contract Documents, including concerning any Claim, alleged breach or failure to perform and remedies.

Contract Dispute Procedures means the procedures for resolving Contract Disputes set forth in Article 18 (Partnering; Contract Dispute Procedures).

Contract Documents means this Agreement and all its exhibits including the Technical Requirements and other documents identified in Section 1.2 (Contract Documents; Rules to Reconcile Conflicting Provisions).

Contract Month means a calendar month, except with respect to the first Contract Month, which runs from the Payment Commencement Date until the end of the calendar month in which the Payment Commencement Date falls, and the last Contract Month, which runs from the first day of the calendar month in which the Termination Date falls until the Termination Date.

Contract Quarter means a Quarter, except with respect to the first Contract Quarter, which runs from the Payment Commencement Date until the end of the calendar quarter in which the Payment Commencement Date falls, and the last Contract Quarter, which runs from the first day of the Quarter in which the Termination Date falls until the Termination Date.

Contract Year means a calendar year, provided that:

- (i) the first Contract Year shall be such period that commences on the Payment Commencement Date and ends on the next ensuing December 31st; and
- (ii) the final Contract Year shall be such period that commences on the January 1st that precedes the date on which this Agreement expires or is terminated, for whatever reason, and ends on the expiry or termination of this Agreement.

Any computation made on the basis of a Contract Year shall be adjusted on a pro rata basis to take into account any Contract Year of less than 365 or 366 days, whichever is applicable.

Contractor means any Person or entity with whom Non-Profit Entity has entered into any Contract to perform any part of the Work or provide any materials, equipment or supplies for the Project on behalf of Non-Profit Entity, and any other Person or entity with whom any Contractor has further subcontracted any part of the Work, at all tiers.

Controlling Affiliate means any Person which directly, or indirectly through one or more intermediaries, controls a majority of the voting shares of Non-Profit Entity, or controls the election of a majority of the board of directors, trustees or other persons exercising similar functions for Non-Profit Entity. For purposes of this definition, the term “control” means the possession, directly or indirectly, of the power to cause the direction of the management of a Person, whether through voting rights or securities, by contract, family relationship or otherwise.

Controlling Work Item means the activity or work item on the Critical Path of the D&C Work having the least amount of total float.

Cost and Pricing Data means the data (including calculations, formulas, unit and material prices, and other cost and fee information) acknowledged and accepted by Non-Profit Entity and Principal Project Company and delivered by Lead Developer as specified in the Predevelopment Agreement, which data supports and explains the basis of cost estimates by Non-Profit Entity and Principal Project Company for development, design and construction of the Project and provides all cost assumptions for human resources, including salary and benefits for non-management personnel performing the Work.

Cost to Complete means (without double-counting):

- (a) those costs (internal and external) that City reasonably and properly projects that it will incur in carrying out any process to request tenders from any parties interested in entering into a contract with City to achieve Final Acceptance, including all costs related to the preparation of tender documentation, evaluation of tenders and negotiation and execution of relevant contracts; plus
- (b) costs that City reasonably and properly projects that it will incur in achieving Final Acceptance; plus
- (c) any other Losses that, but for the termination of this Agreement, City would not have incurred prior to Final Acceptance; minus
- (d) any insurance proceeds available to City for the purposes of achieving Final Acceptance.

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

Critical Path means each critical path on the Project Schedule, which ends on the Substantial Completion Deadline or the Final Acceptance Deadline, as applicable (i.e., the term shall apply only following consumption of all available Float in the schedule for Substantial Completion or

Final Acceptance, as applicable). The lower case term "critical path" means the activities and durations associated with the longest chain(s) of logically connected activities through the Project Schedule with the least amount of total float for all chains.

Critical Path Method (CPM) is a method of planning and scheduling a construction project where activities are arranged based on activity relationships.

Current Status Documents has the meaning set forth in Section 1.6.4(C) of Division 1 of the Technical Requirements.

Daily Delay Cost Amount means the amounts set forth in Exhibit 8, representing the full amount of costs for delay and disruption damages, Delay Costs, extended overhead and similar costs incurred by or on behalf of Non-Profit Entity, Principal Project Company, D&C Contractor and all other NPE-Related Entities for each day of delay of the Work.

DBI means the City's Department of Building Inspection.

D&C Contract means:

- (a) the contract for the D&C Work entered into between Principal Project Company and D&C Contractor dated on or about the date of this Agreement; and
- (b) any other contract between Principal Project Company and a Subcontractor for the undertaking of the D&C Work.

D&C Contract Amount means \$612,107,000.

D&C Contractor means the Contractor primarily responsible for the D&C Work.

D&C Contractor Guarantor means each Person that provides a D&C Contractor Guaranty.

D&C Contractor Guaranty has the meaning set forth in Section 10.5.1.

D&C Failure Event means each event identified in the D&C Failure Events Table which occurs prior to the Final Acceptance Date.

D&C Failure Events Table means the table in Appendix A of Exhibit 4A (Milestone Payment Mechanism).

D&C Management Plan means the City-approved document included in the approved Project Management Plan setting forth Non-Profit Entity's prescribed approaches to, and plan for, its scope of Work, as it may be modified and updated from time to time, following written approval thereof by City. The preliminary D&C Management Plan shall be replaced by the final approved D&C Management Plan, which shall be developed by Non-Profit Entity and approved by City pursuant to Division 1 of the Technical Requirements, as a condition precedent to issuance of NTP 2, as updated in accordance with this Agreement.

D&C Noncompliance Event means a D&C Failure Event occurs which, where a Rectification Time applies, has not been Rectified within the relevant time. For the avoidance of doubt, where no Rectification Time applies (for example, in respect of scheduled activities) there shall be a

D&C Noncompliance Event at the point at which the D&C Failure Event occurred (for example, non-performance of the scheduled activity by the scheduled time).

D&C Noncompliance Points means points accrued in association with each D&C Noncompliance Event as set out in Appendix A (D&C Noncompliance Points and Deductions) of Exhibit 4A (Milestone Payment Mechanism).

D&C Payment Bond means the payment bond(s) to secure payment for labor and materials for the D&C Work, as required under this Agreement.

D&C Percentage means the value of Design Work, Construction Work, and Work relating to the manufacturing and supply of equipment, completed at a given point in time divided by the value of the total Design Work, Construction Work, and Work relating to the manufacturing and supply of equipment required to be completed to achieve Final Acceptance.

D&C Performance Bond means the performance bond(s) securing performance of the D&C Work required under this Agreement.

D&C Performance Security has the meaning set forth in Section 10.2.2.1.

D&C Period means that portion of the Term that commences on the Effective Date and ends at 11:59 p.m. on the day immediately preceding the Substantial Completion Date.

D&C Period Deduction means a deduction from Milestone Payment 2 made in accordance with Section 2 (D&C Period Deductions) of Exhibit 4A (Milestone Payment Mechanism).

D&C Period Residual Amounts has the meaning set forth in Section 11.10.2.

D&C Quality Management Plan means Non-Profit Entity's plan to ensure that the Project deliverables and completed Work meet the minimum required standards of quality, prepared and submitted by Non-Profit Entity in accordance with Section 1.4 of Division 1 of the Technical Requirements, as updated and approved by the City in accordance with this Agreement.

D&C Site means the real property owned by City, under the jurisdiction of SFMTA, commonly known as 2500 Mariposa Street in San Francisco, California, which is a 4.4-acre site comprised of Assessor's Block No. 3971-001, bounded by Bryant Streets, 17th Street, Hampshire Street, and Mariposa Street, any Additional Properties acquired by City in accordance with Section 7.5.1 (Additional Acquisitions), and such additional areas as may, from time to time, be designated in writing by City for Non-Profit Entity's use in performance of the Work. If the parcel is later subdivided to accommodate the HCC, this definition may be amended upon mutual agreement. For purposes of insurance (subject to any notification and other requirements imposed by the insurer(s) for approval), indemnification, safety and security requirements, the prevailing wage requirements, and payment for use of equipment, the term "Project Site" shall also include (a) the field office sites, (b) any property used for bonded storage of material for the Project approved by City, (c) staging areas dedicated to the Project, and (d) areas where activities incidental to the Project are being performed by Non-Profit Entity and Contractors covered by the worker's compensation policy but excluding any permanent locations of Non-Profit Entity or such covered Contractors.

D&C Work means all Work to be performed to achieve Final Acceptance, including Design Work and Construction Work.

D&C Work Value means an amount equal to the D&C Contract Amount minus the aggregate of (i) the Cost to Complete, (ii) the amount of Milestone Payment 1 if paid to Non-Profit Entity prior to the Early Termination Date, and (iii) any other reduction to Milestone Payment 2 under Exhibit 4 (Payment Mechanism) accrued prior to the Early Termination Date that has not been deducted from Milestone Payment 2.

Day means calendar day, unless otherwise expressly specified.

Disadvantaged Business Enterprise or **DBE** means a disadvantaged business enterprise as defined in 49 CFR § 26.5 (2025).

Default Notice has the meaning set forth in Section 16.1.2.2.

Default Termination Event has the meaning set forth in Section 17.3.1.1.

Defect means a defect, whether due to design, construction, installation, damage or wear, affecting the condition, use, functionality or operation of any element of the Project, which would cause or have a reasonable likelihood to cause one or more of the following:

- (a) a hazard, nuisance or other risk to public or worker health or safety, including the health and safety of Building Occupants;
- (b) a structural deterioration of the affected element or any other part of the Project;
- (c) damage to a Third Party's property or equipment;
- (d) damage to the Environment; and
- (e) failure of the affected element to meet the requirements of the Contract Documents.

Delay Costs means direct costs incurred by Non-Profit Entity relating to D&C Work as allowed pursuant to this Agreement, which is payable at the Daily Delay Cost Amount, or some portion of such amount. The term "Delay Costs" does not include any Extra Work Costs, including those incurred by Non-Profit Entity that relate to non-Controlling Work Items incident or collateral to a Delay Event or Controlling Work Items that do not result solely and directly from a Delay Event. In any event, Non-Profit Entity shall not be entitled to Delay Costs to the extent Non-Profit Entity is responsible for the delay or could have reasonably mitigated such costs.

Delay Event means any of the following events or circumstances that occurs prior to the Final Acceptance Date and directly impacts the D&C Work:

- (a) an Unavoidable Delay Event; or
- (b) a Compensable Delay Event.

Delayed Financial Close Date has the meaning set forth in Section 3.4.2(a).

Design Deliverables has the meaning set forth in Section 1.8.5 of Division 1 of the Technical Requirements.

Design Documents means all studies, quantitative assessments, evaluations, reports, documents, calculations, plans, drawings, diagrams, specifications, and other documentation that manifest the design for the Project, at all stages, as developed by Non-Profit Entity or any portion, component or element thereof, in each case regardless of whether such documents are required by the Contract Documents or are prepared or used by Non-Profit Entity in the Design Work. Design Documents include the Final Design Documents.

Design Management Plan means Non-Profit Entity's plan describing its approach to undertake and achieve the requirements in Section 1.8 of Division 1 of the Technical Requirements, prepared and submitted by Non-Profit Entity in accordance with Section 1.1.7.1 of Division 1 of the Technical Requirements, as updated and approved by the City in accordance with this Agreement.

Design Work means all Work related to the design, engineering, architecture and other professional services for the Project, including all such Work relating to the Infrastructure Facility. Design Work includes any Early Works related to the design, engineering, architecture and other professional services for the Project.

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

Deviation(s) means any change, deviation, modification or alteration from the Technical Requirements (other than Change Orders and amendments to this Agreement). Deviations are not intended to amend or modify portions of this Agreement other than the Technical Requirements.

Direct Agreement means the agreement substantially in the form of Exhibit 5B (Form of Direct Agreement), by and among City, Non-Profit Entity and the Lender (or if there is more than one Lender, the Collateral Agent on behalf of the Lenders) in connection with Lenders' rights in relation to the Contract Documents.

Early Termination Date means the effective date of termination of this Agreement prior to the stated expiration of the Term set forth in Section 2.3 (Term).

Early Works has the meaning set forth in the Early Works Agreement.

Early Works Agreement means the agreement entered into by City and Non-Profit Entity or an Affiliate with respect to the performance of certain Work by Non-Profit Entity or such Affiliate during the PDA Term and prior to Financial Close.

Earthquake means all land movement due to seismic activity, including shocks, tremors, volcanic action, tsunami and earth rising or shifting, including any aftershocks or other Earthquakes for a period of 168 hours after the initial event, which proximately causes damage to the physical improvements of the Project or interrupts the Work.

Effective Date means the date of Commercial Close.

Eligible Funds means has the meaning set forth in Section 23.16.4(c).

Eligible LC Issuer means a financial institution with long term unsecured debt ratings of at least the following, from at least two of the listed major rating agencies: (a) A- by Standard & Poor's Ratings Services; (b) A3 by Moody's Investor Service, Inc.; or (c) A- by Fitch Ratings.

Eligible Surety(ies) means a surety or insurance company, as applicable, meeting the requirements of applicable Law, licensed or authorized to do business in the State and rated at least "A" (excellent or above) according to A.M. Best's Financial Strength Rating and "VIII" or better according to A.M. Best's Financial Size Rating.

Emergency means any unplanned event within or adjacent to the Project Site that (a) causes or has the potential to cause disruption to operation of the Infrastructure Facility, (b) presents an immediate or imminent threat to the long term integrity of any part of the Facility, to the Environment, to property immediately adjacent to the Facility or to the safety of Building Occupants or the traveling public, or (c) is recognized or declared to be an emergency by the Mayor, Board of Supervisors, any other City official authorized under law, the Governor of the State, the Federal Emergency Management Administration (FEMA), the U.S. Department of Homeland Security or other Governmental Entity with authority to declare an emergency.

Energy means energy/power including electricity and natural gas.

Engineer of Record (EOR) has the meaning set forth in Section 1.1.4.5 of Division 10 of the Technical Requirements.

Environment means air, soils, submerged lands, surface waters, groundwaters, land, stream sediments, surface or subsurface strata, biological resources, including endangered, threatened and sensitive species, natural systems, including ecosystems, cultural (including historic and archaeological) resources and paleontological resources.

Environmental Approvals means all Regulatory Approvals arising from or required by any Environmental Law in connection with the Project.

Environmental Compliance Plan means the procedures and plans described in Sections 01 35 43 of Division 10 of the Technical Requirements.

Environmental Law(s) means (a) any Law applicable to the Project or the Work regulating or imposing liability or standards of conduct that pertains to the Environment, Hazardous Materials, contamination of any type whatsoever, or health and safety matters, and (b) any requirements and standards that pertain to the protection of the Environment, or to the management or Release of Hazardous Materials, contamination of any type whatsoever, or health and safety matters with respect to Hazardous Materials, set forth in any agreements, permits, licenses, approvals, plans, rules, regulations or ordinances adopted, or other criteria and guidelines promulgated, pursuant to Laws applicable to the Project or the Work, as each of the foregoing have been or are amended, modified, or supplemented from time to time (including any present and future amendments thereto and reauthorizations thereof), including those relating to:

- (a) the manufacture, processing, use, distribution, existence, treatment, storage, disposal, generation and transportation of Hazardous Materials;
- (b) air, soil, surface and subsurface strata, stream sediments, surface water, and groundwater;

- (c) releases of Hazardous Materials;
- (d) protection of wildlife, endangered, threatened, and sensitive species, wetlands, water courses and water bodies, paleontological, cultural, archaeological and historical resources and natural resources;
- (e) the operation and closure of underground or aboveground storage tanks;
- (f) health and safety of employees and other persons with respect to Hazardous Materials; and
- (g) notification, documentation and record keeping requirements relating to the foregoing.

Without limiting the above, the term “Environmental Laws” shall also include the following (each as may be amended from time to time):

- (i) the National Environmental Policy Act (42 U.S.C. § 4321 et seq.);
- (ii) the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9601 et seq.) and associated Superfund Amendments and Reauthorization Act (42 U.S.C. § 9601 et seq.);
- (iii) the Solid Waste Disposal Act (42 U.S.C. § 6901 et seq.);
- (iv) the Emergency Planning and Community Right to Know Act of 1986 (42 U.S.C. § 11001 et seq.);
- (v) the Clean Air Act (42 U.S.C. § 7401 et seq.);
- (vi) the Federal Water Pollution Control Act, as amended by the Clean Water Act (33 U.S.C. § 1251 et seq.);
- (vii) the Resource Conservation and Recovery Act (42 U.S.C. § 6901 et seq.);
- (viii) the Hazardous and Solid Waste Amendments of 1984 (42 U.S.C. § 6924 et seq.);
- (ix) the Toxic Substances Control Act (15 U.S.C. § 2601 et seq.);
- (x) the Hazardous Materials Transportation Act (49 U.S.C. § 5101 et seq.);
- (xi) section 404 of the Clean Water Act (33 U.S.C. § 1344);
- (xii) the Oil Pollution Act (33 U.S.C. § 2701 et seq.);
- (xiii) the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. § 136 et seq.);
- (xiv) the Federal Safe Drinking Water Act (42 U.S.C. § 300 et seq.);

- (xv) the Federal Radon and Indoor Air Quality Research Act (42 U.S.C. § 7401 et seq.);
- (xvi) the Occupational Safety and Health Act (29 U.S.C. § 651 et seq.);
- (xvii) the Endangered Species Act (16 U.S.C. § 1531 et seq.);
- (xviii) the Fish and Wildlife Coordination Act (16 U.S.C. § 661 et seq.);
- (xix) the California Environmental Quality Act (§ 21000 et seq. of the California Public Resources Code);
- (xx) the California Clean Air Act of 1988 (§ 39000 et seq. of the California Health and Safety Code);
- (xxi) the California Occupational Safety and Health Act of 1973 (§ 6300 et seq. of the California Labor Code);
- (xxii) the Porter-Cologne Water Quality Act (§ 13000 et seq. of the California Water Code);
- (xxiii) the Integrated Waste Management Act of 1989 (§ 40000 et seq. of the California Public Resources Code);
- (xxiv) the Safe Drinking Water and Toxic Enforcement Act of 1986 (§ 25249.5 et seq. of the California Health and Safety Code);
- (xxv) Hazardous Waste Control (§ 25100 et seq. of the California Health and Safety Code); and
- (xxvi) Fish and Wildlife Protection and Conservation (§ 1600 et seq. of the California Fish and Game Code).

Environmental Protection Program means the overarching system by which Non-Profit Entity shall ensure that commitments made during the environmental approval and permitting processes, and other environmental requirements, be carried forward and reflected, as appropriate, in the design and implemented throughout the Work, as provided in Sections 01 35 43, and 01 35 50 of Division 10 of the Technical Requirements.

Equipment List means the list of all FF&E for the Infrastructure Facility prepared and maintained in accordance with this Agreement which identifies NPE-Furnished FF&E, City-Furnished Equipment and Existing FF&E. The initial form of the Equipment List is included in Appendix 1 of Division 3 of the Technical Requirements.

Equity Member(s) means (a) PNC Holdco LLC and any Person that holds a direct ownership interest (legal and beneficial) in Non-Profit Entity or Principal Project Company as a result of an Equity Transfer; or (b) each Person that will hold a 10% or greater indirect interest in Non-Profit Entity.

Equity Member(s) Debt means bona fide indebtedness for funds borrowed that: (a) is held by any Equity Member or Affiliate of any Equity Member; and (b) is subordinated in priority of

payment and security to all Project Debt held by Persons who are not Equity Members or Affiliates of any Equity Member.

Equity Transfer means any assignment, mortgage, encumbrance, hypothecation, conveyance, sale, or other transfer of equity interest in Non-Profit Entity and/or Principal Project Company.

ESA means, collectively, (i) the Final Phase II Environmental Site Assessment Report for SFMTA Potrero Facility Rebuild, in its entirety, by AEW dated November 6, 2018; and (ii) the Additional Phase II Site Investigation Report for SFMTA Potrero Yard Modernization Program, in its entirety, by Arcadis, dated March 12, 2024.

Escalation Factor means the escalation factor calculated in accordance with Section 4 (Escalation Factor) of Exhibit 4B (Availability Payment Mechanism).

Exempt Refinancing means:

- (a) any Refinancing that was fully and specifically identified and taken into account in the Base Case Financial Model;
- (b) any of the following, provided that Non-Profit Entity does not receive a direct or indirect financial benefit therefrom, individually or in the aggregate:
 - (i) amendments, modifications, supplements or consents to Financing Agreements and Security Documents; or
 - (ii) the exercise by a Lender of rights, waivers, consents and similar actions, in the ordinary course of day-to-day loan administration and supervision;
- (c) movement of monies between the Project accounts in accordance with the terms of Financing Agreements and Security Documents;
- (d) any of the following acts by a Lender of senior lien priority Project Debt: (i) the syndication of any of such Lender's rights and interests in the senior Financing Agreements; (ii) the grant by such Lender of any rights of participation, or the disposition by such Lender of any of its rights or interests, with respect to the senior Financing Agreements in favor of any other Lender of senior lien Project Debt or any other investor; or (iii) the grant by such Lender of any other form of benefit or interest in either the senior Financing Agreements or the revenues or assets of Non-Profit Entity, whether by way of security or otherwise, in favor of any other Lender of senior lien Project Debt or any investor; and
- (e) periodic resetting and remarketing of tax-exempt or taxable bonds that bear interest at a variable or floating rate and are money market eligible under SEC Rule 2a-7.
- (f) any Refinancing that occurs due to an audit of (i) Non-Profit Entity, (ii) any tax-exempt financing for the Project, or (iii) Non-Profit Parent, and which, in any of the foregoing cases, is required (x) for Non-Profit Parent to maintain its tax-exempt status or (y) to maintain any exemption of interest payable under any tax-exempt financing from federal income tax.

Existing FF&E means all FF&E identified by City in the updated Equipment List under Section 7.13.2 (Selection of City-Furnished Equipment and Existing FF&E).

Exterior OCS Work Allowance means the Allowance to be used pursuant to Section 11.12.7 (Exterior OCS Work Allowance) by Developer for cost and expenses for Work associated with the temporary removal and new OCS installation outside of the Project Site. The initial Exterior OCS Work Allowance amount is identified in Section 11.12.7.

Extra Work means any Work in the nature of additional work, altered work or deleted work that is directly attributable to the occurrence of a Compensable Delay Event or uninsured Force Majeure Event (to the extent permitted under Section 14.6 (Loss or Damage Due to Force Majeure Termination Event)) and, absent the Compensable Delay Event or uninsured Force Majeure Event (to the extent permitted under Section 14.6 (Loss or Damage Due to Force Majeure Termination Event)), would not be required by the Contract Documents. The term “Extra Work” does not include “Delay”.

Extra Work Costs means the incremental increase in Non-Profit Entity’s cost of labor, material, equipment and other direct and indirect costs directly attributable to Extra Work, calculated in accordance with Section 1 of Exhibit 13 (Costs Schedule). Extra Work Costs do not include Financing Delay Costs, Delay Costs, delay and disruption damages, extended overhead or similar costs.

Facility means the Infrastructure Facility and the HCC (if built), collectively.

Final Acceptance means that all D&C Work is complete and all other prerequisites for Final Acceptance have been met. Final Acceptance is deemed to have occurred upon satisfaction of all the conditions in Section 7.9 (Final Acceptance), as confirmed by City’s issuance of a certificate in accordance with the procedures and within the time frame established in Section 7.9 (Final Acceptance).

Final Acceptance Date means the date that Final Acceptance is achieved.

Final Acceptance Deadline means 180 days after the Substantial Completion Date, as such date may be extended from time to time pursuant to Section 14.1.2 (Extension of Deadlines for General Delay Events).

Final Design means the general design stage, consistent of all elements, collections of elements or areas of the Project at 100% design completion, as more fully set forth in the Technical Requirements, and depending on the context: the term “Final Design” may refer to (a) the Final Design Documents, (b) the design concepts set forth in the Final Design Documents or (c) the process of development of the Final Design Documents.

Final Design Documents means the complete final construction plans (including plan sheets, specifications, technical memoranda, reports, studies, calculations, drawings, elevations, sections, details and diagrams) and specifications needed for performance of Construction Work, which includes all Submittals specified as required to be part of the Final Design or Final Design Documents under the Technical Requirements.

Final Environmental Impact Report (FEIR) means the Final Environmental Impact Report for the Potrero Yard Modernization Project at 2500 Mariposa Street available at <https://sfplanning.org/environmental-review-documents?title=Potrero+Yard+Modernization+Project>.

Final Schedule Report means has the meaning set forth in Section 1.2.5 of Division 1 of the Technical Requirements.

Finance Plan means the plan for financing the Project submitted to City at Performance Milestone 32 of the Predevelopment Agreement.

Finance Plan Due Date means the date on which the final Finance Plan was submitted to City at Performance Milestone 32 of the Predevelopment Agreement.

Finance Plan Validity Period means the period of 180 consecutive days commencing on the Finance Plan Due Date, as such period may be extended under the terms of the Predevelopment Agreement. If the period of 180 consecutive days commencing on the Finance Plan Due Date ends on a weekend or national holiday, then the Final Finance Plan Validity Period shall end on the next Business Day.

Financial Close means satisfaction by Non-Profit Entity of (a) all conditions precedent to the effectiveness of commitments of the Lenders under the Financing Documents; and (b) the conditions set forth in Section 3.2.4 (Conditions Precedent to Financial Close).

Financial Close Date means the date on which Financial Close occurs.

Financial Close Deadline means June 19, 2026, as such date may be extended by agreement of the Parties or as a result of an Adverse Event or other excuse set forth in this Agreement.

Financial Close Security means the bond or letter of credit in the amount of \$15,000,000 provided by Non-Profit Entity to City as a condition precedent to execution and delivery of this Agreement by both City and Non-Profit Entity.

Financial Model means the Microsoft Excel-based financial model that includes financial forecasts, projections and calculations with respect to revenues, expenses, the repayment of Project Debt, which shall be in macro-enabled excel format, on electronic storage media, or in such other format and medium as the Parties may agree in writing.

Financial Model Update(s) has the meaning set forth in Section 4.7.2.1.

Financial Modeling Data means all books, documents and back-up information in any media or format setting forth all assumptions, estimates, projections, calculations and methodology used in the preparation of the Implementation Proposal, the Financial Model, and in Financial Model Updates of revenues, pricing, costs, expenses and repayment of Project Debt, including:

- (a) the logical layout and structure of the Financial Model, including the names of all worksheets and a description of the color coding and/or labeling scheme(s);
- (b) an assumptions book, fully describing all assumptions and their sources underlying the estimates, projections and calculations in the Financial Model, revisions to the Base Case Financial Model in accordance with Sections 3.2.4 (Conditions Precedent to Financial Close) and 3.3.1, and updates to such assumptions book related to Financial Model Updates;
- (c) a detailed description of the function and intended use of all macros (each of which must be logically structured and well documented with comments included

within the programming code);

- (d) the step-by-step instructions on the procedure to run and to optimize the Financial Model submitted with the Finance Plan and each Financial Model Update, such that City will be able to read, use and modify the data contained therein, operate the Financial Model and conduct detailed sensitivity analyses;
- (e) copies of all offers, and all data and information within this definition, received from all Contractors (at all tiers) identified in the Implementation Proposal;
- (f) copies of all offers, and all data and information within this definition, received from all Contractors (at all tiers) related to any Delay Event or Change Order; and
- (g) all other supporting data, technical memoranda, calculations, formulas, unit and materials prices (if applicable) and such other cost, charge, fee, financing, equity return, and revenue information used by Principal Project Company in the creation and derivation of the Implementation Proposal, Finance Plan, the Financial Model, or of any Financial Model Update, or related to any Delay Event or Change Order.

Financial Proposal means the Financial Proposal provided at Exhibit 3A (Financial Proposal).

Financing Agreement means:

- (a) any loan agreement, bond purchase agreement, funding agreement, account maintenance or control agreement, insurance or reimbursement agreement, collateral agency and intercreditor agreement, subordination agreement, trust indenture, agreement from any Equity Member in favor of any Lender, hedging agreement, interest rate swap agreement, guaranty, indemnity agreement, agreement between any Contractor and any Lender, or other agreement by, with or in favor of any Lender pertaining to Project Debt (including any Refinancing), other than Security Documents;
- (b) any note, bond or other negotiable or non-negotiable instrument evidencing the indebtedness of Non-Profit Entity for Project Debt (including any Refinancing); and
- (c) any amendment, supplement, variation or waiver of any of the foregoing agreements or instruments.

Financing Delay Costs means in the case of Delay Events, an amount equal to principal payments, interest payments, hedging costs and other financing costs accrued and/or paid, or which became payable, by Non-Profit Entity to the Senior Lenders in accordance with the Financing Agreements that accrued during the period of the schedule extension granted pursuant to Section 14.1.2 (Extension of Deadlines for General Delay Events).

Financing Documents means Financing Agreements and Security Documents.

Financing Document Terms means Exhibit 5G (Financing Document Terms).

Fiscal Year means the consecutive 12 calendar month period starting on July 1 and ending on June 30.

Float means the amount of time that any given activity or logically connected sequence of activities shown on the Project Schedule may be delayed before it will affect the Substantial Completion Deadline or Final Acceptance Deadline, as applicable. Float is generally identified on the Project Schedule as the difference between the early start date and late start date, or early completion date and late completion date for activities shown on the Project Schedule, and shall include any float contained within an activity as well as any period containing an artificial activity (that is, an activity that is not encompassed within the meaning of the definition of “D&C Work”).

Force Account Work means Change Order work that City authorizes and will pay for on the basis of direct costs plus markup on direct costs for overhead and profit as provided in Exhibit 13 (Costs Schedule).

Force Majeure Event means the occurrence of any of the following events or circumstances which directly causes either Party to be unable to perform all or a material part of its obligations under this Agreement:

- (a) war (including civil war or revolution), invasion, violent act of foreign enemy or armed conflict occurring within the continental United States or military or armed blockade, or military or armed takeover of the Project;
- (b) any act of terrorism, riot, insurrection, civil commotion or sabotage that causes direct physical damage to, or otherwise directly causes interruption to construction of, or incurrence of direct losses during the performance of Warranty Work in respect of, the Project;
- (c) national or state-wide strikes not specific to Non-Profit Entity, or embargoes, that, in each case, directly cause interruption to construction of, or incurrence of direct losses during the performance of Warranty Work in respect of, the Project;
- (d) nuclear, radioactive, or biological contamination of the Project unless the source or cause of the contamination is brought to or near the Project Site by NPE-Related Entities, or is the result of any NPE Fault;
- (e) flood, fire, explosion, tidal wave, sinkhole caused by natural events, or landslide caused by natural events, in each case, occurring within the City and directly impacting the Project or performance of Work;
- (f) SFMTA staff strikes and work stoppages not caused by NPE Fault that directly cause interruption to construction of, or incurrence of direct losses during the performance of Warranty Work in respect of, the Project;
- (g) any City, or governor-declared, Emergency within the limits or precluding access to the Project Site;
- (h) (i) any epidemic in the State; or (ii) Pandemic (defined as the worldwide spread of a disease due to lack of immunity in most people, excluding COVID-19);

- (i) a Change in Law (other than a Relevant Change in Law); and
- (j) Intentionally Omitted; and
- (k) a seismic event in excess of a magnitude 3.5 on the Richter Scale, where (i) such Earthquakes, ground shaking, liquefaction, settlement, or ground movements directly impact, and cause damage to, temporary or permanent works of the Project; and (ii) such event is not insured or required to be insured under the terms of the Contract Documents.

Force Majeure Termination Event has the meaning given in Section 17.2.1.

Geotechnical Baseline Report (GBR) means the report entitled Geotechnical Baseline Report, set forth in Appendix I of Division 3 of the Technical Requirements.

Good Faith Efforts means with respect to SBE, the efforts to meet the SBE Goal(s) required by the Project Agreement.

Good Industry Practice means:

- (a) in the case of Work (excluding the Design Work), the exercise of the degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced constructor or supplier, as applicable, operating in the United States under the same or similar circumstances and conditions, seeking in good faith to comply with its contractual obligations, the Contract Documents and all applicable Laws and Regulatory Approvals in conformance with all professional engineering principles and construction practices generally accepted as standards of the industry in the State. With respect to storm water management for construction activities, Good Industry Practice means Best Management Practices; and
- (b) in the case of Design Work, the exercise of the degree of skill, diligence, prudence, and foresight which would reasonably and ordinarily be expected from a professional designer or engineer, as applicable, operating in the United States under the same or similar circumstances and conditions, seeking in good faith to comply with its contractual obligations, the Contract Documents and all applicable Laws and Regulatory Approvals and engaged in the same type of undertaking under circumstances similar to the Project and conditions similar to those within the same geographic area as the Project Site.

Government Code Dispute has the meaning set forth in Section 18.4 (Government Code Dispute).

Governmental Entity(ies) means City in its regulatory capacity, any federal, state, local or foreign government and any political subdivision or any governmental, quasi-governmental, judicial, public or statutory instrumentality, administrative agency, authority, body or entity other.

Governmental Utility(ies) has the meaning set forth in Section 00 73 20 of Division 10 of the Technical Requirements.

Guidelines has the meaning set forth in Section 23.16.4(b).

Hazardous Material(s) means any (a) substance, product, waste, pollutant, contaminant or other material of any nature whatsoever that exceeds maximum allowable concentrations for that material, as defined by any Environmental Law; (b) substance, product, waste, pollutant, contaminant or other material of any nature whatsoever that is or becomes listed, regulated, or addressed under any Environmental Law; (c) substance, product, waste, pollutant, contaminant or other material of any nature whatsoever which may give rise to liability under clause (a) or (b) or under any statutory or common law theory based on negligence, trespass, intentional tort, nuisance, or strict liability or under any reported decisions of a state or federal court; (d) petroleum hydrocarbons excluding de minimis amounts and excluding petroleum hydrocarbon products contained within regularly operated motor vehicles; and (e) hazardous building materials including asbestos or asbestos-containing materials, lead or PCBs in structures and/or other improvements on or in the Project Site or in subsurface artifacts. The term “Hazardous Materials” includes Hazardous Waste and contaminated materials.

Hazardous Materials Event means Hazardous Materials in, over, under or emanating from the Project Site or which has migrated onto the Project Site from land or premises adjoining the Project Site that (1) render use of the Project unsafe or potentially unsafe absent assessment, containment and/or remediation, or (2) are required by applicable Law to be recycled, treated or stored, excluding Hazardous Materials:

- (a) that are Known or Suspected Hazardous Materials; and
- (b) to the extent caused, contributed, or, once discovered, exacerbated, by any NPE-Related Entity.

Hazardous Materials Management means procedures, practices and activities to address and comply with Environmental Laws and Environmental Approvals with respect to Hazardous Materials encountered, impacted, caused by or occurring in connection with the Project, Project Site or the Work (including demolition Work), including investigation and remediation of such Hazardous Materials. Hazardous Materials Management may include sampling, characterization, stock-piling, storage, backfilling in place, asphalt batching, recycling, treatment, clean-up, remediation, transportation and/or off-site disposal of Hazardous Materials, whichever approach is effective, most cost-efficient and permitted under applicable Law.

Hazardous Waste means waste as defined in 40 CFR Part 261 and/or 22 California Code of Regulations 66260.10.

HCC Agreement means an agreement between City and the Housing Project Company (or between City and the Non-Profit Entity and assigned by Non-Profit Entity to a Housing Project Company), pursuant to which City will grant a long-term real property interest in certain premises for the development of the Housing and Commercial Component.

HCC Project Company means an entity, including a special-purpose entity(ies), that will undertake the HCC pursuant to an amendment to this Agreement or a separate agreement, including an HCC Agreement.

HCC-Related Entity(ies) means:

- (a) the HCC Project Company;
- (b) any other persons or entities performing any work relating to the HCC;

- (c) any Affiliate of the Non-Profit Entity or the Principal Project Company and any affiliate of any other NPE-Related Entity, the HCC Project Company and any other HCC-Related Entity participating in or responsible for any aspect of the HCC;
- (d) any other persons or entities for which the HCC Project Company may be legally or contractually responsible;
- (e) any non-City party to any separate agreement relating to the HCC, including an HCC Agreement, including all subcontractors, subconsultants and suppliers of any tier; and
- (f) the employees, personnel, officers, directors, agents, representatives, successors and assigns of any of the foregoing.

Health and Safety Plan means Non-Profit Entity's plan describing the policies and procedures to be followed by all NPE and PPC personnel at the Site under CFR Title 29, CCR Title 8 and other applicable regulations, prepared and submitted by Non-Profit Entity in accordance with Section 01 35 45 of Division 10, as updated and approved by the City in accordance with this Agreement.

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

Implementation Proposal means the Financial Proposal, provided at Exhibit 3A (Financial Proposal); and the specific elements of the documents, if any, included at Exhibit 3B (Technical Proposal Elements).

Implementation Proposal Final Price means the full and complete fixed price for all D&C Work included in the Implementation Proposal.

Inaccurate Utility Information means during performance of Construction Work, Non-Profit Entity encounters any Non-Dig Alert Utilities located at the Project Site that requires a Utility Adjustment, and such Utility is (i) an Unidentified Utility; (ii) not a Service Line (other than an Active Service Line); and (iii) not identified or reflected in whole or in part in the Utility Information.

Incidental Utility Work means, for all Utilities, all of the following work necessary for construction of the Project, including any necessary coordination with Utility Owners and property owners, furnishing design, performing construction, and obtaining and complying with all required Regulatory Approvals:

- (a) Service Line relocations;
- (b) The adjustment of Utility appurtenances (e.g., manholes, valve boxes and vaults) for line and grade upon completion of roadway work;

- (c) Protection in Place of Utilities;
- (d) All work necessary to remove and dispose of any Utilities (whether or not in use as of the Effective Date) in situations for which leaving the Utilities in place is not feasible or not permitted, or is required in order to accommodate or permit construction of the Project, regardless of whether replacements for such Utilities are being or have been installed in other locations;
- (e) All work necessary to abandon in place any Utility in accordance with applicable Law and proper Utility Owner and/or industry procedures (e.g., flushing, capping, slurry backfill, etc.) regardless of whether replacements for such Utilities are being or have been installed in other locations;
- (f) Traffic control for Utility Adjustment work;
- (g) Resurfacing and re-striping of streets; reconstruction of curbs, gutters and sidewalks; reinstallation of signage; and reinstallation or replacement of traffic signals;
- (h) Supplemental investigation, potholing, electronic detection, surveying and any other methods used to determine Utility locations, preparation of Non-Profit Entity's Utility conflict matrix and other material information concerning Utilities;
- (i) Temporary Relocations; and
- (j) Earthwork trenching requested by a Utility Owner.

Increased Oversight Cure Plan means the plan including specific actions (including timeframes) to be taken by Non-Profit Entity, to improve its performance, prepared and submitted by Non-Profit Entity in accordance with Section 15.6.4(a) of the Agreement, as updated and approved by the City in accordance with this Agreement.

Increased Oversight Threshold means:

- (a) Non-Profit Entity receives a total of 200 or more Noncompliance Points over the course of 12 consecutive calendar months (determined on a rolling basis); or
- (b) Non-Profit Entity receives a total of 350 or more Noncompliance Points over the course of 36 consecutive calendar months (determined on a rolling basis).

Indemnitees means City, including its boards and commissions, other persons and entities designated as "Indemnitees" in the Contract Documents, and all of their respective officeholders, officers, directors, agents, members, consultants, employees, authorized representatives, successors, and assigns.

Information Management Plan means Non-Profit Entity's plan describing procedures to produce and control all documentation and relevant information, prepared and submitted by Non-Profit Entity in accordance with Section 1.6 of Division 1 of the Technical Requirements, as updated and approved by the City in accordance with this Agreement.

Infrastructure Facility means the Facility’s transit operations component, which (a) will include the spaces needed for City’s operation and maintenance activities at the Facility after Substantial Completion of the Infrastructure Facility, and (b) must meet the Infrastructure Facility criteria in the Technical Requirements except as otherwise approved by City in writing, which approval shall be at its sole discretion. The Infrastructure Facility is generally described in the “Project Description” included in Division 1 of the Technical Requirements..

Initial Financing Agreements means the documents identified in Part A (Initial Financing Agreements) of Exhibit 5A (List of Initial Financing Documents).

Initial Financing Documents means Initial Financing Agreements and Initial Security Documents.

Initial Project Debt means the Project Debt originally incurred to finance the Project and Work, in the total face amount at each lien priority, and with the particular Lenders, set forth in the Contract Documents, which Project Debt is evidenced by the Initial Financing Agreements and secured by the Initial Security Documents.

Initial Schedule means the schedule attached as Exhibit 19 (Initial Schedule), setting out all the relevant D&C Work activities from Commercial Close through Final Acceptance, with key interim milestones during that period of work, and at a minimum at Level 3 defined in AACE 91R-16 “Schedule Development”.

Initial Security Documents means the documents identified in Part B (Initial Security Documents) of Exhibit 5A (List of Initial Financing Documents).

Institutional Lender means:

- (a) The United States of America, any state thereof or any agency or instrumentality of either of them, any municipal agency, public benefit corporation or public authority, advancing or insuring mortgage loans or making payments which, in any manner, assist in the financing, development, operation and maintenance of projects;
- (b) Any (i) bank, trust company (whether acting individually or in a fiduciary capacity), savings and loan organization or insurance company organized and existing under the laws of the United States of America or any state thereof, (ii) foreign insurance company or bank qualified to do business as such, as applicable under the laws of the United States of America or any state thereof, or (iii) pension fund, foundation or university or college endowment fund; provided that an entity described in this clause (b) only qualifies as an Institutional Lender if it is subject to the jurisdiction of state and federal courts in the State in any actions;
- (c) Any “qualified institutional buyer” under Rule 144(a) under the Securities Act of 1933, 15 U.S.C. § 77a et seq., or any other similar Law hereinafter enacted that defines a similar category of investors by substantially similar terms;
- (d) Any purchaser of debt securities the proceeds of which are used to finance the Project that are not publicly offered pursuant to the exception to registration provided in Section 4(2) of the U.S. Securities Act of 1933; or

- (e) Any other financial institution or entity designated by Non-Profit Entity and approved in writing by City; provided that such institution or entity, in its activity under this Agreement, is acceptable under then current guidelines and practices of City;

provided, however, that each such entity (other than entities described in clause (c) and (d) of this definition), or combination of such entities if the Institutional Lender is a combination of such entities, shall have individual or combined assets, as applicable, of not less than \$1 billion. The foregoing dollar minimums shall automatically increase at the beginning of each calendar year by the percentage increase, if any, in the CPI during the immediately preceding calendar year, determined by comparing the CPI most recently published for the immediately preceding year with the CPI most recently published for the second preceding year.

Insurance Policy(ies) means all of the insurance policies Non-Profit Entity is required to carry under Exhibit 7 (Insurance Requirements).

Insurance Proceeds means all proceeds from insurance payable to Non-Profit Entity (or that would have been payable to Non-Profit Entity but for Non-Profit Entity's breach of any obligation under this Agreement to procure or maintain said insurance) on or after the Early Termination Date.

Insurance Unavailability means either:

- (a) Any Insurance Policy coverage required under Section 10.1 (Insurance) or Exhibit 7 (Insurance Requirements) is deemed unavailable under Section 10.1.4 (Insurance Unavailability); or
- (b) Provision of all such Insurance Policy coverages has become unavailable at Commercially Reasonable Insurance Rates from insurers meeting the requirements in Section 10.1.2.1 (Insurers).

For the purpose of clause (b), the only increases in premiums that may be considered are those caused by changes in general market conditions in the insurance industry affecting insurance for project-financed transit facilities, and Non-Profit Entity shall bear the burden of proving that premium increases are the result of such changes in general market conditions. No increase in insurance premiums attributable to particular conditions of the Project or Project Site, or to claims or loss experience of any NPE-Related Entity or Affiliate, whether under an Insurance Policy required to be placed under this Agreement or in connection with any unrelated work or activity of NPE-Related Entities or Affiliates, shall be considered in determining whether Insurance Unavailability exists or has occurred.

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

the physical, electronic, and/or mechanical embodiments of such Intellectual Property (see IP Materials).

Interior OCS Work Allowance means the Allowance to be used pursuant to Section 11.12.9 (Interior OCS Work Allowance) by Non-Profit Entity for Interior OCS Work. The initial Interior OCS Work Allowance amount is identified in Section 11.12.9.

Interior OCS Work means the coordination, provision, permits, installation, and testing related to the OCS elements within the interior of the Infrastructure Facility that are required to fulfill the requirements of the Contract Documents.

IP Escrow(s) has the meaning set forth in Section 21.5.2 of this Agreement.

IP Escrow Agent has the meaning set forth in Section 21.5.2 of this Agreement.

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

IT / Comms Site means those areas related to City-Furnished IT/Comms FF&E, including locations of each MDF, IDF, wireless access point, RTLS point, a 15-foot radius immediately around each of these locations, and other areas the City, acting reasonably, deems necessary and identifies for NPE at least 14 days prior to the beginning of the City Access Period.

Key Contract means any one of the following:

- (a) the Project Implementation Agreement;
- (b) all Prime Contracts for Construction Work and Design Work;
- (c) all Prime Contracts for project or program management services; and
- (d) all other Prime Contracts with a single Contractor (or a single Contractor and its affiliates) that individually or in the aggregate total in excess of \$25 million on a term (not annual) basis.

The term “Key Contracts” means all such Contracts in the aggregate or more than one of such Contracts.

Key Contractor means each Contractor under any Key Contract.

Key Personnel means, collectively, those individuals: (a) in Exhibit 20 (List of Key Personnel); and (b) appointed by Non-Profit Entity and approved by City from time to time to fill the “Key

Personnel” positions identified in Section 1.1.4 of Division 1 of the Technical Requirements (each is a “**Key Person**”).

Key Ratios means ratios contained in the Financing Documents that have financial covenants attached to them or ratios that are condition precedents to Financial Close under the Financing Agreements.

Known or Suspected Hazardous Materials means Hazardous Materials (i) that are known or reasonably suspected to exist as of the Setting Date based on information, data or analysis contained or referenced in the ESA; (ii) excluding Hazardous Materials that are entirely subsurface, which should have been known or reasonably suspected pursuant to a Reasonable Investigation prior to the Setting Date, including those listed in the Technical Requirements; (iii) that constitute asbestos, lead, PCBs, any byproducts of the foregoing and/or any other material or substance indicated as present or potentially present at, in, on or under the Project Site in the ESA; (iv) anticipated or likely to be present in a building or structure that was constructed in 1915 and in continuous operation as a bus maintenance facility and heavy industrial use since that time; and/or (v) excluding Hazardous Materials that are entirely subsurface, which should have been identified or referenced pursuant to a Reasonable Investigation undertaken pursuant to the Predevelopment Agreement. Known or Suspected Hazardous Materials include Hazardous Materials arising in or from any of the Hazardous Materials sites listed in the CEQA documents, the NEPA documents or in the Technical Requirements.

Late Payment Rate means the legal rate, as set forth in Section 685.010(a) of the California Code of Civil Procedure, as may be amended from time to time, up to a maximum amount equal to 10% per annum.

Law(s) means (a) any statute, law, code, regulation, ordinance, rule or common law, (b) any binding judgment (other than regarding a Claim), (c) any binding judicial or administrative writ, order, judgment, injunction, award or decree (other than regarding a Claim), (d) any written directive, guideline, policy requirement or other governmental restriction (including those resulting from the initiative or referendum process, but excluding those by City within the scope of its administration of the Contract Documents) or (e) any similar form of decision of or determination by, or any written interpretation or administration of any of the foregoing by, any Governmental Entity, in each case which is applicable to or has an impact on the Project or the Work, whether taking effect before or after the Effective Date. The term “Laws”, however, excludes Regulatory Approvals.

Lead Developer means and Potrero Neighborhood Collective LLC, a limited liability company organized under the laws of the State of Delaware.

Lender(s) means each of the holders and beneficiaries of Security Documents, including any financial guarantor providing Project Debt or any guaranty or credit enhancement in respect thereof, and their respective successors, assigns, participating parties, trustees and agents, including the Collateral Agent.

Lenders’ Liabilities means, at the relevant time, the aggregate of (without double counting) all principal, interest (including capitalized and default interest under the Financing Documents, but with respect to default interest, only to the extent that it arises as a result of City making any payment later than the date that it is due under this Agreement or any other default by City under this Agreement), Breakage Costs, banking fees, premiums or reimbursement obligations with respect to financial insurance policies, agent and trustee fees, costs and expenses properly

incurred owing or outstanding to the Lenders by Non-Profit Entity under or pursuant to the Financing Documents on the Early Termination Date, including any prepayment premiums or penalties, make-whole payments or other prepayment amounts, including costs of early termination of interest rate and inflation rate hedging, swap, collar or cap arrangements, that Non-Profit Entity must pay, or that may be payable or credited to Non-Profit Entity, under any Financing Agreement or Security Document or otherwise as a result of the payment, redemption or acceleration of all or any portion of the principal amount of Project Debt prior to its scheduled payment date that were determined to be reasonable by City at the time City reviewed and approved the Financing Agreements in connection with Financial Close, as evidenced by City's approval of such Financing Agreements.

Lenders' Technical Advisor (LTA) means the Lenders' technical advisor, BTY US LLC, and any replacement technical advisor engaged by Non-Profit Entity and the Lenders with respect to the Project.

Long Stop Date means 12 calendar months after the Substantial Completion Deadline, as such date may be extended from time to time pursuant to Section 14.1.2 (Extension of Deadlines for General Delay Events).

Loss(es) means, whether asserted, suffered or incurred by a Party or a Third Party, any debt, assessment, claim, action, loss, proceeding, damage, injury, liability, obligation, cost, response cost, expense (including attorneys', accountants' and expert witnesses' fees and expenses (including those incurred in connection with the enforcement of any indemnity or other provision of this Agreement), loss (whether direct or indirect), proceedings, demands and charges whether arising under statute, contract or at common law), compensation, charge or liability of any kind (including fees, judgments, or penalties), and whether or not arising under or for breach of contract, in tort (including negligence), restitution, under statute or otherwise at law. Losses include injury to or death of persons, damage or loss of property, and harm or damage to natural resources, utility facilities or Intellectual Property.

LTA Agreement means the technical advisory agreement dated as of the Financial Close Date between Non-Profit Entity, the Lenders (or the Collateral Agent) and Lenders' Technical Advisor.

Major Approval means the Regulatory Approvals issued by DBI set forth on Exhibit 21.

Major Approval Conditions to Assistance has the meaning set forth in Section 6.3.8.2.

Major Approval Deadline means, with respect to a Major Approval, the deadline for Non-Profit Entity, Principal Project Company and/or D&C Contractor to secure such Major Approval set forth on Exhibit 21.

Major Approval Delay means a Critical Path delay to the Work resulting from the failure to obtain a Major Approval by the applicable Major Approval Deadline where that delay is not due, in whole or in part, to a change to the Non-Profit Entity's design between the Effective Date and Final Design Documents (unless such design change is as a direct and sole result of a City Change or Delay Event (excluding Major Approval Delay)) or due to any act or omission of any NPE-Related Entity or any NPE Fault or failure of the Non-Profit Entity to act diligently in accordance with the requirements of the Contract Documents and Good Industry Practice (including any failure to provide City with an updated Project Schedule or to perform the Work in accordance with the Project Schedule). Subject to the terms of the Contract Documents, Major

Approval Delay shall be determined on a full day basis commencing on the Major Approval Deadline and continuing until DBI approves the applicable Major Approval.

Major Utility Adjustment means Utility Adjustments to the following Utilities:

(a) storm and sanitary sewer to be undertaken by or on behalf of the San Francisco Public Utilities Commission;

(b) water, including fire, potable, and non-potable, to be undertaken by or on behalf of the San Francisco Public Utilities Commission; and

(c) Undergrounding Existing PG&E Power Line Work.

Major Utility Adjustment Deadline means the deadline to complete each Major Utility Adjustments specified in the approved Project Schedule.

Major Utility Adjustment Delay has the meaning set forth in Section 7.6.13.1. Subject to the terms of the Contract Documents, Major Utility Adjustment Delay shall be determined on a full day basis commencing on the Major Utility Adjustment Deadline and continuing until the applicable Major Utility Adjustment is completed.

Main or Trunkline Utility means an underground Utility, which is not a Service Line, and which relative to the particular system of which it is a part, (a) is a larger line serving as a main line to connecting tributary lines and (b) serves a larger area, all as determined by City, in its sole discretion. In determining whether a facility should be considered a Main or Trunkline Utility, City may refer to definitions in the relevant manual or code, if any, of the Utility Owner.

Maintenance of Traffic (MOT) means the comprehensive effort to maintain traffic.

Manual or **Manuals** means policies, procedures, practices, guidelines, plans, checklists, deliverables, etc. that are developed, implemented and updated by Non-Profit Entity.

Milestone Payment 1 has the meaning set forth in Section 1.1 of Exhibit 4A (Milestone Payment Mechanism).

Milestone Payment 2 has the meaning set forth in Section 2.1 of Exhibit 4A (Milestone Payment Mechanism) and, collectively, means Milestone Payment 2A and Milestone Payment 2B.

Milestone Payment 2A has the meaning set forth in Section 2.2 of Exhibit 4A (Milestone Payment Mechanism).

Milestone Payment 2B has the meaning set forth in Section 2.2 of Exhibit 4A (Milestone Payment Mechanism).

Milestone Payments means, collectively, Milestone Payment 1, Milestone Payment 2, or each of them, as the context may require.

Model Update Event has the meaning set forth in Section 4.7.1.1.

Monthly Progress Meeting has the meaning set forth in Section 1.1.3.5 of Division 1 of the Technical Requirements.

Monthly Report means the report described in Section 1.2.4.1 of Division 1 of the Technical Requirements.

Move-In has the meaning set forth in Section 7.14 (Move-In).

Move-In Plan means the plan prepared and submitted by Non-Profit Entity and approved by the City in accordance with Section 6.10 of Division 6 of the Technical Requirements, as updated in accordance with this Agreement.

Move-In Resource Candidate has the meaning set forth in Section 7.14.3.1.

Move-In Resource means the advisor selected in accordance with Section 7.14.3.

Move-In Subcommittee has the meaning set forth in Section 7.14.2.1.

NEPA Approval means the Categorical Exclusion Determination issued by the Federal Transit Administration under 23 C.F.R. §771.118(c)(9), dated December 23, 2024, confirming that the Potrero Yard Modernization Project qualifies as a categorical exclusion under the National Environmental Policy Act. A copy of the determination is available on file with the SFMTA and available upon request.

NEPA Event means:

- (a) any new or modified NEPA Approval necessitated solely by a City Change or a Delay Event;
- (b) legal action being taken in respect of the NEPA Approval that results in a temporary restraining order, preliminary injunction or other form of interlocutory relief by a court of competent jurisdiction that prohibits prosecution of, or by complying with such temporary restraining order, preliminary injunction or other form of interlocutory relief by a court of competent jurisdiction results in prohibiting the prosecution of, a material portion of the Work;
- (c) review or revocation or material change to, the NEPA Approval; or
- (d) any review or revocation of, or change to, a NEPA Approval directly resulting from the circumstances specified in clauses (b) and (c).

except, in each case, to the extent resulting, in whole or in part, from Non-Profit Entity's design, Work or from any NPE Fault.

New PG&E Service Allowance means the Allowance to be used pursuant to Section 11.12.6 (New PG&E Service Allowance) by Developer for New PG&E Service Work. The initial New PG&E Service Allowance amount is identified in Section 11.12.6.

New PG&E Service Work means the investigations, design, provision, permits, installation, and testing related to bringing a new PG&E power feed from the SF A (Potrero) substation to the Project Site as described in Appendix C and Appendix G of Division 3 of the Technical

Requirements.

Noncompliance Database has the meaning set forth in Section 15.3.1.1.

Noncompliance Event means a D&C Noncompliance Event.

Nonconforming Work means any D&C Work (including any product of the D&C Work) that does not conform to the requirements of the Contract Documents, the Regulatory Approvals, applicable Law, the Design Documents or the Construction Documents, including any Work required to be repaired or replaced under Section 7.11 (Nonconforming Work) of this Agreement.

Non-Dig Alert Utilities means Utilities that are not documented by or recorded with USA Dig Alert.

Non-Profit Entity (NPE) means PRG – Potrero Properties LLC, a limited liability company organized under the laws of the State of Delaware whose sole member is Non-Profit Parent, and its permitted successors and assigns.

Non-Profit Entity Allowances has the meaning set forth in Section 11.12.1(b).

Non-Profit Parent means Provident Resources Group Inc., a Georgia non-profit corporation and a tax-exempt entity under the Internal Revenue Code, and its successors and assigns.

Non-Regulated Load means the metered provision of Energy other than Regulated Load. Non-Regulated Loads are to be aggregated in a logical fashion through a submetering system.

Notice has the meaning given in Section 23.10 (Notices and Communications).

Notice(s) of Conditional Termination has the meaning set forth in Section 17.2.1 (Notice of Conditional Election to Terminate – Force Majeure Termination Events).

Notice of Determination has the meaning set forth in Section 15.3.3.2.

Notice of Potential Claim means a written Notice submitted by Non-Profit Entity in accordance with Section 18.2 (Notice of Potential Claim).

Notice of NPE Default means a written Notice provided by City concerning City's determination that a NPE Default has occurred, with respect to any default for which a cure period is allowed under Section 16.3.2 (Cure Periods).

NPE Change Request has the meaning set forth in Section 3.1 of Exhibit 9 (Change Procedures). For certainty, any Notice delivered by Principal Project Company or an NPE-Related Entity to City in respect of a Relevant Event is deemed not to be an NPE Change Request.

NPE Default has the meaning set forth in Section 16.1.1 (NPE Default).

NPE Employee(s) means employee(s) of Non-Profit Entity or any other NPE-Related Entity at the Project Site.

NPE Employee and Contractor Breakage Costs means:

- (a) the payment of all wages earned, accrued unused vacation time, and any other payments required to be made by Non-Profit Entity to its employees under law, or under the terms and conditions of Non-Profit Entity's employment agreements with its employees as a direct result of the termination of this Agreement; and
- (b) Losses that have been or will be reasonably and properly incurred by Non-Profit Entity under a Key Contract as a direct result of the termination of this Agreement (and which shall not include lost profit or lost opportunity), but only to the extent that:
 - (i) the Losses are incurred in connection with the Project and with respect to the Work required to be provided or carried out, including:
 - (1) any materials or goods ordered or subcontracts placed that cannot be cancelled without such Losses being incurred; and
 - (2) any expenditure incurred in anticipation of the provision of services or the completion of Work in the future; and
 - (3) the cost of demobilization including the cost of any relocation of equipment used in connection with the Project; and
 - (ii) the Losses are reasonably and properly incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on an arm's length basis; and
 - (iii) Non-Profit Entity and the relevant Key Contractor have each used their reasonable efforts to mitigate such Losses and, as to Principal Project Company and the Project Implementation Agreement, Principal Project Company shall have fully complied with all mitigation obligations applicable to Non-Profit Entity under this Agreement.

NPE Fault means:

- (a) the breach by any NPE-Related Entity of any of its obligations or any representation, warranty or covenant under the Contract Documents;
- (b) a breach of applicable Law or any Regulatory Approval by any NPE-Related Entity; and
- (c) fraud, criminal conduct, intentional misconduct, recklessness, bad faith, gross negligence, negligence or other culpable act or omission of any NPE-Related Entity.

NPE Intellectual Property means Intellectual Property developed by Non-Profit Entity, Contractors, or any of their respective Affiliates either (a) prior to the Effective Date, (b) independently of the Contract Documents or (c) any adaptation, continuation or derivative work which requires the incorporation, exercise or practice of Intellectual Property that is the subject of either clause (a) or (b).

NPE Project Relief has the meaning given in Section 3.8.3.

NPE Release means, with respect to Hazardous Materials, (a) any Release of Hazardous Material, or the exacerbation of any such Release, attributable to any NPE Fault; (b) any Release of Hazardous Materials arranged to be brought onto the Project Site by any NPE-Related Entity; regardless of cause; (c) any migration of Hazardous Materials into, onto, under or from the Project Site where the source of such Hazardous Materials is a NPE-Related Entity; or (d) any use, containment, storage, management, handling, transport or disposal of any Hazardous Materials, by any NPE-Related Entity in violation of the requirements of the Contract Documents, Good Industry Practice or any applicable Law or Regulatory Approval.

NPE Resources means the employees of Non-Profit Entity or any Non-Profit Entity that are not at the Project Site.

NPE's Construction Quality Plan (PCQP) means the Non-Profit Entity deliverable described in Section 1.4.3 of Division 1 of the Technical Requirements, following approval thereof by City, as updated in accordance with this Agreement.

NPE's Design Quality Plan (PDQP) means the Non-Profit Entity deliverable described in Section 1.4.2 of Division 1 of the Technical Requirements, following approval by City, as updated in accordance with this Agreement.

NPE-Furnished FF&E means all FF&E required by the Technical Requirements or the Equipment List (including items marked CP) or otherwise required to be included on the Equipment List under Section 7.13.1 (Selection and Procurement of NPE-Furnished FF&E) including the Office/Admin and Training Spaces FF&E and the IT/Comms Equipment, but excluding City-Furnished Equipment and Existing FF&E.

NPE's Interest means all right, title and interest of Non-Profit Entity in, to, under or derived from the Contract Documents, including the Infrastructure Facility, Project Management Plan, Subcontracts, Submittals, Claims and Intellectual Property.

NPE's Quality Program (PQP) means the program described in Section 1.4.1 of Division 1 of the Technical Requirements, including all sub-plans.

NPE's Quality Program Plan (PQPP) means Non-Profit Entity's plan describing its approach to undertake and achieve the requirements in Section 1.4.1 of Division 1 of the Technical Requirements, prepared and submitted by Non-Profit Entity in accordance with Section 1.4 of Division 1 of the Technical Requirements, as updated and approved by the City in accordance with this Agreement.

NPE PIA Default means an NPE Default, as defined and used in the Project Implementation Agreement.

NPE-Related Entity(ies) means:

- (a) Principal Project Company;
- (b) Principal Project Company's Equity Members, including Lead Developer;
- (c) D&C Contractor;

- (d) Contractors;
- (e) any other persons or entities performing any of the Work;
- (f) any other persons or entities for whom Non-Profit Entity may be legally or contractually responsible;
- (g) any Affiliate of the Non-Profit Entity, or any other NPE-Related Entity (excluding such Affiliates to the extent that they are participating in or responsible for any aspect of the HCC); and
- (h) the employees, agents, officers, directors, representatives, consultants, successors and assigns of any of the foregoing.

NTP 1 means the written Notice issued by City to Non-Profit Entity in accordance with Section 7.4.3 (Commencement of Non-Construction Work) authorizing Non-Profit Entity to proceed with non-Construction Work.

NTP 2 means the written Notice issued by City to Non-Profit Entity in accordance with Section 7.4.4 (Commencement of Construction Work) authorizing Non-Profit Entity to proceed with Construction Work.

Office/Admin and Training Spaces FF&E means all FF&E to be included in Office/Admin and Training Spaces and all additional FF&E identified as "Office/Admin and Training Spaces FF&E" in the Equipment List or otherwise required to be included in the Office/ Admin and Training Spaces under Section 7.13.1 (Selection and Procurement of NPE-Furnished FF&E).

Office/ Admin and Training Spaces means administration and training facility spaces including Office/Admin and Training Spaces FF&E, identified as "Office Modules", "Training" and "Operations", as well as the enclosed circulation between, as set forth in Division 3 of the Technical Requirements and relevant subsequent Design Documents.

Offsite Utility Information shall mean the results of the investigations taken pursuant to Section 7.6.16.1 in accordance with the Offsite Utility Reasonable Investigation Plan.

Offsite Utility Reasonable Investigation means the following activities by appropriate, qualified professionals:

Prior to the expiration of the 135-day period in which the Offsite Utility Information must be submitted by Non-Profit Entity to City:

- (a) Visit and visual inspection of the boundaries of the Offsite Utility Work and adjacent locations, including visual inspection to identify the presence of other facilities, such as barriers, railing, structures, manholes or identifying markers;
- (b) Review and analysis of all Reference Documents and online map tools;
- (c) Review and analysis of the CEQA Approval, NEPA Approval and other Regulatory Approvals;
- (d) Reasonable inquiry with Utility Owners, including request for and review of Utility

plans provided by Utility Owners;

- (e) Review and analysis of material applicable Law applicable to the Project or the Work as of the Setting Date; and
- (f) Review and analysis of information, data, analyses or reports undertaken under the Predevelopment Agreement.

Following the expiration of the 135-day period in which the Offsite Utility Information must be submitted by Non-Profit Entity to City:

- (a) Visit and visual inspection of the boundaries of the Offsite Utility Work and adjacent locations, including visual inspection to identify the presence of other facilities, such as barriers, railing, structures, manholes or identifying markers;
- (b) Review and analysis of all Reference Documents and online map tools;
- (c) Review and analysis of the CEQA Approval, NEPA Approval and other Regulatory Approvals;
- (d) Reasonable inquiry with Utility Owners, including request for and review of Utility plans provided by Utility Owners;
- (e) Review and analysis of material applicable Law applicable to the Project or the Work as of the expiration of such 135-day period;
- (f) Review and analysis of information, data, analyses or reports undertaken under the Predevelopment Agreement; and
- (g) Review and analysis of information, data, analyses or reports undertaken within the 135-day investigations period and other activities consistent with Good Industry Practice, including all activities required by the Offsite Utility Reasonable Investigation Plan.

Offsite Utility Reasonable Investigation Plan means Non-Profit Entity's plan describing its approach to and standards for Offsite Utility Reasonable Investigations as further described in the approved Project Management Plan, as updated and approved by the City in accordance with this Agreement.

Offsite Utility Work means the design and construction necessary for a Utility Adjustment for a Utility that is entirely outside of the Project Site and includes Incidental Utility Work. Any Off-Site Utility Work furnished or performed by Non-Profit Entity is part of the D&C Work and any Offsite Utility Work furnished or performed by a Utility Owner is not part of the D&C Work.

Open Book Basis means review by City of documentation showing Non-Profit Entity's underlying assumptions, documents, information and data associated with the issue in question, including assumptions as to the Financial Model and each updated Financial Model, pricing or compensation or adjustments thereto, costs of the Work, costs or compensation claimed with respect to Model Update Events, schedule, composition of equipment spreads, equipment rates (including rental rates), labor rates and benefits, productivity, estimating factors, design and productivity allowance, contingency and indirect costs, Extra Work Costs, risk pricing, discount

rates, interest rates, inflation and deflation rates, swap and hedge rates, insurance rates, bonding rates, letter of credit fees, overhead, profit, traffic volumes and other items reasonably required by City to satisfy itself as to validity or reasonableness. Open Book Basis also includes City review of the foregoing documentation of Principal Project Company and D&C Contractor.

Opinion of Counsel has the meaning given in Section 23.16.1.

Ordinance has the meaning set forth in Recital D.

Other Amounts has the meaning given in Section 11.4.2.

Other Contractor means any contractor, tradesperson or other person engaged by City to do work other than Non-Profit Entity and its Subcontractors.

Oversight means monitoring, inspecting, sampling, measuring, spot-checking, reviewing, attending, observing, testing, investigating, auditing and conducting any other ongoing oversight respecting any part or aspect of the Project or the Work, by any Person so entitled, including all the activities described in Section 5.4.2.

Partnering Allowance means the Allowance to be used pursuant to Section 11.12.8 (Partnering Allowance) by Developer for Partnering. The initial Partnering Allowance amount is identified in Section 11.12.8.

Partnering means the partnering process as set forth in Article 18 of this Agreement.

Party means Non-Profit Entity or City, as the context may require, and “Parties” means Non-Profit Entity and City, collectively.

Payment Bond means the payment bond(s) to secure payment for labor and materials, as required under this Agreement.

Payment Commencement Date means (a) in the case of API_q and APC_{Base}, the later of (i) the date that is one day after the Substantial Completion Date, and (ii) April 1, 2031, and (b) in the case of APC_{DC}, the later of (i) the date that is one day after the Substantial Completion Deadline, and (ii) April 1, 2031.

PDA Term means the period commencing on November 2, 2022 and expiring on the Effective Date.

Performance Bond means the performance bond(s) securing performance of the Work required under this Agreement.

Performance Cure Plan means the plan prepared and submitted by Non-Profit Entity and approved by the City in accordance with Section 15.5.2(a) of the Agreement, as updated in accordance with this Agreement.

Performance Monitoring Report means a report documenting all D&C Failure Events, associated D&C Noncompliance Points and D&C Period Deductions.

Performance Notice means a written Notice provided by City, as set forth in Section 15.5.1.

Performance Notice Threshold means

- (a) if Non-Profit Entity receives a total of 375 or more Noncompliance Points over the course of 3 consecutive calendar months (determined on a rolling basis); or
- (b) A material D&C Noncompliance Event occurs, as determined by the City

Persistent NPE Default means if:

- (a) Non-Profit Entity receives a total of 500 or more Noncompliance Points over the course of 12 consecutive calendar months (determined on a rolling basis); or
- (b) Non-Profit Entity receives a total of 875 or more Noncompliance Points over the course of 36 consecutive calendar months (determined on a rolling basis);

Persistent NPE Default Cure Plan means the plan including specific actions (including timeframes) to be taken by Non-Profit Entity to improve performance, prepared and submitted by Non-Profit Entity in accordance with Section 15.8.1 of the Agreement, as updated and approved by the City in accordance with this Agreement.

Person means any individual, corporation, joint venture, limited liability company, company, voluntary association, partnership, trust, unincorporated organization or Governmental Entity.

PG&E Offsite Utility Delay has the meaning set forth in Section 7.6.17.1

Planning Department means the City's Planning Department.

PNC has the meaning set forth in Recital E.

Potential Contract Dispute has the meaning set forth in Section 18.2.1.

Predevelopment Agreement has the meaning set forth in Recital F of this Agreement.

Pre-Existing Hazardous Materials means Hazardous Materials that:

- (a) are located in, on or under, or are emanating from, any parcel within the boundaries of the Project Site as of the date access to such parcel is provided to Non-Profit Entity; or
- (b) existed in another location as of the date access to such a parcel was provided and thereafter migrated to such parcel,

excluding any Hazardous Materials that are located in, on or under, or are emanating from any Additional Property or Temporary Areas or which arise as a result of any act or omission of any NPE-Related Entity in connection with any Additional Property or Temporary Areas.

Prevailing Rate of Wages has the meaning given in Section 6.22(e) and 21C of the San Francisco Administrative Code.

Prime Contract means a direct Contract between Non-Profit Entity and a Contractor or Principal Project Company and a Contractor.

Prime Contractor means any Contractor that has a direct contract with Non-Profit Entity or Principal Project Company.

Principal Project Company (PPC) means Potrero Neighborhood Collective LLC, a limited liability company organized under the laws of the State of Delaware, and its permitted successors and assigns.

Principal Project Document(s) means the Contract Documents, the Project Implementation Agreement, the other Key Contracts and the escrow agreements relating to the escrow of the Financial Model and Cost and Pricing Data and the IP Escrows.

Private Use has the meaning set forth in Section 23.16.4.

Private Placement means the issuance of debt securities that are exempt from registration under U.S. securities law and are sold directly in the private market.

Prohibited Person means any Person who is:

- (a) debarred, suspended, proposed for debarment with a final determination still pending, declared ineligible or voluntarily excluded from participating in procurement or nonprocurement transaction or determined to be a non-responsible bidder or contractor (as such terms are defined or used in City's Contractor Responsibility Program);
- (b) indicted or convicted of a crime, including misdemeanors, or had a civil suit or administrative judgment rendered against such Person involving the bidding, awarding, or performance of a government contract, a false claim or material misrepresentation to any private or governmental entity, or the crime of theft, fraud, embezzlement, perjury, or bribery (as such terms are defined or used in City's Contractor Responsibility Program);
- (c) identified on the list entitled "Entities Prohibited from Contracting with Public Entities in California per the Iran Contracting Act of 2010" maintained by the Department of General Services;
- (d) a financial institution against which, or a banking institution chartered or licensed in a jurisdiction against which, the United States Secretary of the Treasury has imposed special measures under Section 311 of the USA PATRIOT Act;
- (e) located within or is operating from a jurisdiction that has been designated as a "high-risk and non-cooperative jurisdiction" by the Financial Action Task Force;
- (f) a "senior foreign political figure" or a prohibited "foreign shell bank" within the meaning of 31 CFR Section 1010.605; or
- (g) engaged in litigation with the City of San Francisco relating to performance of a contract or business practices (unless the City has first waived (in the City's sole discretion) by written Notice to the transferring equity holder, with a copy to Non-Profit Entity, the prohibition on a transfer to such Person during the continuance of the relevant litigation).

Project means the design, construction, financing and Warranty Work of the Infrastructure Facility as described in the Contract Documents.

Project Debt means bona fide indebtedness (including subordinated indebtedness) for or with respect to funds borrowed or obligations incurred (including bona fide indebtedness with respect to any financial insurance issued for funds borrowed) or for the value of goods or services rendered or received, the repayment of which has specified payment dates and is secured by one or more Security Documents. Project Debt includes principal, capitalized interest, accrued interest, customary and reasonable lender, financial insurer, agent and trustee fees, costs, expenses and premiums with respect thereto, payment obligations under interest rate and inflation rate hedging agreements or other derivative facilities with respect thereto, reimbursement obligations with respect thereto and lease financing obligations. Project Debt excludes (a) any indebtedness of Non-Profit Parent or Non-Profit Entity that is secured by anything less than the entire Non-Profit Entity's Interest, such as indebtedness secured only by an assignment of economic interest in Non-Profit Entity or of rights to cash flow or dividends from Non-Profit Entity, (b) debt that constitutes consideration paid for the sale of the economic rights in Non-Profit Parent or Non-Profit Entity, and (c) any increase in indebtedness to the extent resulting from an agreement or other arrangement Non-Profit Entity enters into after it was aware (or should have been aware, using reasonable due diligence) of the occurrence or prospective occurrence of an event of termination giving rise to an obligation of City to pay Termination Compensation, including Non-Profit Entity's receipt of a Notice of Termination for Convenience and occurrence of a City Default of the type entitling Non-Profit Entity to terminate this Agreement. In addition, no debt shall constitute Project Debt unless and until the Collateral Agent provides City with Notice thereof and the related Financing Agreements and Security Documents in accordance with the relevant Direct Agreement.

Project Debt Competition has the meaning set forth in Section 3.4.2(d)(ii).

Project Financial Performance means the cashflows from Non-Profit Entity's operations, financing and investments, including: (a) cash revenues and expenses, (b) Project Debt drawdowns, fees, interest expense and repayments, and (c) funding and release of reserves.

Project Implementation Agreement has the meaning set forth in Recital H.

Project IP means all NPE Intellectual Property, Third Party IP and City IP incorporated into the Project, Implementation Proposal or Work.

Project Management Plan (PMP) means the D&C Management Plan.

Project Manager means the Key Person described in Section 1.1.4 of Exhibit 3 (Implementation Proposal).

Project Schedule means (i) during the period from the Effective Date until NTP2, the Initial Schedule; and (ii) from NTP2 until Final Acceptance, the CPM schedule for all D&C Work meeting the requirements of the Technical Requirements, including the requirements in Section 1.2.1 of Division 1 thereof, as approved and updated in accordance with this Agreement.

Project Site means the D&C Site.

Proposed Change Order means a Change Order proposed by City in accordance with Section 1.2 of Exhibit 9 (Change Procedures).

Proprietary Design Review has the meaning set forth by Section 1.8.5 of Division 1 of the Technical Requirements.

Protection(s) in Place means any action taken to avoid damaging a utility facility which does not involve removing or relocating that facility, including staking the location of a facility, exposing the facility, locating construction equipment so as to avoid impacts to facilities, installing steel plating or concrete slabs, encasement in concrete, temporarily de-energizing power lines, and installing physical barriers. For example, temporarily lifting power lines without cutting them would be considered a Protection in Place; whereas temporarily moving power lines to another location after cutting them would be considered a phased Utility Adjustment and not a Protection in Place. The term “Protection in Place” includes both temporary measures and permanent installations meeting the foregoing definition.

Public Outreach Plan has the meaning set forth in Section 1.15.2 of Division 1 of the Technical Requirements.

Public Records Act (PRA) means California Public Records Act, Cal. Gov’t Code § 6250 et seq., as amended from time to time.

Punch List means an itemized list of D&C Work as reasonably agreed upon by Non-Profit Entity and City which remains to be completed after the Substantial Completion Date with respect to the Infrastructure Facility as a condition to Final Acceptance, and which is limited to minor incidental items of Work necessary to correct imperfections consistent with the requirements of the Contract Documents and which have no adverse effect on the safety, use or operability of the Project.

Qualified Eligible Funds has the meaning set forth in Section 23.16.4(c).

Qualified Equity has the meaning set forth in Section 23.16.4.

Quality Assurance (QA) means all planned and systematic actions by Non-Profit Entity necessary to provide confidence that QC is performed in accordance with Non-Profit Entity’s Design Quality Plan and Non-Profit Entity’s Construction Quality Plan, that all Work complies with the Contract Documents and that all materials incorporated in the Work, and that all equipment and all elements of the Work will perform satisfactorily for the purpose intended. QA actions include: monitoring and verification of design through auditing, spot-checking and participation in the review of the Design Documents and work plans; and monitoring and verification of construction, manufacturing/process facilities and equipment, on-site equipment and QC documentation through auditing, spot inspections and reconciliation of material acceptance and rejection based on QC testing and Verification Sampling and Testing at production sites and the Project Site. Quality Assurance also includes documentation of all QA efforts.

Quality Audit means the audits performed by Non-Profit Entity in connection with its quality audit program, as described in further detail in Section 1.4.1 of Division 1 of the Technical Requirements.

Quality Control (QC) means the total of all activities performed by Non-Profit Entity to ensure that the Work meets the requirements of the Contract Documents. For design, this includes procedures for design quality, checking, and design review including reviews for constructability, and review and approval of work plans. For construction, this includes: procedures for

materials handling and construction quality; inspection, sampling, testing and acceptance/rejection of materials, plants, production and construction; material certifications; calibration and maintenance of equipment; production process control; and monitoring of environmental compliance. Quality Control also includes documentation of all QC design and construction efforts.

Quality Program Manager has the meaning set forth in Section 1.1.4.9 of Division 1 of the Technical Requirements.

Quality Records means the documentation required to be produced and maintained by NPE-Related Entities in accordance with Non-Profit Entity's Quality Program.

Quarter means a time period comprised of three calendar consecutive calendar months.

Rating Agency(ies) means any credit rating agency registered with the Securities and Exchange Commission as a nationally recognized statistical rating organization ("NRSRO").

Reasonable Accuracy means with respect to the description or identification of a Utility in the Utility Information:

- (a) The Utility's actual centerline location is located at or less than five feet distant from the horizontal centerline location indicated therefor in the Utility Information (without regard to vertical location);
- (b) The Utility Information shows an active and existent Utility as not abandoned;
- (c) The Utility Information shows a non-existent or inactive Utility as abandoned; or
- (d) The Utility has an actual nominal diameter (excluding casings and any other appurtenances) greater than 12 inches, and its actual nominal diameter is either greater than or less than the diameter shown in the Utility Information by 25% or less of the diameter shown in the Utility Information.

Any other inaccuracies in the Utility Information (e.g., as to type of material or encasement status) shall have no impact on "reasonable accuracy" of its identification and shall not result in a determination that the Utility was not identified with "reasonable accuracy." If there is any discrepancy between any of the components of the Utility Information, only the most accurate information shall be relevant for purposes of determination of "reasonable accuracy."

Reasonable Investigation means the following activities by appropriate, qualified professionals:

- (a) Visit and visual inspection of the Project Site and adjacent locations, including visual inspection to identify the presence of other facilities, such as barriers, railing, structures, manholes or identifying markers;
- (b) Undertaking the geotechnical, Utility, Hazardous Material and other site conditions investigations, sampling, testing, analyses and assessments as required to identify conditions at a specific point or to identify where conditions change between points, and otherwise contemplated by the Predevelopment Agreement;

- (c) Review and analysis of all Reference Documents and online map tools;
- (d) Review and analysis of the CEQA Approval, NEPA Approval and other Regulatory Approvals;
- (e) Without limiting clause (b), reasonable inquiry with Utility Owners, including request for and review of Utility plans provided by Utility Owners;
- (f) Review and analysis of material applicable Law applicable to the Project or the Work as of the Setting Date; and
- (g) Other activities consistent with Good Industry Practice sufficient to familiarize Non-Profit Entity and Principal Project Company with surface and subsurface conditions, including the presence of Utilities, Hazardous Materials, archeological, paleontological and cultural resources, and Threatened or Endangered Species, affecting the Project Site or surrounding locations.

Record Documents means construction drawings, specifications and related documentation furnished by Non-Profit Entity to reflect the actual conditions and location in detail of Work as constructed and installed, which may be generated initially as marked-up Release for Construction Documents, revised subsequently as finished revised drawings and documents, and updated thereafter as required by the Technical Requirements.

Recoverable Costs means:

- (a) The reasonably required costs of any assistance, action, activity or work undertaken by City which Non-Profit Entity is liable for or is obligated to reimburse City for under the terms of the Contract Documents, including the charges of third party contractors and reasonably allocated wages, salaries, compensation and overhead of City staff and employees performing such action, activity or work; plus
- (b) Reasonably required out-of-pocket costs City incurs to publicly procure any such third party contractors; plus
- (c) Reasonable fees and costs of attorneys (including the reasonably allocable fees and costs of the Office of the City Attorney), financial advisors, engineers, architects, insurance brokers and advisors, investigators, traffic and revenue consultants, risk management consultants, other consultants, and expert witnesses, as well as court costs and other litigation costs, in connection with any such assistance, action, activity or work, including in connection with defending claims by and resolving disputes with third party contractors; plus
- (d) Interest on all the foregoing sums at the Late Payment Rate, commencing on the date due under the applicable terms of the Contract Documents and continuing until paid; plus
- (e) An administrative fee of 10% of the actual aggregate costs incurred by City as described in clauses (a) through (d) of this definition.

Recovery Schedule has the meaning set forth in Section 1.2.1.5 of Division 1 of the Technical Requirements.

Rectification means resolving and curing the D&C Failure Event in a way that Non-Profit Entity is in full compliance with this Agreement with respect to that D&C Failure Event.

Rectification Time means, with respect to a D&C Failure Event, the relevant period within which Non-Profit Entity shall Rectify such failure as specified in Appendix A (D&C Noncompliance Points and D&C Period Deductions) of Exhibit 4A (Milestone Payment Mechanism).

Reference Documents means the documents provided (i) with and so designated by City in the RFP or (ii) in writing during the PDA Term, which are provided for disclosure purposes only and without any warranty as to their accuracy, completeness or fitness for any particular purpose.

Refinancing means:

- (a) any amendment, variation, novation, extension, renewal, supplement, refunding, defeasance or replacement of any Project Debt, Financing Agreement or Security Document;
- (b) any Project Debt incurred by Non-Profit Entity in addition to the Initial Project Debt, secured or unsecured;
- (c) the disposition of any rights or interests in, or the creation of any rights of participation with respect to, Project Debt, Financing Agreements and Security Documents or the creation or granting by Non-Profit Entity or any Lender of any other form of benefit or interest in either Project Debt, Financing Agreements and Security Documents or Non-Profit Entity's Interest whether by way of security or otherwise; or
- (d) any other arrangement put in place by Non-Profit Entity or another Person which has an effect similar to any of clauses (a) through (c) above.

Refinancing Data means the Financial Model before and after any refinancing any interim Financial Models, and all assumptions, calculations and other information supporting the calculation of the Refinancing Gain, including any debt term sheets or other similar documentation relating to the proposed Refinancing.

Refinancing Gain means an amount equal to the full positive financial and monetary benefits realized through a Refinancing, including any savings or profit arising out of the Refinancing. The Refinancing Gain may arise from lower interest rates, extended maturities, accelerated or reduced payments, improved cash flows or other additive, positive or beneficial terms of the Refinancing as allowed under the Financing Documents

Regulated Load means the metered provision of Energy for the following end-uses: (i) space heating; (ii) humidification; (iii) space cooling; (iv) dehumidification; (v) heat rejection; (vi) all fans; (vii) lighting; (viii) domestic hot water; and (ix) all pumps except for any domestic water booster pumps and any process-related pumps.

Regulatory Approvals means all permits, licenses, consents, concessions, grants, franchises, authorizations, waivers, variances or other approvals, guidance, protocol(s), mitigation agreement(s), or memoranda of agreement/understanding, and any amendment(s) or modification(s) of any of them, required or provided by Governmental Entities, including State, local, or federal regulatory agencies, agents, or employees, which authorize or pertain to the Project or the Work or take actions required to complete obligations in connection with this Agreement. Regulatory Approvals include encroachment permits and other access rights or right of entries for Work to be performed in areas under the jurisdiction of Governmental Entities, Major Approvals and Environmental Approvals.

Regulatory Approvals Plan means Non-Profit Entity's plan defining its approach to obtain all Regulatory Approvals, prepared and submitted by Non-Profit Entity in accordance with Section 1.1.6 of Division 1 of the Technical Requirements, as updated and approved by the City in accordance with this Agreement.

Related Project(s) has the meaning set forth in Section 1.14.2 of Division 1 of the Technical Requirements.

Release or **Release of Hazardous Materials** means, with respect to Hazardous Materials, any spill, leak, emission, release, discharge, injection, escape, leaching, dumping or disposal of Hazardous Materials into the soil, air, water, groundwater or environment, including any exacerbation of an existing release or condition of Hazardous Materials contamination.

Release for Construction Documents (RFCD) means Design Documents that have been authorized to be used as the basis for Construction Work or Renewal Work, in accordance with the design management portion of the approved Project Management Plan, and as set forth in Section 1.8.6 of Division 1 of the Technical Requirements.

Relevant Event has the meaning set forth in Section 13.3.1.

Relevant Change in Law means a discriminatory Change in Law which is principally borne by Non-Profit Entity (including NPE-Related Entities) and principally directed at, affects or relates only to the design, supply or construction (including installation) of the Infrastructure Facility:

- (a) Except where such change (i) is in response, in whole or in part, to any NPE Fault, or (ii) is otherwise expressly permitted under the Contract Documents; or
- (b) Where such Change in Law is a Change in Law for which compliance requires material capital expenditures by Non-Profit Entity.

As used in this definition of "Relevant Change in Law", material capital expenditures are capital expenditures in excess of \$25,000 per event, such threshold to be index-linked and increased by the Escalation Factor calculated in accordance with Section 4 of Exhibit 4B (Availability Payment Mechanism).

Request for Change Proposal means a written Notice issued by City to Non-Profit Entity setting forth a proposed City Change and requesting Non-Profit Entity's assessment of cost and schedule impacts thereof, as described in Section 1.1 of Exhibit 9 (Change Procedures).

Request for Proposals (RFP) means the request for proposals to design, build, finance, and maintain the Infrastructure Facility and design, build, finance, operate and maintain the Housing and Commercial Component at the Project Site, issued by City on April 9, 2021, as amended.

Request for Qualifications (RFQ) means the request for qualifications to invite interested parties to submit a statement of qualifications to design, build, finance and maintain the Infrastructure Facility at the Project Site and design, build, finance, operate and maintain the Housing and Commercial Component at the Project Site, issued by City on August 21, 2020 as amended.

Rescue Refinancing means any Refinancing that:

- (a) occurs due to the failure or imminent failure of Non-Profit Entity to comply with any material financial obligation under any Financing Document;
- (b) results in the cure of such failure or imminent failure; and
- (c) does not result, singly or in the aggregate, in an actual or potential increase of the Lenders' Liabilities (determined without including any Exempt Refinancings) by more than 10%.

Retaining Wall means a wall structure which retains fill with a minimum exposed face height of 4 feet and a minimum overall height from top of footing to top of wall of 5 feet.

Revenue Account means a deposit account with the Collateral Agent, bearing U.S. Bank Trust Company, National Association Account No. _____ ***To be completed at Financial Close***.

Revised Project Schedule has the meaning set forth in Section 1.2.1.4 of Division 1 of the Technical Requirements.

Room Data Sheet means a sheet or document that summarizes the requirements for each room in the Infrastructure Facility. It should include the room name, number, location, and the relevant prescriptive criteria and performance criteria from the Technical Requirements including for finishes, fixtures and fittings such as furniture and storage, mechanical and electrical requirements, acoustic and lighting performance, and IT Comms and audio-visual requirements.

Safety Compliance means any and all improvements, repair, reconstruction, rehabilitation, restoration, renewal, replacement, changes in configuration, or procedures implemented to correct a specific safety condition or risk that City has reasonably determined to exist by investigation or analysis (excluding a safety condition or risk that exists by reason of Non-Profit Entity's failure to comply with the requirements of the Contract Documents).

Safety Compliance Order means a written order or directive from City to Non-Profit Entity to implement Safety Compliance.

Safety Orientation Program means Non-Profit Entity's detailed plan for the safety orientation of employees and visitors, as more particularly described in Section 01 35 45 of Division 10 of the Technical Requirements.

Safety Standards means those provisions of the Technical Requirements that relate to Project safety, including Section 01 35 45 (Health and Safety Criteria) of Division 10 of the Technical Requirements. Safety Standards are considered to be important measures to protect public safety, worker safety or the safety of property.

Scheduled Financial Close Date has the meaning set forth in Section 3.1.2 (Date of Financial Close).

Security Document means any mortgage, deed of trust, pledge, lien, indenture, trust agreement, hypothecation, assignment, collateral assignment, account control agreement, financing statement under the enacted Uniform Commercial Code of any jurisdiction, security instrument or other charge or encumbrance of any kind, including any lease in the nature of a security instrument, given to any Lender as security for Project Debt or Non-Profit Entity's obligations pertaining to Project Debt and encumbering Non-Profit Entity's Interest.

Senior Debt Service Amount means the debt service payments that are senior to all other debt obligations in the cash flow waterfall.

Service Line(s) means a utility line, the function of which is to connect directly the improvements on an individual property (e.g., a commercial building or an industrial warehouse) to another utility line located off such property, which other utility line connects more than one such individual line to a larger system, as well as any cable or conduit that supplies an active feed from a Utility Owner's facilities to activate or energize a Governmental Entity's local lighting and electrical systems, traffic control systems, street lights, communications systems and/or irrigation systems.

Setting Date means November 17, 2025.

SFMTA Board means the San Francisco Municipal Transportation Agency Board of Directors.

Site Security Plan (SSP) means Non-Profit Entity's plan defining its oversight management program, team organization, and operating strategy to provide and maintain work site security, prepared and submitted by Non-Profit Entity in accordance with Section 1.11.2.2 of Division 1 of the Technical Requirements, as updated and approved by the City in accordance with this Agreement.

SOFR with respect to any US banking day means a rate per annum equal to the secured overnight financing rate published for such US banking day by the Federal Reserve Bank of New York, on the Federal Reserve Bank of New York's Website. The calculation of SOFR with respect to a loan that bears interest at a rate based on SOFR shall be the rate for the one/three/six calendar months period on the date of determination published by the SOFR Administrator; provided, however, that if as of 5:00 p.m. (New York City time) on any date of determination the SOFR rate for the applicable tenor has not been published by the SOFR Administrator, then the SOFR rate will be the SOFR rate for such tenor as published by the SOFR Administrator on the first preceding day.

SOFR Administrator means the CME Group Benchmark Administration Limited (CBA) (or a successor administrator of the SOFR rate as determined by the City, in its reasonable discretion.

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

Source Code means the version of a Software computer program in which the programmer's original programming statements are expressed in any programming language.

Source Code Documentation means (a) software written in programming languages, such as C and Fortran, including all comments and procedural code, such as job control language statements, which shall be in a form intelligible to trained programmers and capable of being translated into object or machine readable code for operation on computer equipment through assembly or compiling, and (b) documentation, including flow charts, schematics, statements of principles of operations, architectural standards, and commentary, explanations and instructions for compiling, describing the data flows, data structures, and control logic of the software in sufficient detail to enable a trained programmer through study of such documentation to maintain and/or modify the software without undue experimentation. Source Code and Source Code Documentation also include all modifications, revisions, additions, substitutions, replacements, updates, upgrades and corrections made to the foregoing items.

Source of Supply Certificate of Compliance has the meaning set forth in Section 1.4.3.3 of Division 1 of the Technical Requirements.

Special Tools means (a) specialized tools necessary for maintenance or repair of Project elements or equipment (including vehicles), and (b) other tools obtained or developed by Non-Profit Entity or any Contractor for use in performance of the Work. The term excludes tools used in performance of the Work that were not procured for the Project or developed for use on the Project and that were acquired by Non-Profit Entity or Contractor at its own expense for use on multiple projects. The term "tool" as used in the Contract Documents includes "special tools."

Standards and Specifications means the standards, specifications and other documents referenced in the Technical Requirements.

State means the State of California.

Statement of Qualification (SOQ) means Non-Profit Entity's Statement of Qualification, provided in response to the Request for Qualifications.

Step-in Party means (a) the Collateral Agent, a Lender or any entity that is wholly owned by a Lender or group of Lenders, or (b) any Person approved by City as a Substituted Entity; in each case where such Person is not a Prohibited Person.

Structure means, as the context may require, bridges, Culverts, catch basins, drop inlets, retaining walls, cribbing, manholes, end walls, buildings, sewers, service pipes, under drains, foundation drains, steps, fences and other features which may be encountered in the Work and not otherwise classified.

Subcontract means each Contract with a Subcontractor.

Subcontractor means each Contractor that is not a Prime Contractor.

Submittal(s) means, generally, any document, work product or other written or electronic end-product, report or item required to be delivered or submitted to City, Third Parties, or Governmental Entities in connection with this Agreement or the Project.

Submittal Schedule has the meaning set forth in Section 1.2.1.7 of Division 1 of the Technical Requirements.

Substantial Completion means that all D&C Work is complete (except for Punch List items that do not affect normal and safe use and operation of the Infrastructure Facility and any D&C Work that, by its nature, is to be performed after the Substantial Completion Date), and all other prerequisites for Substantial Completion have been met. Substantial Completion is deemed to have occurred upon satisfaction of all the conditions for the Project in Exhibit 15C (Conditions to Substantial Completion), as confirmed by City's issuance of a Certificate of Substantial Completion in accordance with the procedures and within the time frame established in Section 7.8 (Substantial Completion).

Substantial Completion Date means the date City issues a Certificate of Substantial Completion for the Project in accordance with the terms of this Agreement, including Section 7.8.1.7.

Substantial Completion Deadline means June 26, 2030, as such date may be extended from time to time pursuant to Section 14.1.2 (Extension of Deadlines for General Delay Events).

[Note: Final date to be adjusted based on Commercial Close Date]

Substantial Completion Development Fee has the meaning set forth in Section 2A of Exhibit 4A (Milestone Payment Mechanism).

Substitute Tariff Material means a material or product that: (a) is functionally and technically equivalent to the originally specified Tariff Material, (b) is compliant with applicable Governmental Rules, Regulatory Approvals and the requirements of the Contract, (c) can be procured within the necessary timeframes to avoid delay to the Critical Path, and (d) is manufactured in a country not subject to the applicable Tariff Event, including a country subject to a smaller tariff.

Substituted Entity means a Third Party proposed by the Collateral Agent and approved by City under a Direct Agreement to act in Non-Profit Entity's stead and not merely as a Step-in Party, in each case where such Person is (a) a Suitable Substitute and (b) not a Prohibited Person; provided, however, that such Person's assumption of Non-Profit Entity's rights and obligations under this Agreement would not adversely affect the tax-exempt status of interest on any tax-exempt financing issued with respect to the Project then outstanding; provided, further, that no such Person shall be a Substituted Entity unless an opinion of nationally recognized bond counsel shall have been delivered to the effect that the assumption by such Person of the Non-Profit Entity's rights and obligations under this Agreement would not adversely affect the tax-exempt status of interest on any tax-exempt financing issued with respect to the Project then outstanding.

Suitable Substitute means a Person, approved in writing by City in accordance with the Direct Agreement that:

- (a) has the legal capacity, power and authority to become the party to and perform the obligations of Non-Profit Entity under this Agreement;
- (b) is in compliance with City's rules and regulations, and has adopted written policies regarding organizational conflicts of interest consistent with City's conflicts of interest policy;
- (c) has ensured that all of its subcontractors are in compliance with City's rules and regulations;
- (d) has adopted written policies regarding organizational conflicts of interest consistent with City's conflicts of interest policy;
- (e) employs individuals having the appropriate qualifications, experience and technical competence to timely perform Non-Profit Entity's obligations under the Contract Documents and the Principal Project Documents; and
- (f) otherwise has available resources (including committed financial resources and subcontracts) sufficient to enable it to perform the obligations of Non-Profit Entity under the Contract Documents and the Principal Project Documents.

Superfund Site means a site listed on either the National Priorities List or the Proposed National Priorities List at <https://www.epa.gov/superfund/superfund-national-priorities-list-npl>.

Supplier means any Person not performing work at or on the Project Site that supplies machinery, equipment, materials, hardware, software, systems or any other appurtenance to the Project to Non-Profit Entity or to any Contractor in connection with the performance of the Work. Persons that merely transport, pick up, deliver or carry materials, personnel, parts or equipment or any other items or persons to or from the Project Site shall not be deemed to be performing Work at the Project Site.

Surety(ies) means each properly licensed surety company, insurance company or other Person approved by City, which has issued a Payment Bond or a Performance Bond.

Sustainability Management Plan means Non-Profit Entity's plan describing its approaches to ensure achievement of the sustainability requirements of the Contract Documents, prepared and submitted by Non-Profit Entity in accordance with Section 1.9.1 of Division 1 of the Technical Requirements, as updated and approved by the City in accordance with this Agreement.

Systems Manual has the meaning set forth in Section 6.7.4.1 (Systems Manual) of Division 6 of the Technical Requirements.

Tariff Event means (i) implementation, taking effect between the Setting Date and the Tariff Material Buyout Date, of a new federal tariff or duty on the importation of a Tariff Material; or (ii) modification or elimination, taking effect between the Setting Date and the Tariff Exposure Date, of an existing federal tariff on the importation of a Tariff Material. A federal tariff or duty that is in effect as of the Setting Date shall not be considered a Tariff Event unless it is later modified or eliminated.

Tariff Event Compensation Amount means for any Tariff Material, 95% the difference between the amount bid for the Tariff Material in the Implementation Proposal Final Price, on a unit price basis, and the documented out-of-pocket amount actually paid for the Tariff Material on a unit price basis, provided, however, that in no event shall the Tariff Event Compensation Amount exceed an amount equal to the quantity (units) of the Tariff Material multiplied by the unit price difference (on a plus or minus percentage basis) determined by comparing the Tariff Index in effect as of the Setting Date and the Tariff Index in effect as of the Tariff Material Buyout Date. The Tariff Event Compensation Amount may be (i) positive, if the Tariff Index has increased, meaning that Non-Profit Entity is entitled to additional compensation in such amount, or (ii) negative, if the Tariff Index has decreased, meaning that City shall be entitled to deduct such amount from Milestone Payment 2, or other amounts payable to Non-Profit Entity on or before the Substantial Completion Date.

Tariff Exposure Date means the following dates for the following materials:

Tariff Material	Tariff Exposure Date
Cement	9/9/2026
Rebar	11/9/2026
Structural steel	12/7/2027
Lumber	10/7/2027
Drywall	10/9/2026
Insulation	10/9/2026
Curtain wall and glazing	3/9/2027
Windows	3/9/2027
Elevators and specialty equipment	12/13/2027
Plumbing pipe and fittings	6/9/2027
Mechanical equipment and ductwork	6/9/2027
Electrical wiring, panels, and fixtures	6/9/2027

Tariff Index means the monthly Producer Price Index for Construction Materials report published by the U.S. Bureau of Labor Statistics.

Tariff Material means the imported materials and supplies set forth in the definition of “Tariff Exposure Date”.

Tariff Material Buyout Date has the meaning set forth in Section 14.1.10.2 .

Tax-Exempt Bonds means has the meaning set forth in Section 23.16.4(c).

Taxes means federal, State, local or foreign income, margin, gross receipts, sales, use, excise, transfer, consumer, license, payroll, employment, severance, stamp, business, occupation, premium, windfall profits, environmental (including taxes under Section 59A of the Internal Revenue Code of 1986, as amended), customs, permit, capital stock, franchise, profits, withholding, social security (or similar), unemployment, disability, real property, personal property, registration, value added, alternative or add-on minimum, estimated or other taxes, levies, imposts, duties, fees or charges imposed, levied, collected, withheld or assessed at any time, whether direct or indirect, relating to, or incurred in connection with, the Project, the performance of the Work, revenues or act, business, status or transaction of Non-Profit Entity, including any interest, penalty or addition to such amounts, and including utility rates or rents, in all cases whether disputed or undisputed.

Technical Requirements means Exhibit 18 (Technical Requirements).

Technology Enhancements means modifications, additions, refinements, substitutions, revisions, replacements and upgrades made to Intellectual Property, equipment, mechanism, operational technology, or to any related documentation, that accomplish incidental, performance, structural, or functional improvements. Technology Enhancements specifically includes modifications, updates, or revisions made to software or any related documentation that correct errors or support new models of input-output devices with which the software is designed to operate.

Temporary Areas means areas outside of the Project Site where activities incidental to construction of the Project are being performed by Contractors, including field office sites, storage sites, staging areas dedicated to the Project, temporary work areas and parking areas, but excluding any permanent locations of Non-Profit Entity or any Contractor.

Temporary Relocation means any (a) interim relocation of any Utility (i.e., the installation, removal and disposal of an interim facility) pending installation of a permanent facility in the same or a new location, and (b) removal and reinstallation of the Utility in the same place without an interim relocation.

Temporary Work means any temporary works and structures necessary for the construction of permanent improvements. This includes falsework, formwork, scaffolding, shoring, temporary earthworks, sheeting, cofferdams, special erection equipment and the like.

Term means the period commencing on the Effective Date and ending on the date specified in Section 2.3 (Term).

Termination Compensation means the measure of compensation owing from City to Non-Profit Entity upon termination of this Agreement prior to the stated expiration of the Term, as determined in accordance with this Agreement.

Termination Date means (a) the date 30 years after the Substantial Completion Deadline, or (b) if applicable, the Early Termination Date.

Termination Due to Court Ruling has the meaning set forth in Section 17.4.3 (Termination Due to Court Ruling).

Termination for Convenience has the meaning set forth in Section 17.1.1 (Termination for Convenience).

Test Procedures means a description of a test to be performed. Test Procedures shall describe the test configuration, the test equipment required, the personnel required to perform the test, all construction and testing pre-requisites that must be completed before the test can be performed, lists each individual step to be followed in the test, expected result of each step, and the pass/fail criteria for each step, and shall include a Test Report form on which the results of the test shall be recorded.

Test Report means a form that lists each step to be performed in a test. Each Test Report shall identify the expected results of each step, a location to enter the actual results of each step, a place for the person responsible for performing the test to sign and date the form, and a place for any witnesses of the test to sign and date the form.

Three-week Look-ahead Activity Reports has the meaning set forth in Section 1.2.1.8 of Division 1 of the Technical Requirements.

Third Party(ies) means any person or entity unrelated to City or Non-Profit Entity. Third Parties expressly excludes any NPE-Related Entities.

Third Party IP means Intellectual Property owned by any Person unrelated to the Non-Profit Entity, any Contractor, or any of their respective Affiliates.

Third Party and Utility Owner Coordination Work Plans has the meaning set forth in Section 1.13 of Division 1 of the Technical Requirements.

Threatened or Endangered Species means any species listed by the United States Fish and Wildlife Service as threatened or endangered under the Endangered Species Act, as amended, 16 U.S.C. § 1531 et seq., or any species listed as threatened or endangered under the California Endangered Species Act, Fish and Game Code § 2050 et seq.

Traffic Control Plan(s) (TCP) means the site-specific design plan that provides necessary details to control traffic through and around the work area.

Trainee Plan means the plan prepared and submitted by Non-Profit Entity and approved by the City to implement the SFMTA Trainee Program.

Transaction has the meaning set forth in Section 20.2.1.

Transportation Management Plan means Non-Profit Entity's plan describing how safe traffic operations will be managed and maintained during each phase of construction and in every work zone of the Project, prepared and submitted by Non-Profit Entity in accordance with Section 1.11.3.1 of Division 1 of the Technical Requirements, as updated and approved by the City in accordance with this Agreement.

Utility Easement means a permanent replacement easement and/or other interest in real property (excluding a franchise) located outside of the Project Site that is necessary for a Utility Adjustment.

Unavoidable Delay Event means any of the following events or circumstances that occurs prior to the Final Acceptance Date and directly impacts the D&C Work:

- (a) a Force Majeure Event; or
- (b) an Adverse Weather Event; or
- (c) an AQI Event.

Unidentified Early Offsite Utility Delay means prior to the expiration of the 135-day Offsite Utility Information investigation period, during performance of the Work (excluding Offsite Utility Work), Non-Profit Entity encounters any Non-Dig Alert Utilities located outside of the Project Site that requires Extra Work for the Offsite Utility Work and causes a Critical Path delay, and such Utility is (i) an Unidentified Offsite Utility; and (ii) not identified or reflected in whole or in part in the Utility Information.

Undergrounding Existing PG&E Power Lines Allowance means the Allowance to be used pursuant to Section 11.12.5 (Underground Existing PG&E Allowance) by Developer for Underground Existing PG&E Work. The initial Underground Existing PG&E Allowance amount is identified in Section 11.12.5.

Undergrounding Existing PG&E Power Line Work means the investigations, design, provision, permits, installation, and testing related to the undergrounding of existing PG&E power poles and lines (“Rule 20 work”) that immediately surround the Project Site.

Unidentified Late Offsite Utility Delay means after the 135-day Offsite Utility Information investigations period, during performance of Construction Work, Non-Profit Entity encounters any Non-Dig Alert Utilities located outside of the Project Site that requires Extra Work for the Offsite Utility Work and causes Critical Path delay, and such Utility is (i) an Unidentified Offsite Utility; and (ii) not identified or reflected in whole or in part in the Utility Information or the Offsite Utility Information.

Unidentified Offsite Utility means:

- (a) prior to the expiration of the 135-day period in which the Offsite Utility Information must be submitted by Non-Profit Entity to City, a subsurface Active Service Line or subsurface Main or Trunkline Utility located entirely outside of the Project Site, (i) where the Offsite Utility Work could not have been reasonably inferred as of the Setting Date based on an Offsite Utility Reasonable Investigation; (ii) where the Utility Information does not identify the subject Active Service Line or Main or Trunkline Utility with Reasonable Accuracy and such information could not have been reasonably inferred as of the Setting Date based on an Offsite Utility Reasonable Investigation; (iii) where such Active Service Line or Main or Trunkline Utility is not identified or referenced in any of the information, data, analyses or reports undertaken pursuant to the Predevelopment Agreement; and (iv) where such Active Service Line or Main or Trunkline Utility should not have been identified or referenced pursuant to an Offsite Utility Reasonable Investigation; and
- (b) after the expiration of the 135-day period in which the Offsite Utility Information must be submitted by Non-Profit Entity to City, a subsurface Active Service Line or subsurface Main or Trunkline Utility located entirely outside of the Project Site, (i) where the Utility Information incorrectly indicates that the subject Active Service Line or Main or Trunkline Utility does not exist anywhere within the boundary lines of the Project Site and the Offsite Utility Work and which Active Service Line or Main or Trunkline Utility could not have been reasonably inferred as of the expiration of such 135-day period based on an Offsite Utility Reasonable Investigation; (ii) where the Utility Information or Offsite Utility Information does not identify the subject Active Service Line or Main or Trunkline Utility within the boundary lines of the Project Site with Reasonable Accuracy and such information could not have been reasonably inferred as of the expiration of such 135-day period based on an Offsite Utility Reasonable Investigation; (iii) where such Active Service Line or Main or Trunkline Utility is not identified or referenced in any of the information, data, analyses or reports undertaken pursuant to the Predevelopment Agreement; and (iv) where such Active Service Line or Main or Trunkline Utility should not have been identified or referenced pursuant to an Offsite Utility Reasonable Investigation.

Unidentified Utility means a subsurface Active Service Line or subsurface Main or Trunkline Utility, (i) where the Utility Information incorrectly indicates that the subject Active Service Line or Main or Trunkline Utility does not exist anywhere within the boundary lines of the Project Site and which Active Service Line or Main or Trunkline Utility could not have been reasonably inferred as of the Setting Date based on a Reasonable Investigation; (ii) where the Utility Information does not identify the subject Active Service Line or Main or Trunkline Utility within the boundary lines of the Project Site with Reasonable Accuracy and such information could not have been reasonably inferred as of the Setting Date based on a Reasonable Investigation; (iii) where such Active Service Line or Main or Trunkline Utility is not identified or referenced in any of the information, data, analyses or reports undertaken pursuant to the Predevelopment Agreement; and (iv) where such Active Service Line or Main or Trunkline Utility should have been identified or referenced pursuant to a Reasonable Investigation undertaken pursuant to the Predevelopment Agreement. Unidentified Utilities specifically exclude any Utility that serves the Project Site as of the Setting Date and which is to be de-energized or de-activated and removed as part of the Project.

Unilateral Change Order has the meaning set forth in Section 2 (Unilateral Change Orders) of Exhibit 9 (Change Procedures).

Uninterruptible Power Supply (UPS) has the meaning set forth in Section 3.12.12 of Division 3 of the Technical Requirements.

Unsafe Condition means a condition that (a) gives rise to the imminent possibility of serious injury to workers or the public or of serious damage to property or the environment, or (b) affects safe movement.

Utility(ies) or utility(ies) means a privately, publicly or cooperatively owned facility (which term includes lines, systems and other facilities, and includes municipal and/or government facilities) for transmitting or distributing communications, cable television, power, electricity, gas, oil, crude products, water, steam, waste, or any other similar commodity, including any fire or police signal system as well as streetlights associated with roadways owned by local agencies. However, when used in the context of Utility Adjustments of facilities to accommodate the Project, the term "Utility" or "utility" excludes traffic signals, ramp metering systems, flashing beacon systems, and lighting systems for roads adjacent to the Project. Necessary appurtenances to each utility facility (including the utility source, guide poles, Service Lines, supports, etc.) shall be considered part of the facility. Without limitation, any service lateral connecting directly to a utility shall be considered an appurtenance to that utility, regardless of the ownership of such service lateral.

Utility Adjustment means each relocation (temporary or permanent), abandonment, Protection in Place, removal (of previously abandoned utility facilities as well as newly-abandoned facilities), replacement, reinstallation, and/or modification of existing Utilities necessary to accommodate the Project or the Work. For any utility crossing the Project Site or public right of way, the Utility Work for each crossing of the Project Site or public right of way, as applicable, by that utility shall be considered a separate Utility Adjustment. For any utility installed longitudinally within the Project Site or the public right of way, the Utility Work for each continuous segment of that utility located within the Project Site or public right of way, as applicable, shall be considered a separate Utility Adjustment.

Utility Betterment means any upgrading of a Utility that is not attributable to the construction of the Project and is made during the course of a Utility Adjustment solely for the benefit of and at

the election of the Utility Owner, including an increase in the capacity, capability, efficiency or function of the facility over that which was provided by the existing Utility. The following are not considered Utility Betterments:

- (a) any upgrading required for accommodation of the Project;
- (b) any upgrading required under the Contract Documents;
- (c) replacement devices or materials that are of equivalent standards although not identical;
- (d) replacement of devices or materials no longer regularly manufactured with an equivalent or next higher grade or size;
- (e) any upgrading required by applicable Law;
- (f) replacement devices or materials that are used for reasons of economy (e.g., non-stocked items may be uneconomical to purchase); and
- (g) any upgrading required by the Utility Owner's applicable Utility Standards.

Utility Information means as-built drawings, existing facility drawings, or other documentation of existing underground Utilities within the Project Site available to Non-Profit Entity (exercising Good Industry Practice) or generated by any NPE-Related Entity. Utility Information includes the Utility conflict matrix and subsurface utility engineering investigations undertaken by or on behalf of Non-Profit Entity during the PDA Term.

Utility Owner means the owner or operator of any Utility (including both privately held and publicly held entities, cooperative utilities, and municipalities and other governmental agencies), including City acting by and through the San Francisco Public Utilities Commission (it being understood that the San Francisco Public Utilities Commission is not the "City" for other purposes under this Agreement)).

Utility Standards means the standard specifications, standards of practice, and construction methods that a Utility Owner customarily applies to facilities (comparable to those being adjusted on account of the Project) constructed by the Utility Owner (or for the Utility Owner by its contractors), at its own expense. Except as may be specifically identified in the Technical Requirements, "Utility Standards" are not "Standards and Specifications."

Utility Work means the design and construction necessary for a Utility Adjustment and includes Incidental Utility Work. Any Utility Work furnished or performed by Non-Profit Entity is part of the D&C Work; and any Utility Work furnished or performed by a Utility Owner is not part of the D&C Work. Utility Work expressly includes Utility Adjustments of PG&E's power lines and poles that impact the Project.

Verification Sampling and Testing means sampling and testing performed to validate the quality of the product. City, or its designee, will perform Verification Sampling and Testing as part of its QA Oversight efforts.

Warning Notice has the meaning set forth in Section 16.1.3.1.

Weather Data means a record of annual hourly data for dry and wet bulb temperature, dew point, relative humidity, total horizontal solar radiation, wind speed and direction and atmospheric pressure at the Weather Monitoring Station.

Weather Monitoring Station means the closest National Weather Service weather monitoring station to the Infrastructure Facility.

Warranty Work means all work necessary to correct (i) a Defect or (ii) Nonconforming Work discovered during the Warranty Period, including repair or replacement of the defective, nonconforming and/or non-compliant D&C Work and any adjacent D&C Work that may have been damaged or displaced in the course of such work.

Work means all of the work, services and obligations required to be furnished, performed and provided by Non-Profit Entity under the Contract Documents, including activities to obtain financing as well as all administrative, design, engineering, construction, demolition, Utility Adjustments, Utility Work, Work covered by an Allowance, payment to Third Parties, support services, financing services, Warranty Work and management services. The term does not include any efforts which the Contract Documents expressly specify will be performed by Persons other than NPE-Related Entities.