

ADOPTED BY THE
MAYOR AND COUNCIL

May 12, 2009

RESOLUTION NO. 21283

RELATING TO RIO NUEVO; AUTHORIZING THE MAYOR TO EXECUTE A MASTER DEVELOPMENT AGREEMENT ON BEHALF OF THE CITY OF TUCSON WITH GARFIELD TRAUB DEVELOPMENT AND THE RIO NUEVO MULTIPURPOSE FACILITIES DISTRICT FOR THE PLANNING, DESIGN AND CONSTRUCTION OF THE TUCSON CONVENTION HOTEL AND IMPROVEMENTS TO THE TUCSON CONVENTION CENTER; AND DECLARING AN EMERGENCY.

BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF TUCSON, ARIZONA, AS FOLLOWS:

SECTION 1. The Master Development Agreement with Garfield Traub Development and the Rio Nuevo Multipurpose Facilities District for the Tucson Convention Center and Hotel (Agreement), attached to this Resolution as Exhibit 1, is approved.

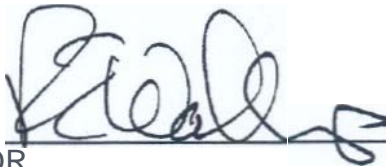
SECTION 2. The Mayor shall execute, and the City Clerk shall attest to, the Agreement on behalf of the City of Tucson.

SECTION 3. The various City officers and employees are hereby authorized and directed to perform all acts necessary or desirable to give effect to this resolution.

SECTION 4. WHEREAS, it is necessary for the preservation of the peace, health and safety of the City of Tucson that this resolution become immediately effective, an

emergency is hereby declared to exist, and this resolution shall be effective immediately upon its passage and adoption.

PASSED, ADOPTED, AND APPROVED by the Mayor and Council of the City of
Tucson, Arizona, May 12, 2009.


MAYOR _____

ATTEST:


CITY CLERK _____

APPROVED AS TO FORM:


CITY ATTORNEY _____

REVIEWED BY:


CITY MANAGER _____

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MASTER DEVELOPMENT AGREEMENT
FOR THE
TUCSON CONVENTION CENTER
AND HOTEL

BETWEEN

THE RIO NUEVO MULTIPURPOSE FACILITIES DISTRICT

AND

GARFIELD TRAUB DEVELOPMENT ARIZONA, LLC

Exhibit to Resolution No. 21283

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MASTER DEVELOPMENT AGREEMENT

THIS MASTER DEVELOPMENT AGREEMENT (the "Agreement"), is made as of this 12th day of May, 2009 (the "Effective Date"), between The Rio Nuevo Multipurpose Facilities District ("Owner") and Garfield Traub Development **Arizona**, LLC, an Arizona limited liability company ("Developer") (each of them individually, a "Party," or jointly, the "Parties").

RECITALS:

- A. Owner is the owner of certain property located in the City of Tucson, Arizona ("**City**"), as more particularly described on Exhibit A attached hereto and made apart hereof (the "Property").
- B. Owner is a multipurpose facilities district established pursuant to A.R.S. Section **48-4202** for the **purpose** of supporting the revitalization of a portion of the City of Tucson, an Arizona municipal corporation ("**City**") downtown area with the construction of a mix of structures, including without limitation, a convention center headquarters hotel (the "Hotel"), an **expanded** Tucson Convention Center (the "**CC** Expansion"), the East Entrance to the Convention Center (the "**CC** East Entrance") and supporting garage facilities (the "Garage") (the Hotel, CC Expansion, CC **East** Entrance and Garage are collectively referred to as the "Project").
- C. City has completed an RFQ and RFP process for the Project and selected Developer to develop (i) a Sheraton-brand convention center headquarters hotel to be operated by Starwood Hotels and Resorts ("Operator") and (ii) the CC Expansion, the CC East Entrance and Garage.
- D. City **and** Owner have entered into the Pre-Development Agreement pursuant to which Developer has provided pre-development feasibility period services as **set** forth therein in connection with the Project.
- E. Developer, with the guidance of City, in compliance with all applicable laws, ordinances and regulations, has selected a joint venture comprised of Turner Construction Company and Skidmore Construction Company as the design builder for the Project (the "Design Builder"), which Design Builder has selected DLR Group as the architect for the Project (the "Project Architect") (collectively, Operator, Design Builder and Project Architect are **referred** to as the "Team" and each a "Team Member").
- F. Following the completion of the pre-development feasibility period services, Owner has determined that the Project should proceed and that the Hotel should be publicly **owned** rather than privately owned.
- G. Owner and/or a designee of **Owner** intend to issue bonds or other obligations to finance the costs of the Project ("Bonds").
- II. Owner is desirous of now engaging the Developer **and** the rest of the Team to begin certain pre-construction work on the Project.

- I. Developer is desirous of acting as development manager for the development, design, financing, construction, furnishing, equipping, and preparation for the opening and operation of the Project.
- J. Prior to starting construction on the Project, Developer will expend significant amounts of time, effort and money in order to finalize the capitalization plan for the Project, to oversee the design of the Project, to cause the production of complete construction drawings, to oversee the generation and execution of a Guaranteed Maximum Price design/build contract with the Design Builder, to assist with negotiating various Hotel agreements, and to assist in the negotiation of all other legal documents, including, but not limited to, the Hotel Operating Agreement and the Development Consulting Services Agreement.
- K. Following the Closing (as hereinafter defined) of the financing for the Project and commencement of construction, Developer will continue to expend significant amounts of time, effort, and money to coordinate, manage and supervise with the Team Members the construction of the Project and the opening of the Hotel, CC Expansion, CC East Entrance and Garage.
- L. The Parties agree that the performance of the duties and tasks outlined in this Agreement are vital to the ultimate development and success of the Project.

NOW, THEREFORE, in consideration of the foregoing, the mutual covenants herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

ARTICLE 1 DEFINITIONS

1.1. Definition of Terms. When used in this Agreement with an initial capital letter or letters, each of the following terms shall have the meaning given it below.

"*Agreement*" means this Master Development Agreement between the Owner and the Developer.

"*Applicable Law*" is defined in Section 9.2.

"*Approved Plans*" means all plans and specifications necessary in the construction and equipping of the Project, as approved by the Owner, including final site plans, construction plans and specifications, FF&E plans and specifications, and all other plans, reports, studies, diagrams, data and information reasonably requested by Owner, as the same may be changed at Owner's direction from time to time.

"*Bonds*" means the indebtedness or other obligations incurred by the Owner or its designee to design, finance, construct and operate the Project.

"Capital Plan" means the Bond model, the preliminary development and construction schedule, the proposed Project Budget, and the projected profit and loss statement, prepared and submitted to Owner for its approval in accordance with the provisions of this Agreement.

"Claim" means collectively all claims, demands, losses, liabilities, actions, lawsuits and other proceedings, judgments and awards, and costs and expenses (including court costs, reasonable attorneys' fees, investigative costs and expert witness fees).

"Closing" means the consummation and closing of the transactions contemplated by the Bond documents, which are anticipated to occur prior to commencement of the construction phase of the Project.

"Completed" or "Completion" means, with respect to any portion of the Project, when the Project Architect certifies in writing to the applicable Parties that the construction of such portion of the Project is substantially completed in accordance with the Development Plan to permit use thereof for the purposes for which it is intended, which date may precede the full completion of all punch list items, landscaping and similar design and development functions.

"Confidential information" is defined in Section 11.7.1.

"Construction Period" means the period of time commencing upon, or after, the Closing, and ending upon the date which is approximately twenty-eight (28) months thereafter, as such date may be extended by mutual agreement of the Parties, during which period the Parties shall diligently and in good faith attempt to accomplish and mutually agree upon all of the matters enumerated in ARTICLE 5 hereof.

"Contract" means any agreement between a Contractor and Owner or Developer.

"Contractor" means any Person or entity, including the Design Builder, supplying materials, supplies, labor or services under Contract directly with Owner or Developer, in connection with the Project.

"Deliverables" is defined in Section 11.6.

"Design Builder" means an Arizona joint venture comprised of Sundt Construction Company, an Arizona corporation, and Turner Construction Company, a New York corporation, or such other general contractor as Owner and Developer may approve.

"Design Development Period" means the period of time commencing upon the Effective Date, and ending upon the date which is approximately eleven (11) months thereafter, as such date may be extended by mutual agreement of the Parties, during which period the Parties shall diligently and in good faith attempt to accomplish and mutually agree upon all of the matters enumerated in ARTICLE 4 hereof.

"Design Professionals" means the planning, architectural, engineering, interior design and other specialists and consultants engaged by Owner, Design Builder or Developer for the design and construction of the Project, including the Project Architect and Hotel Interior Designer which will be engaged by the Design Builder.

"District Board" means the governance board of the Owner.

"Developer" means Garfield Traub Development Arizona, LLC, an Arizona limited liability company, or its affiliate.

"Developer Delay" means (i) any delay in the services and obligations to be provided under this Agreement resulting from any act or delay of Developer, other than delays resulting from acts that Developer is obligated to perform pursuant to this Agreement, and (ii) any delay in completion of construction of the Project resulting from the failure by Developer to perform timely any of its obligations under this Agreement.

"Developer Related Parties" means Developer's affiliates, officers, directors, members, agents and employees.

"Development Fee" means the fee to be paid by Owner to Developer for the work and services to be performed by Developer under this Agreement, as described in Section 7.1.

"Development Plan" means the detailed plan concerning the Project and all items which will be required to cause Final Completion of the Project and opening of the Hotel, as more fully described in this Agreement.

"Effective Date" is defined in the Preamble.

"Event of Default" or *"Default"* is defined in ARTICLE 10.

"Final Report" means Pre-Development Feasibility Report prepared by Developer pursuant to the Pre-Development Agreement, a copy of which is attached as Exhibit E.

"Fee Base" is defined in Section 7.3.

"FF&E" means those items of furnishings, fixtures, equipment, accessories and materials for use in the occupancy and operation of the Project, as such may be evidenced on the Approved Plans.

"FF&E Schedule" is defined in Section 4.1.11.

"Final Completion" means, with respect to any portion of the Project, completion of all punch list items, satisfactory completion of all items under the Bonds that are required to be completed, delivery and installation of all remaining FF&E, delivery to Owner's Representative of a written certification, executed by the Developer's Representative, certifying that all aspects of Final Completion of the applicable portion of the Project have been achieved, along with such documentation as is necessary or as reasonably requested by Owner to substantiate same and the date Final Completion occurred, delivery to Owner's Representative from Operator of final written acceptance of the Hotel executed by a representative of Operator who has knowledge of such matters and the requirements with respect hereto, obtaining all final permits and certificates of occupancy, and the completion of all matters which remain undone or incomplete following receipt thereof; provided, however, any punch list items that are not reasonably capable of being completed at that time as to which Developer and/or Design Builder have established sufficient

reserves to cover the cost of such items and which they are making commercially reasonable best efforts to complete on a schedule approved by Owner, will not be a condition to Final Completion.

"Final Repon" means the Pre-Development Feasibility Report prepared by Developer pursuant to the Pre-Development Agreement, a copy of which is attached hereto as Exhibit E.

"Force Majeure" means any cause or contingency beyond the reasonable control of a Party which shall include, without limitation, (a) strike, lockout or other labor troubles, (b) governmental restrictions, delays or limitations, (c) riot, war, insurrection or other national or local emergency, (d) accident, flood, fire or other casualty, (e) adverse weather conditions, (f) other act of God, or (g) other cause similar or dissimilar to any of the foregoing and beyond any Party's reasonable control.

"Guaranteed Maximum Price" means such term as defined in the Design-Build Contract.

"Hotel Operating Agreement" means the agreement to be entered into by and between Owner and Operator for the operation of the Hotel.

"Indenture" means the Trust Indenture to be executed in connection with the financing of the Project at the Closing between Owner or its designee and the Trustee, as originally executed or as it may from time to time be supplemented modified or amended by all Supplemental Indentures executed pursuant to the provisions of the Indenture.

"Notice to Proceed" means written notice from Owner to Design Builder to commence construction of Project, as provided in Section 6.8.

"Operator" means Starwood Hotels and Resorts Worldwide, Inc., a Maryland corporation, or its affiliate, or such other management entity as Owner and Developer may jointly approve.

"OS&£" is defined in Section 5.1 13.

"Owner" means the Rio Nuevo Multipurpose Facilities District and its successors and assigns.

"Owner Related Parties" means Owner's affiliates, officers, directors, members, agents and employees, but excluding Developer.

"Owner's Representative" is defined in Section 6.2.

"Person" means an individual, partnership, joint venture, corporation, unincorporated association, firm, association, limited liability company, trust or other legal entity or group of entities, including without limitation, Owner and any other governmental authority or any agency or political subdivision thereof.

"Pre-Development Agreement" means that certain Pre-Development Agreement, dated as of July 30, 2008, among the City, Owner and Garfield Traub Development, LLC.

'Project., means collectively the development, design, financing, construction, furnishing, equipping and preparing for opening and operation of the Hotel, the CC Expansion, the CC East Entrance and the Garage on the Property.

"Project Architect" means DLR Group or such other architect(s) as Design Builder, Owner and Developer may each approve.

"Project Budget., means a budget for development of the Project previously prepared by Developer and submitted to the City and the Owner in the Final Report (as defined in Section 3.1) as such budget shall be modified during the Design Development Period as provided in ARTICLE 4.

"Project Schedule" is defined in Section 4.1.11.

"Property" means the real property described in Exhibit A.

"Standard of Care" is defined in Section 9.1.

"Subcontractors" means any Person supplying materials, supplies, labor or services under contract directly or indirectly, to the Design Builder in connection with the Project.

"Substantia! Completion" means the date of substantial completion with respect to any portion of the Project as defined in the Design Build Contract and as approved by Owner and Developer in writing, in which **Developer** states that the Project (or the specific portion thereof, i.e. the Hotel, the Garage, the CC Expansion or the CC East Entrance) is sufficiently complete such that Owner and Operator (with respect to the Hotel) can enjoy beneficial use and occupancy of such specific portion of the Project for its intended purposes and, with respect to the Hotel, delivery to Owner's Representative by Operator of written acceptance of the Hotel, executed by a representative of the Operator who has knowledge of such matters and the requirements with respect thereto, subject to any punch list items acceptable to Developer, Owner and Operator. In addition, with respect to each portion of the Project, Developer shall deliver to the Owner Representative a written certification, which has been executed by Developer's Representative certifying (i) that Substantial Completion has been achieved with respect to the applicable portion of the Project, along with such documentation as is necessary (or as the Owner Representative may reasonably require) to substantiate same, including an AIA Substantial Completion Certificate (on the G704-2000 Certificate of Substantial Completion form or such successor AIA form, if such form is no longer available, or such other form as prescribed in the Indenture) from the, Project Architect, and (ii) the date upon which Substantial Completion actually occurred. Promptly upon receipt, the **Owner** shall provide same to the Operator for review and approval or confirmation, as applicable. A condition precedent to Substantial Completion is the receipt by Developer and the Owner of all necessary certificates of occupancy (temporary, permanent or otherwise, as applicable) or other authorizations for the use and occupancy of the Project (or portion thereof) required by any governmental or regulatory authority. The **Owner** or the Operator may occupy and use any part, phase or system of the Project when such part, phase or system is substantially completed, but such partial use or occupancy of the Project shall not result in the Project being deemed substantially complete, and such partial use or occupancy shall not be evidence of Substantial Completion.

"Team" and "Team Member" is defined in Recital E.

"Trustee" means a banking association or trust company organized and existing under the laws of the United States of America or any state, or its successor and assigns, as provided in the Indenture.

"Work" shall have the meaning ascribed to such term in the Design-Build Contract.

ARTICLE 2 DESIGNATION OF DEVELOPER; PROJECT PHASES

2.1. Designation of Developer. Owner hereby agrees that Developer will act as development manager for the Project with respect to designing, developing, financing and constructing, equipping and opening the Project, all in accordance with the terms and conditions of this Agreement. Developer shall be an independent contractor and nothing contained in this Agreement shall be construed to create a partnership, joint venture, or agency relationship between or among Developer and Owner.

2.2. Project Phases. The Parties shall design, plan, develop and construct the Project, and perform their various obligations, as outlined in this Agreement in accordance with the following schedule of phases:

2.2.1. Design Development Period. As set forth in ARTICLE 4, detailed design development, planning and budgeting for the Project shall occur during the Design Development Period, with the objective of preparing plans and specifications for the Project sufficiently complete and detailed so as to obtain a Guaranteed Maximum Price from the Design Builder. During the Design Development Period, the Developer and/or Owner and Operator (with respect to Hotel matters) shall also schedule, prepare, negotiate and finalize the form of the various Contracts, and other agreements necessary for the funding, development, construction, completion and ongoing occupancy, use, management and operation of the Project. Upon completion and satisfaction of all of the requirements to be completed during the Design Development Period, the Parties shall proceed to Closing.

2.2.2. Payment for Design Development Period Costs and CC East Entrance Costs. With respect to the payment of fees and costs associated with the Design Development Period (excluding the costs for the construction of the CC East Entrance), Developer shall submit detailed invoices, in form and substance reasonable to Owner for all fees and costs of Developer and the Team Members incurred and payable, an estimate of which is described on attached Exhibit D. In connection with such costs and fees, Owner shall wire transfer to Developer or the applicable Team Member, as the case may be, the amounts set forth in the submitted invoices within fifteen (15) days after receipt thereof. Such request for payment shall not be delivered more often than one time per month.

Commencing approximately on or about October 1, 2009, Developer shall cause the Design Builder to commence the construction of the CC East Entrance and

thereafter to diligently pursue such Work to completion based upon the Standard of Care, Applicable Law and the Construction Documents for such Work. Five (5) days prior to the date that construction of the CC East Entrance is scheduled to commence, Owner will deposit adequate funds into escrow to pay for the cost (excluding any fees to Developer or Team Member) of the construction of the CC East Entrance, which cost is estimated on Exhibit D but which shall be determined based on the Guaranteed Maximum Price for such Work. Such funds will be deposited into a mutually agreed upon third party escrow account ("CC East Entrance Construction Fund") with construction draw standards and schedules agreed to by Owner, Developer and any applicable third party. In connection with such construction costs, Owner shall cause the third-party escrow agent to wire transfer to Developer or Design Builder, as the case may be, the amounts set forth in the draw requests submitted by Developer for the construction of the CC East Entrance, within fifteen (15) days after receipt of each draw request. Draw requests shall not be requested more often than one time per month.

Until the CC East Entrance Construction Fund is fully funded or Owner or City is able to provide reasonable evidence to Design Builder that such funds will be available for draws in connection with the construction costs of the CC East Entrance, Developer shall have no obligation to commence construction of the CC East Entrance. The execution of this Agreement by City obligates City to expeditiously pursue mutually agreeable methods for funding the CC East Entrance Construction Fund, which may include, without limitation TiP funds, or the application of rental payments to Owner by City for the City's use of the Tucson Convention Center. In the event the City is unable to obtain the necessary funding and Owner is unable to identify alternative funding, then Owner may terminate this Agreement in accordance with Section 10.1.3 or suspend all Work under this Agreement pursuant to Section 10.4. In lieu of termination, Developer may offer and agree to carry the design and construction costs detailed on Exhibit D on mutually agreeable, commercially available and reasonable terms up to the time of Closing.

2.2.3. Closing. Upon satisfaction of all of the conditions and requirements to be completed during the Design Development Period, Closing shall occur as follows:

(a) On the date of the issuance and delivery of the Bonds, the Bond proceeds of such financing shall be deposited into the Construction Fund held by the Trustee under the terms of the Indenture and made available for disbursement as development of the Project progresses in accordance with industry-standard construction disbursement procedures as reasonably applied to the Project, and as agreed among the Parties. In addition, on such day or promptly thereafter upon receipt of documentation with appropriate backup and in form and detail meeting the requirements of the Trustee funds shall be disbursed from the Construction Fund to Owner, City, if applicable, and third parties, if any, as reimbursement for monies paid or advanced by such parties in connection with those items listed on

Exhibit D or incurred and paid in connection **with** costs on the Project Budget during the Design Development Period.

(b) The Parties, as appropriate, shall have entered into the vanOlls documents necessary for the funding, construction, completion and ongoing occupancy, use, management and operation of the Project in contracts therefor agreed upon and/or executed during the Design Development Period, subject to the occurrence of the Closing.

2.2.4. **Construction Phase.** Following Closing, Owner shall deliver to Developer a Notice to Proceed, directing Design Builder to commence construction of the Project (excluding the CC East Entrance) in accordance with the Approved Plans. During construction, Developer shall act as development and construction manager for the Project on behalf of Owner, and shall coordinate and oversee all aspects of the construction of the Project and the pre-opening services for the Project. in accordance with ARTICLE 5.

2.2.5. **Post Construction.** Owner will engage Operator to oversee the use, operation, management, maintenance and repair of the Project pursuant and subject to the Hotel Operating Agreement. Developer shall direct and oversee Design Builder to undertake all warranty work in accordance with the Design-Build Contract.

2.2.6. **Asset Management.** if Owner were to elect, in its sole discretion, to utilize Developer's management skills and services, Owner would enter into a Qualified Asset Management Agreement with Developer.

ARTICLE 3 PRE-DEVELOPMENT FEASIBILITY ACTIVITIES

3.1. **Pre-Development Feasibility Services.** Developer has delivered to Owner the Final Report. The Parties have confirmed the feasibility of the Project and have elected to continue promptly to the Design Development Period in accordance with the provisions of this Agreement.

ARTICLE 4 DESIGN DEVELOPMENT ACTIVITIES

4.1. **Developer Services.** The Design Development Period shall commence promptly after the Effective Date and continue in accordance with the Project Schedule. During the Design Development Period, Developer's services shall include the duties set forth in subparagraphs 4.1.1 through 4.1.15 of this Section 4.1 and as provided elsewhere in this Agreement:

4.1.1. **General.** Developer shall coordinate, manage and supervise the development of the Project, and shall provide certain services, advice and assistance to Owner which will aid in the economical, efficient, and desirable development, financing, design, construction and operations of the Project. Developer shall

provide sufficient organization, personnel and management to carry out its obligations during the Design Development Period. Developer shall supervise the day-to-day management and administration of all aspects relating to the design of the Project, using its reasonable business judgment in order to maximize the value and potential profitability of the Project while minimizing the risks associated therewith. and at all times complying with the decisions of the Owner.

4.1.2. **Team Leadership.** Developer shall act at all times as Team leader, facilitating and arranging necessary work sessions and meetings with Owner and Operator, as appropriate, maintaining **Team** continuity and representing the interests of Owner in Developer's interaction with the Team. Developer shall provide Owner and the Team with a high level of **transparency** and accessibility during the Design Development Period.

4.1.3. **Periodic Meetings.** During the Design Development Period, Developer shall coordinate and chair weekly telephonic meetings, or additional meetings reasonably requested by Owner or Developer, at times and locations to be agreed upon, at which the various aspects of the Project will be discussed. Depending upon the topics to be discussed, the meetings will be attended by the appropriate parties. including as appropriate, **Owner's** Representative, Operator, Team Members, and any applicable Contractors, Subcontractors and/or primary consultants.

4.1.4. **Contract Administration.** Developer shall select, in consultation with Owner, additional Contractors not already selected or proposed for the Team which may include architects, engineers, interior designers, food facilities planners, parking, transportation and other consultants and delineate their respective design responsibilities. Owner, acting in good faith and in its reasonable judgment, shall **have** the right to reject any such additional Contractor if the amount to be paid such Contractor shall exceed \$100,000. Developer shall coordinate **all** activities of the Contractors with the Team Members and other Contractors and Subcontractors in connection with the design, development and/or construction of the Project.

4.1.5. **Legal Work/Contract Terms.** Developer shall advise, assist or participate in the negotiation of the legal and business aspects of the transaction, including without limitation the Design-Build Contract, Hotel Operating Agreement, Room Block Commitment Agreement, Pre-Opening Services Agreement and the Development Consulting Services Agreement. These Contracts and other material Contracts shall contain the following provisions as applicable and/or such other provisions as are customary in the industry that is the subject of the specific Contract: (i) insurance and indemnification consistent with this Agreement; (ii) the Design Build Contract to include a requirement that the Work shall be done in a good and workmanlike manner, in compliance with all applicable OSHA and ADA standards, (iii) any construction Contract to contain a representation and warrant)' that the work covered by such construction Contract will be warranted **from** defects in workmanship and materials for a period of at least one (1) year from the date of Substantial Completion (unless a longer period of time

is provided for by the manufacturer or supplier of any materials or equipment which is a part of the Project) and an assignment to the Owner of the right to enforce any warranties thereunder, all to the same extent as if the Owner were a party to such contract, and (iv) the Design Build Contract shall (A) require Substantial Completion to be achieved on or before the completion deadlines in the Project Schedule, subject to changes, if any, approved by both Owner and the Developer, and with extensions or delays for Force Majeure events or excusable delays, (B) be 100% bonded by a qualified surety (or co-qualified sureties), pursuant to standard payment and performance bonds, in form and substance approved by the Owner Representative, such approval not to be unreasonably withheld, naming the Owner and the Developer as co-obligees which covers 100% of the payment and performance obligations of the Design Builder under the Design Build Contract, and (C) contain other provisions consistent with this Agreement. The Developer shall deliver to the Owner the Design Build Contract thirty (30) days before the Closing. The cost for any legal services associated with Developer's negotiation and drafting of Contracts shall be paid by Developer, which cost is included as part of the Development Fcc. Owner shall be responsible for all third party legal fees and costs approved by and incurred on behalf of Owner, which costs and fees may be included as an allowance in the Project Budget. Owner shall have approval rights over the terms and provisions of the aforesaid Contracts.

4.1.6. Financing/Ownership. Developer shall work with Owner, its Bond counsel, financial advisors, the Bond Underwriter and underwriter's counsel to refine and finalize the Project's financial, ownership and funding structure. Developer shall participate as reasonably requested by Owner in the development of the Bond offering documents.

4.1.7. Project Advocacy/Approvals. Developer shall attend and engage as necessary in meetings or interaction with governmental agencies (including the City zoning or other land use departments and agencies), special interest groups, civic organizations or other entities as required by Owner. Developer shall assist Owner and the Team with any necessary information and/or documentation required to secure approvals for the Project or the financing, design, construction or equipping thereof from the Owner, the Operator, and/or other Persons.

4.1.8. Design Leadership. Developer shall coordinate with Owner, Operator, Project Architect and Design Builder, in supervising and directing the design development process, providing input, leadership and oversight as necessary to facilitate the completion and approval by the foregoing, as applicable, of all plans and specifications necessary or desirable in the construction and equipping of the Project in accordance with the Final Report, the Space Allocation Program included in the Final Report, and the Sheraton Brand Standards to be defined in the Hotel Operating Agreement (except as waived by Operator and Owner), including final site plans, construction and FF&E plans and specifications, and all other plans, reports, studies, diagrams, data and information reasonably necessary for the Project. Developer, with the approval of Owner, shall cause the design of the plans and specifications for the CC East Entrance and the relationship of the Project to the

other components of the Project and adjacent properties to be prepared by the Project Architect so that construction can be commenced by and the Guaranteed Maximum Price can be established in accordance with the Project Schedule. Developer shall direct the Design Builder in consultation with the Owner (and Operator in connection with the Hotel) on defining the operational requirements for the Project with respect to HVAC systems, plumbing, sewage and water treatment, electrical power supply and distribution, including lighting, alarm, television, etc., systems, telephone, public address, and internal communications systems, and special hotel systems. All changes to the Approved Plans shall require the written approval of the Owner and Operator (solely as such is required under the Hotel Operating Agreement). Developer shall review the schematic drawings, the design drawings and the Construction Documents of the Project Architect to determine whether they conform to the requirements of the Project and to assess the appropriateness of the design in the context of the Project and its goals and the Project Budget.

4.1.9. Value-Engineering. Owner, Operator, Project Architect and Design Builder shall work with Developer to improve the efficiency, design, cost or delivery schedule of the Project without compromising the quality required by Owner and Operator. Developer shall cause the plans and Approved Plans to be value engineered, as needed, to take into account the input from the Team Members and Owner. Owner shall have the right to approve all changes involving increased costs and overall aesthetics that result in changes to the Space Allocation Program and Project Budget.

4.1.10. Project Budget. After completion of each of the schematic drawings, design drawings and Construction Drawings, Developer shall obtain from Design Builder updates as to its estimate of all costs to be included in the Design Builder's Guaranteed Maximum Price and promptly send copies thereof to Owner for further discussion with Developer and Team Members, as needed. Developer shall update the estimate of all other anticipated Project costs, with input from other members of the Team or Owner as appropriate, in order to update fully the Project Budget from time to time. In its review of the Design Builder's estimate(s) of design and construction costs, Developer shall recommend action, if required, to maintain costs within Owner's desired maximum allowable Project Budget. Developer shall formulate cost control and reporting systems and update and keep current cost estimates as and when directed by the Owner.

4.1.11. Project Schedule. The initial Project Schedule shall be the Project Schedule in the Final Report. This Project Schedule shall be revised in accordance with scheduling changes included within the Design Build Contract. Thereafter, Developer shall, no less frequently than monthly, update or cause the Project Schedule to be updated, with input from Owner, Design Builder, and the Team Members, in order to provide efficient and timely completion of the Project and to minimize construction interest costs (collectively, the "Project Schedules"). The Project Schedules shall include a schedule for the procurement and installation of FF&E (hereinafter referred to as the "FF&E Schedule").

4.1.12. Design Builder Bid Evaluation. The Developer shall insure that the bid process detailed on Exhibit C, and any bidding requirements set forth in the Design-Build Contract, are implemented and adhered to.

4.1.13. Finalize Design-Build Contract. Developer shall negotiate and execute the Design-Build Contract, subject to the approval of Owner, and keep Owner advised as the Guaranteed Maximum Price is developed by the Design Builder. Developer shall establish the contract commencement and completion dates and assist Owner, as necessary, in issuing the Notice to Proceed. The terms of the Design Build Contract shall be in accordance with Applicable Law and this Agreement.

4.1.14. Permits and Approvals. City agrees to expedite to the fullest extent possible plan review and approvals as well as the issuance of all permits and consents required for the Project. Subject to Section 6.5, Developer shall obtain or cause Design Builder to obtain, on behalf and with the cooperation and assistance of Owner, approval by the City of all Approved Plans and all building, development and other permits necessary to commence and complete construction of the Project. All permit fees that will be required to be paid or prepaid for the Project prior to commencement of construction are in addition to the fees payable to Developer as set forth in Section 7.2. Developer will use reasonable efforts (with Owner's assistance, as appropriate) to negotiate with the permitting agencies to postpone permit fees until after the Bonds are issued for the Project. If such arrangement is not possible, the fees shall be paid from the CC East Entrance Construction Fund.

4.2. Satisfaction of Design **Development Period** Requirements. Upon satisfactory completion of all of the foregoing items and agreements, the Parties shall proceed to Closing, and shall commence construction of the Project as set forth in ARTICLE 5. City agrees to expedite to the fullest extent possible plan review and approval as well as the issuance of all permits and consents required for the Project.

4.3. Developer's Representative; Decisions. Developer shall designate a representative authorized to act on Developer's behalf with respect to the Project ("Developer's Representative"). Developer's Representative may be replaced from time to time by Developer, with written notice of such replacement to Owner. The initial Developer's Representative shall be Steve Moffett, Tony Traub and Steve Swisher, each of which can act separately on behalf of Developer. Developer's Representative shall communicate with persons or entities employed or retained by Owner only through Owner's Representative, unless otherwise directed by Owner. Developer's Representative shall examine documents submitted by Owner and shall render decisions pertaining thereto promptly to avoid unreasonable delay in the progress of the design of the Project and/or the Work; provided sufficient information is submitted or available such that Developer's Representative can make an informed decision. Developer's Representative shall render any decisions required to be made by Developer with respect to any documents submitted hereunder in or within seven (7) business days after the submission to Developer of such documents or in or within such longer or shorter period as shall be expressly permitted or required by the Project Schedule, as such may be revised from time to time.

4.4. Cooperation. Developer shall cooperate fully and timely with Owner's Representative and all of Owner's other consultants, Contractors, Subcontractors, advisers and their respective employees as the same are involved or retained from time to time. Owner shall cooperate fully and timely with Developer, the Team Members, the Contractors and their respective employees, agents, advisers, as the same are involved or retained from time to time. Developer acknowledges and agrees that the involvement of Owner's Representative, other consultants, employees, Contractors, Subcontractors, advisers and Team Members in the performance of their respective duties with respect to the Project shall not reduce the scope of Developer's duties hereunder or relieve Developer of its responsibilities under this Agreement. Developer shall keep Owner properly informed of the status and needs of the Project and phases thereof.

4.5. Non-Liability for **Information**. Any documentation or information provided by Owner to Developer in connection with this Agreement is provided as a convenience. Developer may use such information so long as such reliance should not violate the Standard of Care (as defined in Section 9.1) and so long as Developer agrees that Owner does not warrant or represent in any way the truth or accuracy of any such information.

4.6. Reports.

4.6.1. Delivery of Reports to Developer. Owner has provided all site information in its possession or control to Developer, including, without limitation, those reports provided as part of the RFQ and RFP process and shall provide to Developer reasonably promptly after receipt any other reports that they may commission, if any, in connection with the Project (collectively, the "Reports"). Owner does not warrant conclusions in any such Reports and makes no representations with respect to the accuracy or completeness of the Reports. Upon the request of Developer, Owner shall take reasonable action to have the providers of such Reports certify the contents of the Reports to Developer but shall not be required to pay any additional costs to such providers for such certifications. It shall be Developer's responsibility to verify and confirm conditions that may have an impact upon its services and obligations under this Agreement. The Reports shall remain the property of Owner.

4.6.2. Delivery of Information to Owner. If Developer, Team Members and Contractors undertake studies, reports or other analysis in connection with the Project, copies of such information shall be promptly provided to the Owner's Representative, and, if directed by the Owner's Representative, to others identified by the Owner's Representative. Developer shall respond promptly (which may occur in the next submittal) in writing to each comment (that by its nature requires a response) made with respect to a submittal to the Owner's Representative or other parties to whom they were directed to deliver the submittals and/or reports.

4.7. Budget for Design Development Activities. The budget for the Design Development Period activities is included in Exhibit D. All of the costs and fees included in this budget are part of the preliminary Project Budget as detailed in the Final Report. Descriptions of specific services provided by Developer, Project Architect and Design Builder during the Design

Development Period are included in Exhibits F, G and H, respectively. Upon request of Owner or City, an allowance will be included in such budget to cover the commercially reasonable costs of any consultants hired by Owner or City to perform environmental, geotechnical, archaeological, marketing or other related Project studies and analyses.

ARTICLE 5 CONSTRUCTION ACTIVITIES

5.1. Construction Period Services. The Construction Period shall commence promptly after Closing. During the Construction Period, Developer's services shall include the duties set forth in the following subparagraphs of this Section 5.1 and as provided elsewhere in this Agreement:

5.1.1. General. Developer shall coordinate, manage and supervise the construction of the Project to ensure that it is completed in accordance with Owner's objectives for cost, time and quality. Developer shall provide sufficient organization, personnel and management to carry out its obligations during the Construction Period. Developer shall also comply with certain obligations under ARTICLE 4 to the extent they relate to or would apply to construction activities.

5.1.2. Team Leadership. Developer shall act at all times as Team leader, facilitating and arranging necessary work sessions and meetings and representing the interests of Owner until final acceptance of the Project by Owner. Developer shall provide Owner and the Team with a high level of transparency and accessibility during the Construction Period.

5.1.3. Periodic Meetings. During the Construction Period, Developer shall arrange and attend regular progress meetings among the appropriate consultants, contractors and suppliers and representatives of the Owner and develop reporting programs to keep the Owner properly informed of the status and needs of the Team. In addition, the Developer shall report, in writing, to the Owner [from time to time, but not less frequently than bi-monthly, or upon the reasonable request of Owner, as to the progress of design, construction, compliance with the Approved Plans and "FF&E Specifications." as developed; and the Project Budget and Project Schedule, and other major aspects of the construction and development of the Project including, without limitation, quality control testing reports. Developer shall report to the Owner from time to time, but not less frequently than monthly or upon the reasonable request of Owner, in writing as to the progress of design, construction, and compliance with the Project Budget, including, without limitation, (1) a cash disbursement record, (2) a cash receipts record, and (3) a summary of development and construction expenses paid to date and a comparison of same versus the Project Budget. As required by the topics to be discussed, the meetings will be attended by Owner's Representative, Operator, Design Builder, Project Architect, any applicable Contractors, Subcontractors and primary consultants. Developer shall be responsible for compiling detailed minutes of each meeting, and such minutes shall be promptly made available to Owner.

5.1.4. Design-Build Contract. Developer shall act on behalf of Owner in supervision of Design Builder in order to facilitate Design Builder's expeditious and complete performance under the Design-Build Contract until the Project is completed and accepted by Owner in accordance **with** the Design-Build Contract. Developer shall provide to Design Builder routine instructions, requirements, and approvals provided for in the Design-Build Contract. Developer shall direct the Hotel interior designer, food facilities consultant, and such other consultants as necessary, on the technical and functional requirements of the Hotel and other aspects of the Project, in consultation with Owner and Operator.

5.1.5. On-Site Supervision. Developer shall provide on-site supervision including, at a minimum, an on-site Project manager/superintendent for construction administration and to supervise and coordinate the overall process of construction of the Project (the "Developer's Construction Manager"); such person shall (i) monitor, observe and inspect, or cause to be monitored, observed or inspected, the construction of the Project to prevent delays, resolve disputes and otherwise cause the timely completion of the Project in conformity with the Approved Plans and FF&E specifications, the Project Budget, Applicable Law and the Project Schedule pertaining thereto (all as the same may be revised in accordance with the provisions of this Agreement), (ii) timely notify Owner's Representative of the occurrence of any material delays or disputes and take actions deemed by Developer to be appropriate to protect the interests **and** position of the Project in the event of any disputes or claims arising from or relating to the Project, without involvement by the Owner, and (iii) on a monthly basis, provide Owner **with** copies of all records related to the Project as reasonably requested by Owner's Representative. The cost of such person shall be included in the Project Budget as a separate line item, separate from the Development Fee. Developer shall maintain at its onsite location correct and **proper** books of account and records as **are** necessary to reflect the assets, liabilities, revenues and expenses and all transactions relating to the Project and make all **such** materials available to Owner at all times.

5.1.6. Decisions; Recommendations. Developer shall forward promptly to Owner, as appropriate, any change orders, notices or requests that Developer initiates or receives from the Design Builder pursuant to the Design-Build Contract. When such items require decisions of Developer, Developer shall make such decisions and communicate them in **writing** promptly to Design Builder and **Owner**. When such items **require** decisions of Owner, Developer shall recommend to Owner, in an agreed format, **a** course of action. Owner agrees to respond to each such request within the time frames set forth in the Design-Build Contract.

5.1.7. Design Review. Developer shall review all additional drawings, specifications, clarifications and changes to the Approved Plans that may occur throughout the course of construction for design intent. If at any time, Developer observes or otherwise obtains knowledge of any material errors, inconsistencies or omissions in the Approved Plans, Developer shall notify Owner and Design Builder of same and require Design Builder to correct such errors, inconsistencies or

omissions in accordance with the Design Builder's obligations under the Design-Build Contract.

5.1.8. **Change Orders.** Developer shall evaluate and negotiate all change order requests submitted by the Design Builder subject to the approval of Owner.

5.1.9. **Payment Applications; Lien Waivers.** Developer shall develop and implement procedures for the review and processing of payment applications by Design Builder, including all lien waivers required in connection therewith. Developer shall verify, approve or disapprove (based on conformity with the Design Build Contract), and, when approved, process all legitimate and verified requests for payment made by the Design Builder and/or other Contractor, payments to Team Members, and payments of insurance premiums, and utility charges, and all other development expenses required to be paid in connection with the Project, including the preparation of all draw requests and the disbursement of funds advanced pursuant to such draw requests, and to report to the Owner the amount of development expenses incurred through the preceding month and the amounts due under such Contracts and the amounts to be withheld, if any. Developer shall determine that appropriate waivers of lien correspond with and support the payment applications.

5.1.10. **Prompt Payment to Subcontractors.** Developer shall use its best efforts in enforcing requirements of the Design Builder to make prompt payment of funds received from Owner and/or Trustee under the Design-Build Contract and/or the Indenture, subject to retentions and good faith disputes, to all Subcontractors, and its laborers and material suppliers performing labor or furnishing materials for the Project.

5.1.11. **Third Party Services.** Developer shall assist Owner and/or Design Builder in selecting the professional services of surveyors, special consultants and testing laboratories. Developer shall require materials testing and third party inspections as called for in the specifications for the Project. Owner may hire its own consultants in connection with peer reviews of the Work, the cost of which shall be included as an allowance in the Project Budget.

5.1.12. **Furniture, Fixtures and Equipment.** During the course of construction, Developer shall cause the Design Builder to handle the procurement and installation of the FF&E for the Project in accordance with the Design-Build Contract and the Hotel Operating Agreement.

5.1.13. **Operating Supplies and Equipment; Information Technology.** In accordance with the Pre-Opening Services Agreement and the Development Consulting Services Agreement, Developer shall oversee the Operator's procurement and installation of operating supplies and equipment ("OS&E"), computer systems and information technology, as well as Operator's conformance to the Operator's approved pre-opening budget for the Hotel.

5.1.14. **Obtaining Licenses and Permits.** Developer shall take such actions, or cause Design Builder to take such actions, as may be required in preparing, applying for, and securing, to the extent required by Applicable Law, any notices of completion required or permitted to be filed or recorded upon the completion of the Project or any portion thereof, the building permits, utility permits, utility easements, any temporary, and permanent certificates of occupancy or equivalent documents, and all other licenses, permits, land use approvals and entitlements required for the lawful construction, occupancy and operation of the Project or any portion thereof. On or prior to the commencement of construction of the Hotel, Owner and Operator shall determine which entity shall be responsible for owning any liquor licenses with regard to the operation of the Hotel and which entity shall be responsible for obtaining such licenses.

5.1.15. **Start-Up and Testing.** Jointly with the Design Builder, Operator and Owner, Developer shall undertake as necessary, the start-up and testing for readiness of utilities, operational systems and equipment in the Project.

5.1.16. **Punch Lists; Completion Inspection.** Developer, Operator (with respect to the Hotel) and Owner shall participate with Design Builder in the preparation of a punch list for each of the Hotel, the Garage, the CC Expansion and the CC East Entrance. Following the issuance of the required certificates of Substantial Completion for the Project or any designated portion thereof, Developer shall coordinate with Owner and Operator (if applicable, with respect to the Hotel) the scheduling of the Project inspection and will inspect and evaluate the completion of the Work on Owner's and Operator's behalf and with their input. This same process shall occur prior to Final Completion for the Project or any designated portion thereof

5.1.17. **Operator Inspections and Approvals.** Developer shall coordinate the scheduling of Project inspections and approvals by Owner and Operator, as required, and see that such inspections are carried out, and approvals secured, on a timely basis.

5.1.18. **Project Closeout.** Developer shall review and participate, as needed, in Project closeout, and shall coordinate the turnover of Project upon completion to Owner and Operator (with respect to the Hotel). Developer shall prepare and submit to Owner final Project accounting and closeout reports and documents as described in Sections 5.1.23 through 5.1.25.

5.1.19. **Pre-Opening Duties.** Developer shall monitor and coordinate on behalf of the Owner pre-opening activities with the Operator and assist Owner with respect to pre-opening duties required under the Pre-Opening Services Agreement and the Development Consulting Services Agreement.

5.1.20. **Operation of Building Systems.** Developer shall cause the applicable Contractor, Subcontractor, consultants or other appropriate person to provide appropriate training and instruction to the Owner's or the Operator's

technical personnel regarding the operation of the various mechanical and other systems in the Project prior to turnover of the Project to the Owner and Operator for operation and thereafter confirm that those systems are operating in accordance with the applicable specifications.

5.1.21. **Delivery of Materials.** Developer shall coordinate the delivery to Owner and Operator of guarantees, warranties, affidavits, releases, bonds, waivers, keys, operations and maintenance manuals, record drawings, maintenance stocks, as-built drawings, occupancy certificates and other Project records and documents deemed necessary for and incidental to the full functioning and operation of all the Project improvements.

5.1.22. **Accounting Reports.** Developer shall provide the Owner, within sixty (60) days following Substantial Completion and Final Completion, respectively, an accounting showing all draws incurred for the Project and a comparison of the same versus the Project Budget.

5.1.23. **Preliminary Project Completion Report.** Developer shall furnish to the Owner, as soon as reasonably practicable after Substantial Completion is achieved, a Preliminary Project Completion Report describing all material aspects of the Project. Included in such report shall be those items included within the definition of "Substantial Completion" and copies of the following:

(a) such documents, instruments and certifications as are reasonably required by the Owner to evidence the achievement of Substantial Completion;

(b) a certificate from Developer stating that all invoices, payrolls, bills for materials, equipment and supplies and all other expenses in connection with the Project that are due and payable through the date of Substantial Completion have been paid, fully satisfied or bonded over, subject to any applicable retainage not yet payable, amounts to be incurred in respect of punch list items or other work not yet completed, and matters as to which bona-fide disputes exist (in which case a full explanation of the status of such matters shall be provided by Developer);

(c) all fire and safety and occupancy related certificates and all other permits, licenses and approvals required for operation and use of the Project (some of which may be temporary in nature).

5.1.24. **Final Project Completion Report.** Developer shall furnish to the Owner, within sixty (60) days after Final Completion is achieved, a completed Project report. Included in such report (to the extent not previously furnished to the Owner in the preliminary report issued upon Substantial Completion) shall be those items included within the definition of "Final Completion" and copies of the following:

(a) such documents, instruments and certifications as are reasonably required to evidence the achievement of Final Completion, including a certificate of acceptance from Operator;

(b) a certificate from Developer stating that all invoices, payrolls, bills for materials, equipment and supplies and all other expenses in connection with the Project have been paid, fully satisfied or bonded over (subject to matters of retainage not yet payable and matters as to which bona-fide disputes exist, in each case with a full explanation of the status of such matters);

(c) copies of all quality control testing reports;

(d) final testing, balancing and commissioning reports with respect to HVAC, electrical, plumbing, vertical transport and other systems;

(e) final record drawings, specifications, equipment manuals, warranties and guarantees;

(f) a certificate from Developer stating that all FF&E has been installed in the Hotel in substantial accordance with the agreed-upon FF&E Specifications; and

(g) all permanent fire and safety and occupancy related certificates and all other permits, licenses and approvals required for the operation and use of the Project.

5.1.25. Project Close-out Report. Within ninety (90) days after Final Completion, deliver to the Owner a report evidencing the payment of all development expenses (including retainages) other than matters as to which a bona-fide dispute continues to exist. In the case of any ongoing disputes and warranty claims or issues, the report shall advise the Owner of the status of such matters, and Developer shall continue to work with Design Builder to resolve such matters and take actions deemed by Developer to be appropriate to protect the interests and position of the Project, without involvement by the Owner, and with continuing periodic reports. Upon final resolution of such matters, Developer shall deliver to the Owner its final report as to those matters and Developer shall direct the Trustee to deliver to Owner any monies remaining in the Construction Fund. Thereafter, Developer shall engage in any other activities which are necessary and required to carry out the close-out of the development and construction of the Project.

5.2. No Conflict. Notwithstanding any provision hereof to the contrary in this Agreement or in the Exhibits to this Agreement, Developer has the obligations, responsibilities and duties set forth in this Agreement, including Articles 4 and 5 hereof, and in the event of any conflict between the provisions of this Agreement and the Exhibits to this Agreement, the provisions of this Agreement shall control.

ARTICLE 6 OBLIGATIONS OF OWNER

6.1. **Information.** Owner shall provide timely and complete information regarding its requirements for the Project and all other documents and information reasonably required by Developer in accordance with the Project Schedule, Project Budget, Final Report and the Design/Build Contract, as such may be amended from time to time.

6.2. **Owner's Representative; Decisions.** Owner shall designate a representative authorized to act in the Owner's behalf with respect to the Project (the "Owner's Representative") in connection with all decisions that do not require the consent of the District Board. Owner's Representative may be replaced from time to time with written notice from the District Board of such replacement to Developer. The initial Owner's Representative shall be Gregory Shelko. Developer shall communicate with persons or entities employed or retained by the City and/or Owner only through the Owner's Representative, unless otherwise directed by Owner. The **Owner's** Representative shall examine documents remitted by a Developer and shall render decisions pertaining thereto promptly to avoid unreasonable delay in the progress of Developer's services, provided sufficient information is submitted such that Owner's Representative can make an informed decision. The Owner's Representative shall render any decisions required to be made by Owner in respect to any documents submitted hereunder by Developer within seven (7) business days after the submission by Developer of such documents or in or **within** such longer period as shall be expressly permitted by the Developer's Representative, as such may be **revised** from time to time. **If** any decision is required to be made or any action is required to be taken by the District Board, or the **Owner's** Representative advises Developer thereof, then the timing of any required approval hereunder shall be subject to prompt approval (in lieu of the aforescribed seven (7) business days) recognizing **that** additional time may be required (to get on such entities' agenda. Developer may rely upon the actions and approvals of Owner's Representative unless and until Developer receives notice to the contrary.

6.3. **Approvals and Consents.** Whenever Owner's approval or consent is required for a Contract, plans or documents, a payment request, an act of Developer, a change order or any other matter, Developer shall deliver to Owner the document(s) which require Owner's approval, together with the date a response thereto is required. Owner shall consider and act upon such matter in the timeframe set forth in the transmittal letter from Developer. Owner acknowledges the need to comply with the request from Developer within the required timeframe so as not to cause Developer or Design Builder to incur or **suffer** a material adverse effect with regard to the design construction and completion of the Project. Owner approvals and consents shall be consistent with the terms of **this** Agreement and in compliance with Applicable Law.

6.4. **Zoning.** Owner shall cooperate with and assist Developer to the extent required in connection **with** obtaining the zoning approvals required for development of the Project.

6.5. **Permits.** Owner shall cooperate with Developer and Design Builder to the extent required in connection with the execution of all building permit applications, plans of development, utility permit applications, utility easements, requests for certificates of occupancy and such other documents as may reasonably be required for Developer and/or Design Builder to

obtain building permits, licenses, approvals, certificates, utility services and other permits and authorizations as may be necessary for the development, construction, occupancy, and operation of the Project.

6.6. **Obtaining of Funding.** **Owner** will use all reasonable efforts to obtain the financing for the Project and to cause the Bonds to be sold so long as the same can occur on terms and conditions reasonably acceptable to Owner.

6.7. **Delivery of Property.** Owner shall deliver the Property to Design Builder in accordance with and subject to the requirements set forth in the Design-Build Contract.

6.8. **Notice to Proceed.** Subject to the Closing having occurred, Owner shall issue the Notice to Proceed with respect to the Project (excluding the CC East Entrance which shall commence earlier than the Closing) promptly after the occurrence of all three of the following events: (i) Owner shall have approved the Capital Plan and the Project, as adjusted during the Design Development Period, (ii) the Closing shall have occurred, and (iii) all necessary permits shall have been obtained for the commencement of construction of the Project. Owner shall issue the Notice to Proceed with respect to the CC East Entrance after the occurrence of (i) and (iii) above and the establishment of the CC East Entrance Construction Escrow (as described in Section 2.2).

6.9. **Periodic Meetings.** The Parties shall attend the meetings conducted throughout the term of this Agreement and identified herein and otherwise, upon the reasonable request of the other Party, at times and locations to be reasonably agreed upon, at which the various aspects of the Project will be discussed.

6.10. **Certification.** Within ninety (90) days after Final Completion, Owner will furnish Developer an appropriate instrument certifying that Developer has complied with the provisions hereof relating to the design construction of Project. If Owner shall, for cause, refuse or fail to provide such certification, Owner shall, within thirty (30) days after written request by Developer, provide Developer with a written statement indicating in detail how Developer has failed to complete the construction of the Project in conformity with this Agreement, or is otherwise in default, and what measures or acts will be reasonably necessary in the opinion of Owner for Developer to take or perform in order to obtain such certifications. In the event of a dispute arising under this Section, Section 11.16 shall govern.

ARTICLE 7

PAYMENT OF DEVELOPMENT FEE, CONSTRUCTION FEE AND EXPENSE REIMBURSEMENT

7.1. **Development Fee/Construction Manager's Fee.** For all of Developer's services under this Agreement, Owner shall pay Developer a Development Fee of 3.5% of the "Fee Base," as hereafter defined. The Development Fee does not include the services of Developer's Construction Manager. Developer's Construction Manager is included in the Project Budget as a separate line item, the cost of which will be incurred and paid over the construction portion of the Design Development Period and the Construction Period, plus one month before the commencement of the Construction Period and two months after Final Completion. The scope

of services to be provided by Developer is included in Exhibit F, and the scope of services to be provided by Construction Manager is included in Exhibit L

7.2. **Payment of Development Fee.** The Development Fee shall be paid in installments according to the following schedule:

7.2.1. \$275,000 has been paid pursuant to the Pre-Development Agreement and is included in the 3.5% Development Fee;

7.2.2. 50% of the Development Fee (less the \$275,000 noted in subparagraph 7.2.1 above) shall be paid in equal monthly installments during the Design Development Period;

7.2.3. 10% of the Development Fee shall be paid to Developer at Closing;

7.2.4. 25% of the Development Fee shall be paid to Developer in equal monthly installments during the Construction Period;

7.2.5. 5% of the Development Fee shall be deferred and paid to Developer upon Substantial Completion of the Project;

7.2.6. 5% of the Development Fee shall be deferred and paid to Developer upon Final Completion of the Project; and

7.2.7. 5% of the Development Fee shall be deferred and paid to Developer upon delivery of the Project Close-out Report.

Payments of the Development Fee that become due during the course of development and construction as provided in this Section 7.2 are payable by the Trustee pursuant to the Construction Fund within 15 days after receipt of a monthly draw request from Owner for same in accordance with Section 7.5. Each installment of the Development Fee will be deemed earned upon the date the payment obligation accrues in accordance with this Section 7.2.

7.3. **Fee Base.** The "Fee Base" as used herein shall mean the total amount of the Project Budget (excluding the Development Fee, the Developer's Construction Manager's Fee and Property cost, Bond issuance costs, capitalized interest, Bond reserve requirements, legal fees of both Parties, fees and costs incurred, if any, pursuant to Section 11.16, and any other fees and costs identified in this Agreement as the sole expense of either Party).

7.4. **Payment of Costs and Expenses.** To the extent that costs and expenses have been included as a portion of the Project Budget approved by the Parties in accordance with this Agreement, Owner shall pay such costs and expenses incurred by Team Members (other than Developer) and Contractors in the performance of their obligations with regard to the Project, up to a maximum amount of such costs and expenses as approved in the Project Budget, including, without limitation, costs of the Work (up to the Guaranteed Maximum Price) under the Design Build Contract. Owner shall direct the Construction Trust Fund and/or the CC East Entrance Construction Fund, as applicable, to pay all such approved costs and expenses within fifteen (15) days after Owner receives the monthly draw request in accordance with Section 7.5 from

Developer requesting payment for same. Costs and expenses incurred by Developer in performance of Developer's services under this Agreement are included in the Development Fee above.

7.5. **Monthly Draw Requests.** Developer's requests for (i) payments of the Development Fee pursuant to Section 7.2, (ii) reimbursement of expenses pursuant to Section 7.4, (iii) advance deposits of a customary nature for licenses and permits, FF&E and OS&E and long lead items such as steel and concrete and (iv) payments that are due and payable on Contracts with the Contractors for the Project, including, without limitation, the Design-Build Contract, shall be made to Owner in accordance with the Indenture, with a copy thereof to Owner. Each draw request shall include documentation of all costs and expenses in reasonably sufficient detail to permit Owner and Trustee to determine the appropriateness of such reimbursement payment and, with respect to draw requests during the Construction Period, shall include a certification by Design Builder of the status of completion of Project, in a form reasonably acceptable to Trustee and Owner, and a partial release of liens from the Design Builder with respect to all portions of the Project for which payment to the Design Builder has been made. Funds from the Construction Fund shall be disbursed by wire transfer after receipt of the order of Owner's Representative in accordance with the terms of the Indenture, and payment shall be due within fifteen (15) days after receipt of the items listed above.

7.6. **Owner Payments.** In any instance in which this Agreement provides that Owner shall make or cause to be made payments to or at the direction of Developer within fifteen (15) days of receipt of an invoice, draw request or the like, **Owner** shall endeavor to make or cause to be made such payment within fifteen (15) days or such other period less than thirty (30) days to the extent reasonably possible in light of O\llCrS procedural requirements, but in all events such payments shall be made within no more than thirty (30) days after Owner's receipt of the applicable documentation. In all cases, payments to the Design Builder and Developer shall be paid by wire transfer.

7.7. **Savings.** In the event the final combined sum of the cost of the Work under the Design Build Contract (including the fees and expenses for design services of the Project Architect), the Design Builder's Design Development Period compensation and the Design Builder's Construction Period fee is less than the Guaranteed Maximum Price, the resulting savings shall be shared as follows: 100% shall be paid to Owner up to and including the first \$400,000, and thereafter any savings shall be split 50/50 between Owner on the one hand and Developer, Design Builder and Project Architect, on the other hand.

ARTICLE 8 INSURANCE, INDEMNIFICATION AND LIABILITY

8.1. **Indemnity.** To the fullest extent permitted by law, Developer, at its expense, shall, and/or shall cause Design Builder to, indemnify, defend (with counsel acceptable to **Owner**) and hold harmless Owner and City and their officers, directors, members of the District Board, agents, representatives and employees and their respective subsidiaries and affiliates (each, an "Owner/City Indemnified Party" and, collectively, the "**Owner** Indemnified Parties"), from and against (I) all claims, demands, causes of action in suits associated or connected in any

way with the Project (collectively, "Claims"), and all losses damages and expenses, including, without limitation, reasonable attorneys' fees and costs of investigation and dispute resolution in connection with the Project (collectively, the "Losses"). arising out of or resulting from errors or omissions constituting a breach of the Standard of Care, willful or negligent acts, or any breach of contractual duties of Developer, Design Builder. Contractors or Project Architect. and/or anyone directly or indirectly employed by any of them, and/or anyone for whom any of them may be responsible ("Developer Parties"); and (2) all Claims brought by, through or under Developer. and all Losses in connection with such Claims, arising out of, or resulting from, or in any manner connected with the Project; provided, however, the Developer's obligation to indemnify, and/or cause Design Builder to indemnify, the Indemnified Parties shall not apply to the extent that such **Claims** and/or Losses are caused by the gross negligence or willful misconduct of Owner or, as applicable, Owner/City indemnified Party.

8.2. **Waiver of Certain Claims.** Developer, for itself, and Developer Related Parties agree that it and they shall not assert any claims against Owner based upon the acts or omissions of any construction manager, Contractor or other consultant engaged by **Owner** in connection with the Project (or their respective subcontractors, suppliers, and independent contractors or subconsultants or any other party acting by or through any of them) except for such aClS which, by the tenns of this Agreement, entitle Developer to seek compensation hereunder.

8.3. **Insurance.** Developer shall at all times maintain or cause to be maintained such insurance as will protect Developer from any of the risks of liability imposed on it by this Agreement. Such insurance shall include, withoUl limitation, **Developer's** Commercial General Liability. Worker's Compensation and Employer's Liability Insurance. and Builder's Risk Insurance, as more fully set forth on Exhibit B. Prior to the Effective Date. Developer shall also provide **Owner** with copies of certificaes of insurance for such policies cenified by Developer's insurance compliance officer (or the officer of the named insurer, as applicable) as evidence that the required insurance is in place, upon Owner's request, and in any evenl annually, and within thirty (30) days before any change in any policy of insurance required to be carried hereunder, or thirly (30) before expiration of any policy of insurance required hereunder, as evidence of renewal thereof. Upon the reasonable request of Owner, Developer shaH deliver to Owner certified copies of all insurance policies (or such of them that Owner may request) required to be carried under this Agreement on or prior lo ten (10) days after written request therefor.

8.4. **\Waiver of Consequential, Punitive and Special Damages.** In no event shall either Developer or Owner be entitled lo any compensation for damages on account of consequential, punitive or special damages, no maHer how characterized, including, without limitation, indirect or special damages, or lost profits, cost of capital, interest on judgments, whether pre-or post-judgment, or any other amount, cost or damage similar or related thereto, for any reason whatsoever arising out of or in connection with this Agreement or the Project, including, without limitation, in connection with the termination of this Agreement or Developer"s right to proceed with **any** services.

ARTICLE 9 ADDITIONAL OBLIGATIONS OF DEVELOPER

9.1. **Standard of Care.** Developer shall perform its services hereunder with a degree of care and diligence required by (i) the professional standards prevalent among qualified firms which customarily perform similar services for projects of the nature, complexity and scope of the Project, (ii) the Space Allocation Program, (iii) the Brand Standards for the Sheraton brand (subject to Owner and/or Operator approved waivers), (iv) standard construction practices for construction, repair, renewal, renovation, demolition, rebuilding, addition or alteration, as the case may be, of improvements similar to the Project improvements, (v) all Applicable Law, the requirements of this Agreement, and the requirements, rules and regulations of all insurers of the Project and the Indenture (post Closing), and (vi) a reasonable and prudent developer in light of the particular circumstances of this Project and making adequate provisions for the safety and convenience of all persons affected thereby (the "Standard of Care"). Unless expressly provided otherwise herein, the performance by Developer, the Team Members, and the Contractors of their respective obligations in this Project in connection with the Project shall be in accordance with the Standard of Care. In addition, Developer shall take all reasonable actions so as not to unreasonably interfere with the continuous use and occupancy of the Convention Center.

9.2. **Applicable Law/Developer's Representations.** Developer shall perform its services in compliance with applicable common law, governmental statutes, laws, codes, ordinances, regulations, standards, practices and rules and the requirement of all regulatory authorities and other entities having jurisdiction or rights of approval affecting the performance of its services and/or the Project (collectively, "Applicable Law"). Developer represents and warrants to Owner that Developer (i) is familiar with Applicable Law to the provision of its services under this Agreement in the State of Arizona, and (ii) is fully authorized and properly qualified to perform such services in the State of Arizona. In addition, Developer hereby represents and warrants to Owner that Developer and the Team are financially solvent and possess sufficient experience, licenses, authority, personnel and working capital to complete the Project and that Developer has visited the site for the Project and thoroughly familiarized itself with the local conditions under which the services will be provided.

9.3. **Independent Contractor.** Developer is an independent contractor. Developer acknowledges on its own behalf and on behalf of those for whom it may be responsible that it and they have no right to incur any indebtedness or to make any commitment or contract on behalf of or binding upon Owner without Owner's written consent. This Agreement shall not be deemed to create an employer-employee or joint venture relationship, either express or implied, between Developer and Owner.

9.4. **Presentations.** Upon City's and/or Owner's reasonable request, Developer shall appear on City's and/or Owner's behalf at a reasonable number of meetings of governmental agencies and regulatory officials, community groups, members of City's and Owner's administration, the District Board and the end-users of the Project, and shall make presentations at such meetings and shall prepare written and graphic explanatory materials to be used in connection with such presentations.

9.5. **Staffing.** Developer shall work with the Team and shall assign to the Project its own personnel with significant experience and qualifications in performing Developer's obligations hereunder. Developer shall engage the services of qualified Contractors to assist in the completion of the Project. Developer shall coordinate and be fully responsible for the work, acts, errors and omissions of such Contractors and any other persons either directly or indirectly employed by Developer. If requested to do so by Owner, Developer shall provide Owner with copies of all Contracts with any Contractors. Developer shall ensure that all Contracts with Contractors are consistent with the terms of this Agreement. Developer further agrees to obligate each of the Contractors upon Owner's request to provide their respective services directly to Owner and/or its designees without any further consent in the event that this Agreement is terminated due to an Event of Default or the Parties otherwise agree. All such Contracts shall be in Developer's or Design Builder's name, not as agent for the Owner, and shall specifically include a provision stating or implying that the Contractor is not a third party beneficiary of this Agreement.

9.6. **Liability for Actions of Team and Subcontractors.** Developer acknowledges and agrees that, notwithstanding the retention of the Contractors, the responsibility and obligation of Developer shall be inclusive and extend to the services to be provided by the Contractors, and Developer shall be responsible for the performance of all such services as if Developer had performed them or was obligated to perform them directly. In addition to Developer's responsibility with respect to all services to be provided by the Contractors, Developer shall use commercially reasonable efforts to coordinate its services (including the services to be provided by the Contractors) with the services of any and all other consultants and contractors retained to provide services in connection with the Project, whether or not retained by Developer, Owner or City. Except as otherwise provided in this Agreement, Developer acknowledges and agrees that the amounts payable to Developer hereunder are inclusive of all amounts that may be payable to each Team Member and the Contractors, their employees, or any one or more of them, by reason of the services, and that Developer shall be solely responsible for their payment in full, subject to payment by the Owner directly, through the Construction Fund, or the CC East Entrance Construction Fund, as applicable, to Developer of the amounts payable to Developer pursuant to this Agreement.

9.7. **Labor Issues.** Developer shall not cause and shall use commercially reasonable efforts to prevent any work to be performed on or in connection with the Project that would result in a labor disturbance and shall indemnify and hold harmless Owner from any liability, loss, cost or expense resulting from the actions or inactions of Developer, a Team Member, or the Contractors in connection with any labor disturbances.

9.8. **Sustainable Design.** City, District and Developer acknowledge that the Project shall comply with the Sustainable Energy Standard which has been adopted by the City, with the further intention that the Project shall incorporate all prerequisites and sufficient credits necessary to achieve certification at the LEED Silver level for New Construction and Major Renovations, Version 2.2 ("LEED-NC"). Prior to the Effective Date, the Project has been registered with the USGBC with the intention that the Project will achieve LEED certification upon completion and commissioning. Owner and Developer agree that they shall utilize the LEED score sheet as a sustainable opportunity matrix, and shall incorporate a holistic approach which encompasses site-related issues, water use reduction, optimized energy performance,

recycled and renewable materials, indoor environmental quality, and innovation in the design, construction and operation of the Project.

The achievement of the LEED Silver level certification is dependent on (i) the cooperative and timely efforts of the Developer, Design Builder, Project Architect, Operator, Owner and the City, and (ii) completion of the necessary infrastructure improvements to the district central chilled water plant. In the event receipt of the LEED Silver certification is blocked or delayed by any action or omission of the Operator, Owner, City or entity responsible for the district central chilled water plant, receipt of final LEED Silver certification shall not be considered a requirement for Substantial or Final Completion. It shall be the obligation of the Owner, Developer and the Operator to use all commercially reasonable efforts to pursue obtaining the LEED Silver certification (unless the district central chilled water plant makes it impossible to obtain such certification) after Final Completion and until such certification has been granted.

9.9. Hands on Process. Developer acknowledges and agrees that Owner desires to have a high level of involvement in the design and construction aspects of the Project. To this end, Owner and Developer shall meet on or prior to thirty (30) days after the Effective Date to establish the process by which the Owner will have opportunity to review, participate, revise and approve the concept, design, schematic and construction drawings for the Project.

9.10. Use of Project's Name. After the Effective Date, there shall be no restriction on the use of the name of the Project in written materials (e.g., brochures, promotional advertisements, and in mailings) distributed in the general public or a large group, and on websites, so long as the information is accurate and not misleading.

ARTICLE 10 DEFAULT, TERMINATION, SUSPENSION OR ABANDONMENT

10.1. Termination by Owner for Default.

10.1.1. Developer Default. Owner may terminate this Agreement in the event (1) Developer has breached any term or failed to perform any covenant or agreement in this Agreement, and Developer has been given written notice at least ten (10) business days before the proposed date of such termination of Owner's intent to terminate; provided, however, that if the breach is susceptible of cure and Developer commences to cure, in good faith, and diligently pursues same, Developer shall have such time as is commercially reasonable to cure such breach or failure to perform, (2) Developer is not paying, or admits in writing its inability to pay its debts generally as they become due; files a petition under the federal bankruptcy laws; makes an assignment for the benefit of creditors; consents to the appointment of a receiver, liquidator or trustee for itself or all or part of its assets; commences a proceeding seeking arrangement, composition, readjustment, liquidation, dissolution, or similar relief; or if there shall be filed against Developer any similar petition or there is commenced against Developer any similar proceeding and the same is not discharged within sixty (60) days after filing or commencement; or if a court shall enter an order, judgment, or decree appointing a

receiver, liquidator, or trustee of Developer or of all or **any** part of Developer's assets; (3) **Owner** determines, based on notice from legal counsel for the Bonds, that, due to Developer's actions in contravention of the terms of this Agreement, Owner is in violation of the Bonds, provided however, that if such actions or failure to act can be cured within **thirty** (30) days of notice thereof to Developer, and legal counsel for the Bonds is of the opinion that the interest on the Bonds **will** not be come includible in gross income of the holders thereof for federal income tax purposes during such **thirty** (30) days, then Developer shall have thirty (30) days to cure such default; (4) Developer makes a representation or warranty to **Owner** hereunder knowing that such representation or warranty is not true or is misleading in a material respect; or (5) Developer assigns or purports to assign this Agreement or any of its rights hereunder in violation of this Agreement. Notwithstanding anything to the contrary contained in this Agreement, Owner shall not be required to give Developer any notice or an opportunity to cure its Defaults more than three (3) times over the life of this Agreement, nor shall Owner be required to provide notice and cure periods for any Default that cannot be cured or that is not susceptible to cure within the applicable cure period. Notwithstanding any provision to the contrary herein contained, if (i) the cure periods provided to Owner under the Indenture are less than the cure periods granted herein, the cure periods granted herein shall be deemed reduced to the cure periods in the Indenture, provided Developer is given notice of such reduced period, with the right to terminate this Agreement if such reduced period is not deemed commercially **reasonable** under the circumstances; and (ii) Developer is able to demonstrate to the **reasonable** satisfaction of Owner and Operator that such default is the direct result of following the Operator's written recommendation and would not have occurred but for Developer's **following** the recommendation of the Operator, such default shall not constitute an Event of Default herein. Developer shall keep Owner informed, in writing, of all actions that Developer is taking in order to cure a breach or failure and to satisfy the requirements regarding commencing, pursuing and curing the applicable breach or failure, including, without limitation, satisfaction of time lines regarding the proposed cure and satisfaction of the curative procedure and steps and its effect on the Project Schedule.

10.1.2. **Bankruptcy Matters.** It is recognized that if Developer becomes insolvent, or institutes or has instituted against it a case under the Bankruptcy Code of the United States, or makes a **general** assignment for the benefit of creditors, or if a receiver is appointed for the benefit of its creditors or on account of insolvency, such event or events could impair or frustrate Developer's performance of this Agreement. Accordingly, it is agreed that upon occurrence of any such event, Owner, if it does not exercise its rights under Section 10.1.1, shall be entitled to request of Developer or its successors adequate assurances of future performance in the reasonable opinion of Owner. Failure to satisfy such requirement within ten (10) business days following delivery of the request shall entitle Owner to terminate this Agreement pursuant to Section 10.1.1, by giving notice of termination, without any further cure period. Pending receipt of adequate assurances of performance and actual performance in accordance therewith, Owner shall be entitled to proceed with completion of the Project by **persons** or entities other than Developer, and the

cost thereof shall be charged to any amounts owed to Developer hereunder. Developer acknowledges and agrees that the Deliverables and any other documents or materials described in this Agreement are owned by and the property of **Owner** (subject to Section 11.20) and are not part of Developer's estate in bankruptcy or otherwise.

10.1.3. Termination of Payment if Developer Defaults. If this Agreement is terminated by Owner pursuant to Section 10.1.1 or 10.1.2, subject to the jurisdiction of the Bankruptcy court and Applicable Law with respect to Section 10.1.2, Owner shall pay Developer's Development Fee due as of the date of termination, less amounts withheld by **Owner** to compensate it for any damages, losses and other expenses incurred by it (or which Owner reasonably believes may be incurred by it or are necessary to protect Owner from any damages, losses or other expenses) arising out of or in connection with Developer's default under this Agreement. Such payment shall not be made unless and until Owner can reasonably ascertain the amount of all damages, losses, and other expenses it may incur. This right of set off is in addition to any other right Owner may have under this Agreement or Applicable Law. In addition, Developer shall be required to deliver to **Owner** any and all materials including all information it has developed to date in support of the Project.

10.2. Termination by Owner..

10.2.1. Termination by Owner. Owner may terminate this Agreement (subject to Section 11.20) as a result of a determination that the Project is neither legally nor economically feasible, at any time, upon the giving of thirty (30) days' prior written notice to Developer. If this Agreement is terminated pursuant to this Section 10.2.1, Owner shall pay Developer the compensation and any and all costs and expenses due as of the date of termination including amounts owed to Developer for its Development Fee (prorated through the date of termination) and amounts owed to Team Members, Contractors, Subcontractors and any other Person providing goods and services for the Project through the date of termination based upon the respective Contracts, the work done and/or material provided, and the demobilization costs, subject to Section 8.4.

10.2.2. Termination During First 6 Months Period of the Design Development Period. Notwithstanding any provision hereof to the contrary, in the event Owner terminates this Agreement pursuant to Section 2.2.2 on or before the day that is 180 days following the Effective Date, Owner shall pay the Developer as provided in Section 10.2.1 above, plus an amount equal to sixty percent (60%) of the unpaid balance of the Development Fee that **would** otherwise have been paid to the Developer during the Design Development Period. Following the 180th day described **above**, in the event of a Section 2.2.2 termination, the **Owner** shall pay Developer as provided in Section 10.2.1 above. In the event Owner rejects a commercially reasonable offer by Developer pursuant to the last sentence of Section 2.2.2 and elects to terminate this Agreement, such termination shall be deemed to be a termination for convenience under Section 10.2.3 below.

10.2.3. Termination for Convenience. Owner may terminate this Agreement (subject to Section 11.20) for any reason other than as set forth in Section 10.2.1 and 10.2.2 above at any time upon the giving of thirty (30) days' prior written notice to Developer. If this Agreement is terminated pursuant to this Section 10.2.3 during the Design Development Period, Owner shall pay Developer as provided in Section 10.2.1 above plus an amount equal to sixty percent (60%) of the unpaid balance of the Development Fee that would otherwise have been paid to Developer during the Design Development Period. If this Agreement is terminated pursuant to this Section 10.2.3 following the end of the Design Development Period, the Owner shall pay Developer as provided in Section 10.2.1 above. If the termination of this Agreement under Section 10.1.1 is later found to have been wrongful, it shall automatically be deemed to have been a termination pursuant to this Section 10.2.3, effective as of the original date of such wrongful termination.

10.2.4. Non **Waiver**. Notwithstanding any provision hereof to the contrary, the exercise by Owner of its rights under this Section 10.2 shall not constitute a waiver by **Owner** of any of its respective other rights and remedies under this Agreement in Applicable Law.

10.3. Owner's Failure to Pay or **Other Default**. If **Owner** were to fail to pay undisputed sums, if any, due under this Agreement **within** thirty (30) days after notice that payment is overdue or otherwise were to commit any other Default described in Section 10.7 below, and Developer was not in default of its obligations under this Agreement, then Developer may, as its sole remedy hereunder and at law or in equity, terminate this Agreement. If this Agreement is terminated by Developer pursuant to this Section 10.3, Owner shall pay to Developer the compensation and any and all costs and expenses due as of the effective date of termination as calculated in Section 10.2. above. Developer shall have no other right to terminate this Agreement due to a breach or default under this Agreement except as set forth in this Section 10.3.

10.4. Suspension. Owner may elect to suspend the Project at any time. If Owner suspends the Project, Owner shall pay to Developer the compensation and any and all costs and expenses due as of the date of such suspension, including amounts owed to Developer for its Development Fee (prorated through the date of suspension), and amounts owed to Team Members, Contractors, Subcontractors and any other Person providing goods and services for the Project through the **date** of suspension based upon the respective Contracts, on the Work done and/or material provided, and on the demobilization costs and reasonable damages, if any, subject to Section 8.4. If after a suspension Owner requests Developer to resume providing services for **the** Project, compensation shall be adjusted to the extent necessary to provide for any actual and required increases in costs directly related to the suspension or later resumption of services for the Project after the suspension.

10.5. **Cooperation**. In the event of a termination, Developer shall cooperate with **Owner** in the transition to a new developer, if any, and shall deliver promptly to Owner and Owner's Representative all Deliverables, Reports and other materials and records arising out of and/or relating to the Project that are, or are permitted or required to be, in Developer's possession or control provided Developer shall be paid the compensation and costs and expenses

due as of the **effective** date of termination, as calculated in Section 10.2.2 above. It is a precondition to any payment to Developer that Developer complies in a reasonably commercial manner with the provisions of this Section 10.5

10.6. **Sale Remedy.** The **payments** provided for in this ARTICLE 10 shall be the sole remedy of Developer for termination of this Agreement, or for suspension or abandonment of the **Project**; provided, however, this Section 10.6 shall not waive or release the provisions of Section 11.21. No termination, suspension, abandonment, delay or postponement shall give rise to any cause of action (whether for damages, additional compensation or otherwise) against Owner except for amounts due expressly under this Agreement, and any claim shall be made by Developer solely in accordance with the terms and provisions of this Agreement.

10.7. **Default by Owner.** The occurrence of any of the following shall be Default by Owner under this Agreement:

10.7.1. The filing by Owner of a voluntary proceeding under present or future bankruptcy, insolvency, or other laws respecting debtor's rights.

10.7.2. The consent by Owner to an involuntary proceeding under present or future bankruptcy, insolvency, or other laws respecting debtor's rights.

10.7.3. The entry of an order for relief against Owner or the appointment of a receiver, trustee, or custodian for all or a substantial part of the property or assets of Owner in any involuntary proceeding, and the continuation of such order, judgment or decree unstayed for any period of sixty (60) consecutive days.

10.7.4. The failure of Owner to perform or to observe any covenant, obligation or requirement of this Agreement not otherwise specifically named as a Default in Section 10.3 above or in this Section 10.7, and the continuation of such failure for thirty (30) days after written notice from Developer specifying the nature and extent of any such default, or, if such default cannot reasonably be cured within such 30-day period, the failure either (i) to commence to cure such default within such 30-day period and to diligently continue to pursue such efforts to cure to completion, or (ii) to cure such default within a reasonable time after the expiration of the first 30-day period, in no event to exceed ninety (90) days after the written notice of default.

10.7.5. The failure of Owner to give Notice to Proceed within ninety (90) days of Closing.

10.8. **No Special Interest.** Notice is hereby given of A.R.S. Section 38-511, which provides, inter alia, that this Agreement may be cancelled by the Owner at any time within three (3) years after its execution, without penalty or further obligation, if any person significantly involved in initiating, negotiating, securing, drafting or creating the Agreement on behalf of the Owner is, at any time while the Agreement is in effect, an employee or agent of any other party to the Agreement in any capacity or a consultant to any other party to the Agreement with respect to the subject matter of the Agreement.

ARTICLE II MISCELLANEOUS

11.1. **Limit of Liability.** In performing its services hereunder with respect to development and construction of the Project, Developer extends no guarantees and makes no representation or warranty, express or implied, regarding the sufficiency of any design, plans or drawings prepared by others, but agrees to work with such Persons to correct such designs, plans or drawings with such corrections to be made at no additional expense to Owner, if and to the extent, such corrections are not required due to the fault of Owner or its employees, agents, or its contractors or consultants or due to a change order approved by Owner. Developer shall use **reasonable good faith** to protect the economic interests of Owner with respect to design, development and construction of Project.

DEVELOPER ACKNOWLEDGES THAT, EXCEPT FOR THE OWNER'S REPRESENTATIONS, NEITHER THE OWNER NOR THE CITY, NOR ANY AFFILIATE OF THE OWNER OR THE CITY, NOR ANY RELATED PARTY OF THE OWNER OR THE CITY, HAS MADE ANY REPRESENTATION OR WARRANTY WHATSOEVER (WHETHER EXPRESS OR IMPLIED) REGARDING THE SUBJECT MATTER OF THIS AGREEMENT OR ANY OTHER PROJECT DOCUMENT. DEVELOPER AGREES THAT NEITHER THE OWNER NOR THE CITY, NOR ANY OF THE OWNER'S OR THE CITY'S AFFILIATES, NOR ANY OF THE OWNER'S OR THE CITY'S RELATED PARTIES SHALL HAVE ANY RESPONSIBILITY FOR (AND HAVE MADE NO REPRESENTATION OR WARRANTIES WHATSOEVER AS TO) ANY OF THE DEVELOPER'S RISKS.

NEITHER THE OWNER OR THE CITY, OR ANY OF THEIR RESPECTIVE AFFILIATES, SHALL BE LIABLE AS A RESULT OF ANY FAILURE BY ANY PERSON (OTHER THAN THE OWNER OR THE CITY OR ANY PERSON WITH WHOM THE CITY OR OWNER HAVE SEPARATE DIRECT CONTRACTS) UNDER ANY APPROVED PLANS OR CONSTRUCTION DOCUMENT TO PERFORM THEIR RESPECTIVE OBLIGATIONS THEREUNDER. IT IS UNDERSTOOD AND AGREED BY DEVELOPER (FOR ITSELF OR ANY PERSON CLAIMING BY, THROUGH OR UNDER IT) THAT IT HAS ITSELF BEEN, AND WILL CONTINUE TO BE, SOLELY RESPONSIBLE FOR MAKING ITS OWN INDEPENDENT APPRAISAL OF, AND INVESTIGATION INTO, THE FINANCIAL CONDITION, CREDIT WORTHINESS, CONDITION, AFFAIRS, STATUS AND NATURE OF ANY TEAM MEMBER, CONTRACTOR, SUBCONTRACTOR OR CONSULTANT AND UNDER ANY CONSTRUCTION DOCUMENTS.

11.2. **Waiver.** The failure or any Party to insist upon strict performance of any of the terms or provisions of this Agreement or to exercise any option, right or remedy contained in this Agreement, shall not be construed as a waiver or as a relinquishment for the future of such term, provision, option, right or remedy. No waiver by any Party of any term or provision of this Agreement shall be deemed to have been made unless expressed in **writing** and signed by such Party.

11.3. **"Including".** In this Agreement, whenever general words or terms are followed by the word "including" (or other forms of the word "include") and words or particular and specific meaning, the phrase "including without limitation," and the general words shall be

construed in their widest extent and shall not be limited to Persons or things of the same general kind or class as those specifically mentioned in the words of particular and specific meaning.

11.4. **Notices.** All notices or other communications required or desired to be given with respect to this Agreement shall be **in** writing and shall be delivered by hand or by courier service, sent by registered or certified mail, return receipt requested, bearing adequate postage, or sent by nationally recognized overnight delivery service (such as Federal Express or UPS), or sent by facsimile, and properly addressed as provided below. Each notice given by mail shall be deemed to be given by the sender when received or refused by the Party intended to receive such notice; each notice delivered by hand or by courier service shall be deemed to have been given and received when actually received by the Party intended to receive such notice or when such Party refuses to accept delivery of such notice; each notice given by overnight delivery service shall be deemed to have been given and received on the next business day following deposit thereof with the overnight delivery company; and each notice given by facsimile shall be deemed to have been given and received upon transmission, provided confirmation of receipt is received back by the sending facsimile prior to 5:00 p.m. local time at the sending location, or on the next business day if sent after 5:00 p.m. local time at the sending location. Upon a change of address by either Party, such Party shall give written notice of such change to the other parties in accordance with the foregoing. Inability to deliver because of changed address or status of which no notice was given shall be deemed to be receipt of the notice sent, effective as of the date such notice would otherwise have been received.

To Owner:

Rio Nuevo Multipurpose Facilities District
260 S. Church Avenue
P. O. Box 27210
Tucson, AZ 85726
Attention: Greg Shelko
Telephone: 520.791.5580
Facsimile: 520.791.3240
Email: greg.shelko@tucsonaz.gov

with a copy to:

Dallard Spahr Andrews & Ingersoll LLP
3300 North Central Avenue, Suite 1800
Phoenix, AZ 85012
Attention: M. Virginia Perry
Telephone: 602.798.5473
Facsimile: 602.997.3194
Email: perryg@ballardspahr.com

with a copy to:

City Attorney
City of Tucson
255 West Alameda
P. O. Box 27210
Tucson, AZ 85726-7210
Attention: Michael Rankin
Telephone: 520.791.4221
Facsimile: 520.623.9803
Email: mike.rankin@tucsonaz.gov

To Developer:

Garfield Traub Development Arizona, LLC
13455 Noel, Suite 2150
Dallas, TX 75240
Attention: Steve Moffett
Telephone: 972.716.3838
Facsimile: 972.991.5150
Email: smoffett@garfieldtraub.com

with a copy to:

Daniel K. Hennessy
Garfield Traub Development, LLC
Two Galleria Tower
13455 Noel Road, Suite 2150
Dallas, TX 75240
Telephone: 972.716.3848
Facsimile: 972.991.5150
Email: dhennessy@garfieldtraub.com

11.5. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall comprise but a single document.

11.6. Ownership and Use of Reports and Deliverables. Any and all documents, drawings, specifications, presentation models, the Approved Plans, samples and materials, and other materials that are either prepared or received by, under or through Developer in connection with the Project and other works that derive therefrom or are created in connection therewith (collectively, the "Deliverables") are hereby assigned to Owner and shall be deemed the sale and exclusive property of, and owned by, the Owner, subject to (i) Section 11.20 and (ii) payment by the Owner to Developer of the Development Fee and any other amounts that may be due and payable hereunder on a timely basis in accordance with this Agreement and except as otherwise provided herein. All Deliverables shall be deemed works for hire, and all rights and title in all Deliverables shall be owned by and vested in the Owner; provided however, Owner shall

indemnify Project Architect for the use of Project Architect's work product in connection with repairs or alterations to the Project (excluding post opening repairs performed in the first 12 months after Final Completion and warranty work), or in connection with any other project. The term "Deliverables" as used in this Agreement includes graphic images of the Deliverables contained in computer files stored on computer disks, tapes and other computer memory storage media or in any other form now known or hereafter invented. In the event of any termination of this Agreement pursuant to Section 10.1 or 10.2, Owner shall have the right thereafter to use the Deliverables in connection with the Project, subject to Section 11.20.

11.7. Sensitive Security Information and Confidentiality Requirements.

11.7.1. Confidential Requirements. None of Developer, the Team Members and the Contractors, nor their respective employees, officers, directors, principals, agents or subcontractors, shall divulge Confidential Information (as hereinafter defined) concerning the Project, the Owner or this Agreement to anyone without Owner's prior written consent, which consent may be withheld or granted in its sole discretion; provided, that Developer may without Owner's consent share Confidential Information with those of its employees, officers, directors, agents, principals, Team Members, Contractors and Subcontractors who need to receive such information in order to perform their Project Obligations, or to other persons who have executed confidentiality agreements with respect to the Confidential Information; provided further, that Developer informs each such person and entity receiving Confidential Information of the confidential nature of such Confidential Information and directs each such person and entity receiving the Confidential Information to treat the Confidential Information confidentially and not to use it other than in connection with the performance of its Project obligations. The term "Confidential Information" as used herein shall mean the Reports, Deliverables and all knowledge, information, data, materials, trade secrets and work product gained, obtained, and derived, produced, generated or otherwise acquired by Developer, Team Members, and Contractors or their respective employees, officers, directors, principals, agents or Subcontractors, with respect to the Project, or in the present or projected operation for affairs of the Hotel. The term Confidential Information" shall not include information that is or becomes generally available to the public. Developer or Design Builder will obtain similar assurances from all Contractors and the Project Architect.

11.7.2. Expectations and Disclosures. Developer shall immediately notify Owner of any court order or subpoena requiring disclosure of Confidential Information and shall cooperate with legal counsel for Owner in the appeal or challenge to any such order or subpoena. Developer may disclose Confidential Information required to be disclosed pursuant to court order or subpoena, only after Owner, as receiver, has exhausted any lawful and timely appeal or challenge that Owner elects to file in connection with such court order or subpoena.

11.8. Amendment. This Agreement may be amended only by written instrument signed by the Parties hereto.

11.9. No Solicitation. Developer agrees not to solicit for employment (either as an employee or independent contractor) any employee or independent contractor of Owner at any time during performance of this Agreement or any other agreement with Owner, and for a period of one (1) year after the latest of (i) the expiration of or termination of the last of any agreement with Owner or (ii) the completion of all services to be provided by Developer to Owner under this Agreement or any other agreement with Owner.

11.10. Assignment Inasmuch as Owner is relying on the experience, skill, judgment and qualifications of Developer, Developer may not assign its rights or delegate its obligations under this Agreement, without the prior written consent of the Owner, which consent may be given or denied in its sole and arbitrary discretion. Any attempted assignment or delegation by Developer without such consent shall be void. Developer represents that its principals and responsible individuals thereof for whom experience and background information has been provided to the Owner will maintain their roles in operating Developer. Developer, upon request, shall execute such reasonable further assurances or confirmations of the performance of its obligations for the benefit of any assignee of Owner.

11.11. Integration; Entire Agreement. This Agreement, including the heading and background sections and all exhibits and schedules attached hereto or referenced herein, represents the entire and integrated agreement between Owner and Developer and supersedes all prior negotiations, representations or agreements, either written or oral, and any responses to requests for qualifications and/or proposals, presentations prepared to update Owner or any letters, memoranda, drawings, sketches or other material provided to Owner's Representative.

11.12. No Third-Party Beneficiaries. Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against Owner and/or Developer, and the parties confirm, without limitation, that no third party rights are created in favor of, by or against Owner's Representative or Developer's Representative by virtue of this Agreement.

11.13. Savings Clause; Conflict. In case any one or more provisions set forth in this Agreement shall for any reason be held invalid, illegal or unenforceable in any respect, any such invalidity, illegality, or unenforceability shall not affect any other provision of this Agreement, and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been incorporated herein. In the case of a conflict between any provisions of this Agreement and any provision in any Deliverable or the Reports as between Owner and Developer, the provisions of this Agreement shall prevail.

11.14. Survival. Those obligations of Developer, including, without limitation, the insurance and indemnification obligations of Developer and Developer's agreement to keep information confidential and to refrain from hiring employees of Owner, that could possibly imply the need for performance or observance thereof after the expiration or sooner termination of this Agreement shall survive such expiration or termination.

11.15. Approvals. Notwithstanding anything to the contrary contained in this Agreement, Owner's or Owner's Representative's review and approval or acceptance of any documents or other matters required herein shall be for the purpose of providing Developer with

general information as to Owner's objectives and goals with respect to the Project, and shall not be for the purpose of determining the accuracy and completeness of such documents and shall in no way create any liability on the part of Owner for errors, inconsistencies or omissions in any documents, nor shall any such review and/or approval alter any of Developer's responsibilities hereunder. No action, approval, determination, inspection, test, review, comment, and/or payment, or the failure to take action, approve, determine, inspect, test, review, comment, and/or make payment shall affect or impair any of Developer's representations, obligations or covenants under this Agreement or be construed to alter, amend or waive any of Developer's obligations to comply with any of the provisions of this Agreement, and Owner shall not be deemed to have waived any of its rights arising therefrom or in connection therewith nor to have assumed or created any liability on the part of Owner. Whenever Owner's review, approval, consent or other action is required or requested, such shall be granted, withheld and/or conditioned in Owner's complete discretion unless another standard is expressly otherwise stated in the provision that mandates, permits or allows the approval, consent or other action that is at issue.

11.16. Dispute Resolution.

11.16.1. Initial Dispute Resolution. If a dispute arises out of or relates to this Agreement or its breach, the Parties shall endeavor to settle the dispute first through direct discussions. If the dispute cannot be settled through direct discussions, the Parties shall endeavor to settle the dispute by mediation under the Construction Industry Mediation Rules of the American Arbitration Association before recourse to arbitration. The location of the mediation shall be in the City of Tucson, Arizona, unless the parties mutually agree otherwise. Once one Party files a request for mediation with the other Party and with the American Arbitration Association, the parties agree to conclude such mediation within sixty (60) days of the filing of the request.

11.16.2. Agreement To Arbitrate. Any controversy or claim arising out of or relating to this Agreement or its breach not resolved by mediation shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then in effect unless the Parties mutually agree otherwise. The location of the mediation shall be in the City of Tucson, Arizona, unless the parties mutually agree otherwise.

11.16.3. Notice Of Demand. A written demand for mediation or arbitration by any Party shall be filed with the American Arbitration Association and the other Party to this Agreement within a reasonable time after the dispute or claim has arisen, but in no event after the applicable statute of limitations for a legal or equitable proceeding would have run.

11.16.4. Award. The arbitration award shall be final. Judgment upon the award may be confirmed in any court having jurisdiction.

11.16.5. Work Continuance And Payment. Unless otherwise agreed in writing by the Parties, Developer shall continue to perform its obligations under this Agreement and maintain the Project Schedule during any mediation or arbitration.

proceedings. If the Developer continues to perform, Owner payments in accordance with this Agreement shall continue to be made.

11.16.6. Multiparty Proceeding. The Parties agree that all persons necessary to resolve a claim shall be parties in the same mediation or arbitration proceeding. Developer and Owner shall use their best efforts to include appropriate provisions in all Contracts relating to the Project to provide for the consolidation of any mediation or arbitration proceedings.

II. 16.7. Cost Of Dispute Resolution. The prevailing Party in any dispute arising out of or relating to this Agreement or its breach that is resolved by mediation or arbitration shall be entitled to recover from the other Party reasonable attorney's fees, costs, and expenses incurred by the prevailing Party in connection with such arbitration.

11.17. Liens. In the event that any Team Member, Contractor or Subcontractor or any other party for whom Developer is responsible establishes a lien against the Project, Developer shall, within thirty (30) days of receipt of notice from Owner regarding such lien, either (i) cause the lien to be discharged of record or (ii) obtain and record a lien discharge bond from a surety in a form acceptable to Owner at no additional cost to Owner. If Developer fails to cause the lien to be discharged within such thirty (30) day period, Owner shall have the right to withhold from any sum payable to Developer, an amount equal to one hundred percent of the amount of such lien. Owner may either (a) apply amounts so withheld to discharging such lien or (b) retain such amounts until such lien is discharged or released by Developer or the lienor, and shall thereafter credit to Developer any amounts remaining after payment of the fees and expenses Owner incurs in connection with such lien. Developer agrees to indemnify and hold harmless Owner from all costs and expenses incurred by Owner in connection with such liens. Notwithstanding the foregoing, Developer shall have no obligation to discharge a lien or indemnify and/or hold harmless Owner from costs and expenses incurred in connection with liens, and Owner shall have no right to withhold payments from Developer, to the extent that Owner wrongfully failed to pay Developer for the Work for which the lien is established.

11.18. Headings. The headings preceding any of the Articles, Sections or subsections of this Agreement are for convenience only and shall not be deemed to amplify, modify or give full notice of the contents thereof.

11.19. Representation. Each of Developer and Owner has the requisite power and authority to execute this Agreement and to consummate the transactions contemplated hereby. The execution and delivery of this Agreement by Developer and Owner and the consummation by Owner and Developer of the transactions contemplated hereby have been duly authorized by the appropriate governing entity and no other proceedings or consent is necessary to authorize this Agreement or to consummate the transactions contemplated hereby. This Agreement has been duly executed and delivered by Owner and Developer, and assuming due execution and delivery by each of Owner and Developer, this Agreement constitutes a valid and binding obligation on Owner and Developer, enforceable against Owner and Developer (as applicable), in accordance with its terms.

11.20. Future Pursuit of Hotel Projects. Notwithstanding anything in this Agreement to the contrary, in the event that this Agreement is terminated by Owner without cause, Owner shall not pursue a convention center hotel development which involves the use of the work product of Developer, Design Builder and Project Architect, either alone or with anyone other than Developer, for a period of one (1) year from the date of such termination.

11.21. Waiver. The failure of any Party to insist upon strict performance of any of the terms or provisions of this Agreement or to exercise any option, right or remedy contained in this Agreement shall not be construed as a waiver or as a relinquishment for the future of such term, provision, option, right or remedy. No waiver by any Party of any term or provision of this Agreement shall be deemed to have been made unless expressed in writing and signed by such Party.

11.22. Delegation by Developer. Owner understands and agrees that the services performed, or obligations fulfilled, by Developer hereunder shall be performed or fulfilled either directly by Developer or by persons that Developer causes to perform such services or fulfill such obligations; provided, however, in no event shall Developer be relieved of any of its obligations or duties under this Agreement by any such delegation. Specifically, Developer shall be in default hereunder if any party to whom Developer has delegated responsibility shall fail to comply with the terms of the applicable Contract and such failure results in a breach or failure to comply with the terms of this Agreement by Developer. For example, if the Design Builder fails to comply with the Project Schedule through no fault of Owner, then Developer shall be deemed in default under this Agreement.

11.23. Assignment to Owner of Design **Build** Contract. Developer hereby assigns to Owner, Developer's rights under the Design Build Contract, and every other Contract to which it is a party, and consents to Owner's assignment thereof to Trustee. Such assignment(s) shall be exercised only upon a material Event of Default by Developer hereunder and subject to the terms and conditions herein. Each party to each such Contract shall acknowledge Developer's assignment to Owner and Owner's assignment thereafter to Trustee. Developer agrees to execute such other documents and take such other actions as deemed necessary or appropriate by Owner and/or Trustee to effectuate such assignments. The Developer's assignments hereunder (i) shall be conditioned upon the Developer's retaining an exclusive license to all rights under the Design Build Contract and every other Contract Document to which it is a party for the purpose of completing the Project pursuant to this Agreement, (ii) shall create no liability in Owner or Trustee until the Contract in question has been assumed in writing by such Parties, and (iii) shall not relieve Developer of any of its obligations under this Agreement or any Contract.

{SIGNATURE PAGE FOLLOWS}

WITNESS the following signatures:

IUO NUEYO MULTIPURPOSE FACILITIES
DISTRICT, an Arizona municipal corporation

Approved as to **form** this ____ day of
_____, **2009**:

By: See Next Pages

Name: _____

Title: _____

Date: _____

By: See Next Pages

Name: _____

Title: _____

GARFIELD TRAUB DEVELOPMENT
ARIZONA, LLC, an Arizona limited liability
company

By: See Next Page

Name: _____

Title: _____

Date: _____

Solely in connection with City's obligations and agreement pursuant to Sections 2.2.2, 4.1.14, and 4.2 of this Agreement.

CITY OF TUCSON, an Arizona municipal
corporation

By: _____

Name: Robert E. Walkup

Title: Mayor

Date: May 12, 2009

Approved as to form:

City Attorney

City Clerk File Note:

This document **was** signed in counterpart
resulting in three **signature** pages.

RWR:SM:dp 5/18/09

Signature Page of Master Development Agreement

ATTEST:

City Clerk May 12, 2009

WITNESS the following signatures:

**RIO NUEVO MULTIPURPOSE FACILITIES
DISTRICT**, an Arizona municipal corporation

Approved as to form this ____ day of
_____, 2009:

By: See Next Page

Name: _____

Title: _____

Date: _____

By: See Next Page

Name: _____

Title: _____

**GARFIELD TRAUB DEVELOPMENT
ARIZONA, LLC**, an Arizona limited liability
company

By: 

Name: GREG GARFIELD

Title: PRINCIPAL AND CFO

Date: 5/8/09

*Solely in connection **with** City's obligations and agreements pursuant to Sections 2.2.2, 4.1.14,
and 4.2 of this Agreement.*

CITY OF TUCSON, an Arizona municipal
corporation

By: See Previous Page

Name: _____

Title: _____

Date: _____

City Clerk File Note:

This document was signed in counterpart
resulting in three signature pages.

RWR:SM:dp 5/18/09

SignalUre Page 0/Master Development Agreement

WITNESS the following signatures:

Approved as to form this 8th day of
May, 2009:

By: William A. Hicks III
Name: William A. Hicks III
Title: District Attorney

RIO NUEVO MU TIPURPOSE FACILITIES
DISTRICT, an Arizona municipal corporation

By: ANNE MARIE RUSSELL
Name: _____
Title: CHAIR, RNMTDB
Date: 15 MAY 2009

GARFIELD TRAUB DEVELOPMENT
ARIZONA, LLC, an Arizona **limited** liability
company

By: See Previous Page
Name: _____
Title: _____
Date: _____

*Solely in connection with City's obligations and agreements pursuant to Sections 2.2.2, 4.1.14,
and 4.2 of this Agreement.*

CITY OF TUCSON, an Arizona municipal
corporation

By: See Previous Pages
Name: _____
Title: _____
Date: _____

City Clerk File Note:

This document was signed in counterpart
resulting in three signature pages.
RWR:SM:dp 5/18/09

Signature Page of Master Development Agreement

DESCRIPTION OF LEASED PROPERTY

**PARCEL I (Tucson Convention Center and On Site Parking)
(FKA Parcel Group IV, Tucson Convention Center)**

BLOCK D OF TUCSON CONVENTION CENTER, A SUBDIVISION OF PIMA COUNTY, ARIZONA, ACCORDING TO THE PLAT RECORDED IN BOOK 42 OF MAPS AND PLATS AT PAGE 10, RECORDS OF PIMA COUNTY, ARIZONA.

EXCEPT THAT PORTION OF BLOCK D LYING BELOW A DEPTH OF 500 FEET MEASURED VERTICALLY FROM THE CONTOUR OF THE SURFACE THEREOF AS SET FORTH IN DEED RECORDED NOVEMBER 29, 1977 IN DOCKET 5661 AT PAGE 1064 AND IN DEED RECORDED JANUARY 30, 1979 IN DOCKET 5954 AT PAGE 616.

FURTHER EXCEPT THAT PORTION OF BLOCK D CONTAINING THE MECHANICAL SYSTEMS, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHWEST SECTION CORNER OF SAID SECTION 13:

THENCE SOUTH 00°22'35" EAST, ALONG THE WEST LINE OF SAID SECTION 13, A DISTANCE OF 48.82 FEET TO THE POINT OF INTERSECTION OF SAID WEST LINE AND THE CENTERLINE OF CONGRESS STREET:

THENCE NORTH 81°41'59" EAST, ALONG THE CENTERLINE OF SAID CONGRESS STREET, A DISTANCE OF 525.36 FEET TO THE POINT OF INTERSECTION OF CONGRESS STREET AND GRANADA AVENUE:

THENCE SOUTH 19°21'07" EAST, ALONG THE CENTERLINE OF SAID GRANADA AVENUE, A DISTANCE OF 167.19 FEET TO THE BEGINNING OF A CURVE TO THE RIGHT;

THENCE ALONG SAID CURVE WITH A CENTRAL ANGLE OF 26°19'28", AND A RADIUS OF 470.00 FEET, A DISTANCE OF 215.94 FEET;

THENCE ALONG SAID CENTERLINE OF GRANADA AVENUE SOUTH 06°58'22" WEST, A DISTANCE OF 224.32 FEET TO A 2" BRASS CAP SURVEY MONUMENT;

THENCE SOUTH 51°24'44" EAST, A DISTANCE OF 330.40 FEET TO THE TRUE POINT OF BEGINNING;

THENCE NORTH 89°59'54" EAST, A DISTANCE OF 246.79 FEET:

THENCE SOUTH 00°00'06" EAST, A DISTANCE OF 323.66 FEET:

THENCE SOUTH 89°58'24" WEST, A DISTANCE OF 245.79 FEET;

THENCE NORTH 00°00'06" WEST, A DISTANCE OF 323.65 FEET TO THE TRUE POINT OF BEGINNING.

THE ABOVE EXCLUDED THE MECHANICAL SYSTEMS PARCEL IS DESCRIBED IN CONFORMANCE WITH THE RIGHT OF WAY PLAN OF GRANADA AVENUE, CITY OF TUCSON DEPARTMENT OF TRANSPORTATION. PLAN NO. R-87-11, SHEET 3 OF 9, DATED AUGUST 17, 1987.

**PARCEL II (Tucson Convention Center Parking)
(FKA Parcel Group V (a), Convention Center Parking)**

THAT PORTION OF THE NORTHEAST QUARTER OF SECTION 14. TOWNSHIP 14 SOUTH, RANGE 13 EAST, GILA AND SALT RIVER MERIDIAN, PIMA COUNTY, ARIZONA, AND THAT PORTION OF LOT 6 OF BLOCK 221 OF THE CITY OF TUCSON, PIMA COUNTY, ARIZONA. ACCORDING TO BOOK 3 OF MAPS AND PLATS AT PAGE 70 SPECIFICALLY DESCRIBED IN INSTRUMENT RECORDED IN DOCKET 8121 AT PAGE 1663 LYING SOUTHERLY OF THE SOUTHERLY RIGHT OF WAY LINE OF CUSHING STREET AS ESTABLISHED IN INSTRUMENT RECORDED IN DOCKET 8121 AT PAGE 1667.

EXCEPT A PARCEL OF LAND IN SECTION 13, TOWNSHIP 14 SOUTH, RANGE 13 EAST, GILA AND SALT RIVER MERIDIAN, CITY OF TUCSON, PIMA COUNTY, ARIZONA, WITH THE BASIS OF BEARINGS BEING THE WEST LINE, NORTHWEST QUARTER, SAID SECTION 13 AS NORTH 00°22'21" WEST; SAID PARCEL BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS;

COMMENCING AT THE WEST QUARTER CORNER OF SAID SECTION 13;

THENCE NORTH 20°19'31" EAST, 682.29 FEET TO A 5/8 INCH REBAR AT THE NORTHWEST CORNER OF LOT 1, BLOCK 8, SOUTHWESTERN ADDITION AS RECORDED AT MAPS AND PLATS BOOK 3, PAGE 109 OF THE PIMA COUNTY RECORDER'S OFFICE RECORDS, SAID 5/8 INCH REBAR BEING THE POINT OF BEGINNING;

THENCE SOUTH 06°04'05" WEST, 170.08 FEET;

THENCE SOUTH 75°40'44" WEST, 1.54 FEET TO A 3/4 INCH OPEN PIPE;

THENCE NORTH 06°33'05" EAST, 170.62 FEET BACK TO THE POINT OF BEGINNING.

FURTHER EXCEPT THAT PORTION OF SAID PROPERTY LYING BELOW A ~~DEPTH~~ OF 500 FEET MEASURED VERTICALLY FROM THE CONTOUR OF THE SURFACE THEREOF AS SET FORTH IN DEED RECORDED NOVEMBER 29, 1977 IN DOCKET 6661 AT PAGE 1084.

DEVELOPER'S INSURANCE

Insurance

(a) Developer shall secure and deliver to the Owner (or cause to be secured and delivered to the **Owner**) at the times delineated in subsection (d) below the insurance indicated below and thereafter shall keep such insurance coverage in force at all times during the Tenn hereof:

(i) a commercial general liability (COL) insurance policy, in a form acceptable to Owner, including independent contractors, contractual liability, products and completed operations, personal and advertising injury, bodily injury and property damage, covering the premises, the operations hereunder, in the amount of One Million Dollars (\$1,000,000.00) per occurrence, per project, and Two Million Dollars (\$2,000,000.00) in the aggregate for bodily injury and property **damage**. The policy shall include medical liability for Emergency Medical Techs, if any, to the extent they are working on the Property for Developer. Developer shall immediately reinstate the aggregate limit in the event it is exhausted or impaired by claim payments.

(ii) an umbrella liability insurance policy, in a form acceptable to Owner, with a limit of Fifteen Million Dollars (\$15,000,000.00) in the aggregate, in a form acceptable to Owner. Developer shall reinstate the aggregate limit in the event it is exhausted or impaired by claim payments.

(iii) a comprehensive automotive *bodily* injury and property damage insurance policy, in a form acceptable to Owner, covering all vehicles in connection with the **Project**, whether such vehicles are owned by the Developer, Developer's **parents**, subsidiaries and their officers, **partners**, agents, employees, volunteers, members and shareholders (collectively, "Developer Affiliates"), Owner or Owner's parents, subsidiaries, and their officers, **partners**, agents, employees, volunteers, members and shareholders (collectively, "**Owner** Affiliates"), or otherwise, with a combined single limit of not less than One Million Dollars (\$1,000,000.00) per occurrence (including an extension of hired and non-owned coverage).

(iv) worker's compensation insurance in an amount not less than statutory limits (including occupational disease hazards) and employer's liability coverage with minimum limits of One Million Dollars (\$1,000,000.00) bodily injury by accident for each accident; One Million Dollars (\$1,000,000.00) bodily injury by disease policy limit; One Million Dollars (\$1,000,000.00) bodily injury by disease for each employee; with an insurance company authorized **in** the State of Arizona or through the Arizona State Compensation Insurance Fund.

(v) fidelity/crime insurance coverage in the amount not less than of One Million Dollars (\$1,000,000.00) covering Developer's employees, providing both **first** party and third party coverage (**i.e.**, including coverage for fidelity/crime loss by Developer's employees **against** Developer and also against Owner).

(vi) any other insurance coverage reasonably required by Owner.

(b) The terms of all insurance policies referred to in this Exhibit shall preclude subrogation claims to the extent insurance is provided or should have been provided pursuant to this Exhibit against Developer, Developer Affiliates, Owner, and Owner Affiliates.

(c) Developer shall be the named insured or additional insured under all liability insurance described in paragraph (a) above. Owner and Owner Affiliates shall be identified as additional insured, in a form acceptable to Owner, under the insurance coverage described in paragraphs (a)(i), (ii) and through (iii) above.

(d) Certificates evidencing the existence of the policies set forth in subsection (a)(i), (iii), (iv) and (v), in a form acceptable to Owner, shall be delivered to the Owner **within** five (5) business days after the Effective Date of the Agreement. Certificates evidencing the existence of the policies set forth in the remaining subsections of section (a) above, in a form acceptable to Owner, shall be delivered to Owner prior to commencement of construction of the CC East Entrance. Copies of the applicable policies shall be delivered to the Owner, upon the reasonable request of the Owner. Each such policy or certificate shall contain a valid provision or endorsement stating, "This policy will not be canceled without first giving thirty (30) days' written notice thereof (or ten (10) days' notice for reason of non-payment of premium), sent by certified mail, return receipt requested, to Owner, Rio Nuevo Director, 260 S. Church, Tucson, AZ 85701 and Developer, Garfield Traub Development **Arizona**, LLC, Attention: Steve Moffett and Daniel K. Hennessy."

(e) Each of the aforesaid policies shall be issued by an insurance company acceptable to Owner which must have a "General Policyholder's Rating" of not less than A- and a financial rating of not less than Class X, as set forth in the most current rating as issued by A.M. Best.

(f) A renewal certificate of insurance evidencing coverage shall be delivered by the named insured to the other party at least twenty (20) days after a policy's expiration **date**, with a complete copy of such renewal insurances to follow upon the reasonable request of Owner.

(g) Developer shall cooperate with Owner, if requested by Owner, in securing appropriate evidence of insurance and/or insurance endorsements as may be required for certification of the Project in accordance with the U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED) rating system.

(h) In the event of a loss, Developer will pay, or cause to be paid, all deductibles for all insurance coverage it maintains. Developer will pay or will require payment by the Design Builder for Owner's property deductible cost for losses not covered by builder's risk coverage on the Project. Owner will pay property deductible on property coverage in the event of a loss created by a natural event to the extent it was caused by the natural event.

(i) Developer will cooperate with Owner, **if** requested by Owner, such that Owner shall be able to secure OCIP insurance for the benefit of the Project and those contractors and others performing operations at the site of the Project.

BIDPROCESS

Applicable Laws, as defined in Section 9.2 of the Agreement, allow for the selection of Contractors and Subcontractors to be based on price or qualifications, or a combination of both. The Design Builder will utilize a "best value" selection process – using a combination of qualifications and price. Several proposals (striving for 5, minimum of 3) will be required for each trade package or component of the Project with the exception of General Conditions and General Requirements portions of the **Design** Builder's work.

Design Builder will coordinate and collect bids from multiple contractors for each trade package or component of the Project. Upon receipt of bids, detailed spreadsheets will be developed listing all bidders and the items of work to be purchased. This process ensures ~~that~~ the qualified low bidder is determined based on the full scope of work planned. These spreadsheets will then be reviewed with the Developer and Owner for their approval to proceed with contract negotiations, Developer and Owner agreeing to respond timely to any such request for approval.

Upon completion of the spreadsheets and approval from Owner and Developer to proceed with negotiations, detailed scope review meetings will be held with the applicable vendors to further identify scope, answer questions and discuss schedule **and** job site logistics. **Design** Builder will then negotiate with the qualified bidders to obtain the best price. The results of this process will then be documented in a letter to Owner **and** Developer listing the terms of the recommended award, the final status of the bidders, the estimated cost of the work awarded, and any qualifications at variance with the Contract Documents. With regard to any trade package or component of the Project that involves a cost in excess of \$250,000, the final approval of Owner and Developer will be required before the applicable contract is executed by Design Builder. Timely response by Owner and Developer to any such **request** for approval is essential and must be delivered in accordance with the **time** periods set forth in the Design Build Contract.

Notwithstanding the aforesaid process, concrete work and direct factory purchasing (Turner Logistics) will be self performed by the Design Builder or its affiliates, Design Builder shall establish to the satisfaction of Owner and Developer that this action by Design Builder meets the best qualified value test described above; provided, such approval of Owner and Developer shall not be unreasonably **withheld**.

DESIGN/DEVELOPMENT PERIOD/CASH FLOW STATEMENT

D-1

FINAL PRE-DEVELOPMENT AGREEMENT REPORT

(NOTE: The Pre-Development Agreement Report and Pre-Development Agreement Concept Design were previously distributed with the Mayor & Council **Study** Session Agenda of May 5, 2009, Item #2 and can be viewed online at <http://www.ci.tucson.az.us/agdocsI20090505/ssmav5-09-152-2.pdf>. The documents can also be viewed in the City Clerk's Office during regular business hours, Monday through **Friday** 8:00 a.m. - 5:00 p.m., 255 **W.** Alameda, Tucson, AZ.)

DEVELOPER'S SCOPE OF SERVICES

In addition to providing for **guaranteed** completion date and price, the Developer will assume the team leadership and development supervisory role to ensure that all the team members are fulfilling their responsibilities for the project and that their work is well orchestrated to provide for an efficient use of the Owner's resources. This comprehensive leadership includes (1) review of and active participation in the **preparation** of design plans and specifications as they are developed (including value engineering), both before and during construction, using experience and ingenuity to ensure that the desired product is delivered, (2) preparation of development budgets and operating pro formas in collaboration with the design, construction and operations team, (3) negotiation of project documents and agreements, (4) leading and collaborating with the financing and legal team to structure and implement project financing, (5) independent construction oversight on behalf of the Owner and investors, and (6) review and oversight of pre-opening activities on the Owner's behalf. More **specifically**, the Developer provides the comprehensive scope of services detailed below, as required for each assignment.

I. Design Period

1. Participate in selection of major subcontractors.
2. Establish selection **process** and participate in selection of engineers (civil, mechanical, electrical, structural), and other specialty consultants.
3. Provide vital input as to the programming and design of the facilities, including value-engineering, and provide leadership and oversight of the design and construction team in the preparation and completion of facility design and construction documents to ensure a cost-effective, operationally efficient facility that is consistent with operator brand standards (if applicable) and the **desires** of the **Owner** and which will maximize long-term profitability for the Owner.
4. Oversee all pre-construction and entitlement activities, including zoning, permitting, licensing, soil testing, design review, pre-construction evaluation, etc.
5. Finalize development cost budgets in collaboration with the general contractor, major subcontractors and design team.
6. Finalize project schedule in collaboration with the general contractor, major subcontractors and design team based on appropriate adjustments to the conceptual project schedule to ensure the most efficient and timely completion of the facilities and lowest construction interest costs.
7. Finalize operating pro formas.
8. If **LEED**® certification is required, cause the project to be designed and constructed so as to meet, at a minimum, the level of **LEED**® certification desired according to current certification standards.
9. Ensure that the general contractor and project comply with Owner's requirements for maximizing participation of local, minority-owned, **woman-owned**, and other disadvantaged business enterprises.

10. Ensure that the general contractor and project comply with prevailing wage and other labor-related requirements of the Owner.
11. **Direct** and monitor the interior design(s).
12. Review objectives and architect's room arrangements, develop and coordinate interior colors, finishes, and textures, select furnishings, artwork and room accessories and propose room layout changes as necessary.
13. Secure design approvals from operator as and if required.
14. Manage selection of and engage purchasing agent(s) if necessary, present cost/benefit analyses of alternatives, and communicate alternatives to **Owner**.
15. Assume leadership for the legal aspects of the transaction, including the negotiation of dozens of agreements, including as **necessary, design-build** agreement, agreements associated with operations including operating **agreement, pre-opening** operating and marketing agreements, room block agreement, information technology agreement, development consulting **services** agreement, and others.
16. Evaluate potential financial structures and negotiate terms with lenders and investors on behalf of Owner.
17. Assist in ownership structuring for publicly owned developments.
18. Participate in development of Bond offering documents and subsequent Bond marketing efforts with the **investment** bankers for bond-financed developments.
19. Host or **assist** investment banker in hosting site visits with prospective investors,
20. Invest as **required** in the form of equity or the purchase of subordinated debt.

II. Construction

A. Construction Management

1. Ensure all **necessary** insurance and bonds are obtained.
2. Ensure that all liens are waived or bonded.
3. Upon notice to proceed from Owner and issuance of necessary permits, cause commencement of construction and ensure **diligent** and continuous prosecution of construction until final acceptance of the project by Owner,
4. Administer, manage, coordinate and monitor construction activities with on-site personnel and executive oversight. At all times act as team leader, facilitating and arranging necessary work sessions and meetings with the **Owner**, maintaining team continuity and representing the individual **team** players as one unit to the Owner.
5. Represent Owner's interests throughout construction at **all** necessary functions and meetings until final acceptance of the facilities by the Owner. Provide the Owner with a comfort level and accessibility throughout the development.
6. Provide and review with the Owner regular reports featuring input from all team members outlining the status and schedule of the Project.
7. Maintain and update project **schedule** with the general contractor and design team as needed to ensure the most efficient and timely completion of the facilities.
8. Review all requests for information and clarification.
9. Review and approve all additional specifications and clarifications, work **drawings**, and shop drawings.

10. Manage all other **day-to-day** changes and issues that may occur throughout the course of construction.
11. Verify completion of work for which payment is requested.
12. Evaluate and negotiate all change order requests.
13. Periodically observe the **contractor's** safety procedures, quality assurance and contract compliance.
14. Verify materials testing and third party inspections as called for in the specifications.
15. Review and participate, as needed, in pay applications, **punch** list preparation, project closeout and release of warranties.
16. Cause the **general** contractor to coordinate and promptly correct and complete any incomplete work identified in punch list inspections.
17. Following the issuance of Certificate of Substantial Completion for each building or designated portion thereof, evaluate the completion of the work on the Owner's behalf and make recommendations to Owner and take such other further action as may be necessary or desirable to ensure final completion.
18. Monitor the contractor's efforts to obtain final permits and approvals.
19. Monitor contractor's efforts to obtain the Certificate of Occupancy.
20. Cause the general contractor to secure for Owner's benefit and assign to Owner all negotiated warranties and guarantees of the work by the general contractor, subcontractors, suppliers and manufacturers.
21. Observe, and assist as necessary, general contractor, operator and Owner in start-up and testing for readiness of utilities, operational systems and equipment.
22. Coordinate delivery to Owner and operator of guarantees, warranties, affidavits, releases, bonds, waivers, keys, operation and maintenance manuals, record drawings, maintenance stocks, as-built drawings, occupancy certificates and other project records and documents.

B. Furniture, Fixtures and Equipment (FF&E)

1. Oversee the procurement of FF&E and diligently seek to obtain the most favorable prices and terms in connection therewith.
2. Coordinate and adjust, as necessary, the FF&E schedule with the construction schedule and place purchase orders within sufficient time to allow delivery in accordance with the overall project schedule.
3. Review shipment and storage of FF&E, review and oversee inspection of FF&E, and handle all insurance adjustments and replacements.
4. Review the selection of warehouse and installation contractor(s) for all applicable FF&E.
5. Oversee and review the **installation** and operation of all FF&E.
6. Maintain proper, accurate and complete records of proposals, purchase orders, purchasing receipts and disbursements made in connection with FF&E purchasing.

C. Pre-Opening Management Oversight

1. Negotiate all agreements pertaining to facility operation, including but not limited to the operating agreement (including key money and working capital loan

arrangements), pre-opening operating and marketing agreements, information technology agreement, and development consulting services agreements.

2. Oversee and monitor operator's performance during the **pre-opening** and technical services **phase**, including budgeting, procurement and installation of operating supplies & equipment (OS&E), computer systems, initial inventory, and other information technology (IT).
3. Oversee and monitor operator's pre-opening management services, including the hiring and training of the personnel **required** for opening.
4. Oversee operator's **pre-opening** sales, marketing, advertising, and promotion of the property.
5. Coordinate the timely and efficient turnover of spaces to the operator and the resolution of any remaining punch list items.
6. Coordinate with **operator** to obtain final project and opening approvals.

D. Accounting

1. Maintain all development cost accounting records.
2. Process all invoices and payments.
3. Generate monthly draw requests for lenders and investors.

ARCHITECT/ENGINEER'S SCOPE OF SERVICES

BASIC SERVICES The Architect/Engineer's Basic Services consist of a review of the Project information furnished by the Design-Builder and the provision of the Schematic Design Documents, Design Development Documents, Construction Documents, Guaranteed Maximum Price (GMP) Documents, bidding or negotiation assistance, Construction Phase Services, and other basic services **as** may be provided, and shall include nonnal architectural, structural, mechanical, electrical and site design. The Architect/Engineer shall coordinate its services with all services of design consultants and subcontractors retained by the Design/Builder. These services shall be perfonned in accordance with the schedule established by the Design-Builder. If required by the **Design-Builder**, the Architect/Engineer shall assist the Design-Builder 10 preparing the Preliminary Evaluation, schedule, and estimate for the Owner's approval:

DESIGN PERIOD

1. SCHEMATIC DESIGN DOCUMENTS Based upon the Preliminary Evaluation and other relevant infonnation, the ArchiteetJ Engineer shall prepare, for approval by the Design-Builder and Owner, Schematic Design Documents consisting of drawings, outline specifications and other conceptual documents illustrating the Project's basic elements, scale, and their relationship to the Worksitc. When the Architect/Engineer submits the Schematic Design Documents, the Architect/ Engineer shall note on **drawings** material changes and deviations that have taken place from the conceptual design. Following completion of the Schematic Design Documents, the Architect/Engineer shall cooperate **with the Design-Builder** in updating the preliminary schedule and estimate.

2. DESIGN DEVELOPMENT DOCUMENTS Based on the approved Schematic Design Documents, the Architect/Engineer shall prepare Design Development Documents. The Design Development Documents shall further define the Project, including drawings and outline specifications fixing and describing the Project size and character, and other appropriate elements incorporating the structural, architectural, mechanical and electrical **systems**. When the Architect/Engineer submits the Design Development Documents, the Architect/Engineer shall note on **the drawings** material changes and deviations that have taken place from the approved Schematic Design Documents. Following completion of the Design Development Documents, **the** Architect/Engineer shall cooperate with the Design-Builder in updating **the** schedule and estimate.

3. CONSTRUCTION DOCUMENTS Based on the approved Design Development Documents ArchitectlEngineer shall prepare Construction Documents setting forth in detail the requirements for construction of the Project, consisting of drawings and specifications that comply with codes, Jaws and regulations enacted at the tunc of their preparation. When the Architect/Engineer submits the Construction Documents, the Architect! Engineer shall note on the drawings material changes and deviations that have taken place from the approved Design Development Documents.. Following completion of the Construction Documents, and if a GMP has not been prepared and accepted, the ArehitecUEngineer shall cooperate with the Design-Builder in updating the schedule and estimate.

4. **GUARANTEED MAXIMUM PRICE (GMP) PROPOSAL** Upon request of the Owner and agreement by the Design-Builder, the Design-Builder will prepare a **GMP** Proposal. If the Proposal is prepared prior to completion of the Construction Documents, the Design-Builder will include in the Proposal a statement of the assumptions and qualifications on which the GMP is based. Prior to submission of the proposal to the Owner, the Architect/Engineer shall review the Proposal and advise the **Design-Builder** of any errors, omissions or inconsistencies it may discover. Following acceptance of the Proposal by the Owner, the Architect/Engineer shall complete the Construction Documents, incorporating the **agreed-upon** assumptions and clarifications. The Design-Builder and Architect/Engineer shall work together to monitor the completion of the drawings and specifications so that the Project can be completed within the GMP and by the date of Substantial Completion. Two printed sets and one reproducible set of the drawings and specifications on which the GMP is based shall be provided to the **Design-Builder**.

5. **BIDDING AND NEGOTIATION ASSISTANCE** The Architect/Engineer shall assist the Design-Builder in obtaining bids from subcontractors and major **suppliers** by providing **necessary drawings, specifications and addenda**, attending pre-bid **meetings**, and **clarifying the** scope and intent of the Construction Documents.

6. **NEW EAST ENTRANCE** The Architect/Engineer will provide a separate document package for the new East Entry. Basic Services include: Architectural, Structural, HVAC, **Plumbing**, Electrical, Civil Engineering, Landscape Architecture, Acoustics and **Lighting**, Interior Design and FF&E selection, food service and Vertical Transportation. Geotechnical, Environmental and any off-site improvements are not included.

CONSTRUCTION PERIOD

The Construction Phase shall commence upon the issuance of a written notice from the Owner to proceed with construction. The Architect/Engineer shall furnish interpretations and clarifications of the **drawings** and specifications, by means of additional drawings, addenda or **otherwise**, as are necessary for the proper execution and progress of the Project. All such interpretations and clarifications shall be consistent with the intent of the Construction Documents and reasonably inferable from them and all such clarifications or modifications shall be "bubbled" to show such clarifications. The Architect/Engineer shall timely review and approve or otherwise respond to the Design-Builder's submittals, including shop drawings, product data and samples. Submittals shall be checked for conformance with the design and scope of the Project and for compliance with the Construction **Documents**.

The Architect/Engineer shall visit the Worksite and in addition the engineering disciplines will visit at various intervals as deemed appropriate (all followed up with observation reports) to become generally familiar with the quality of the construction and to determine **in** general if the construction is proceeding in accordance with the Construction Documents. **On the basis** of these on-site observations, the Architect/Engineer shall endeavor to guard the Design-Builder against **defects** or deficiencies in the construction. After each Worksite visit, the Architect/Engineer shall promptly provide the Design-Builder with copies of field reports. If the Architect/Engineer becomes aware of any such defects, deficiencies or violations, it shall give prompt written notice to the Design-Builder.

The Architect/Engineer **shall** assist the Design-Builder and Owner in filing required documents with governmental authorities having jurisdiction over the Project.

DESIGN BUILDER'S SCOPE OF SERVICES

Preconstruction Phase Services

- Alternate systems evaluation: In addition to reviewing proposed building systems Turner/Sundt will provide alternate systems for review by the team. Proposed systems will be reviewed for conformance with design intent, applicability, serviceability, constructability, market presence, coordination with other systems and price relative to budget.
- Materials selection review: In addition to reviewing proposed building materials Turner/Sundt will provide alternate materials for review by the team. **Proposed** materials will be reviewed for conformance with design intent, applicability, serviceability, constructability, market presence, coordination with other systems and price relative to budget.
- Long lead procurement study: As project systems and materials are proposed Turner/Sundt will confirm availability and lead time to insure that purchasing and engineering will not impact the design and construction schedule.
- Detailed cost estimating / budget management: At key milestones (SD, DO, 50% CD) Turner/Sundt will prepare a new estimate **based** on the current drawings **prepared** by DLR. Variances in the cost will be tracked against the baseline budget and previous estimates and the team will work together to reconcile the cost and keep the project on budget.
- Site logistics analysis: Turner/Sundt **will** prepare a detailed analysis of the construction phasing and operations and the project's relationship and interaction with the adjacent neighborhoods, streets, traffic and parking and safety as well as the existing Convention Center operations and ongoing parking, trucking, event schedules, security and public safety.
- Schedule development: The conceptual project schedule will increase in detail concurrently with drawing and estimate development. At the CD phase the schedule will be a fully detailed construction schedule for inclusion in the purchasing documents.
- Cash flow reporting: Turner/Sundt will develop a detailed cash flow **matrix** for the project that will be updated and maintained throughout design and construction period.
- Risk analysis/mitigation: Turner/Sundt will assemble a risk matrix during preconstruction that will be reviewed and adjusted as drawings develop to insure that the team is kept informed.
- Prequalify subcontractors: To insure that we **are** working with financially capable and dependable subcontractors and at the same time benefit from the current market conditions Turner/Sundt will recruit and prequalify subcontractors for each trade that have the wherewithal and capacity to execute the work.
- Development of subcontractor work scopes: As Construction Documents near completion Turner/Sundt will prepare detailed contract scopes packages for each trade to insure that the entire scope is properly bought out and coordinated.

- **Pre-Bid meetings:** Turner/Sundt will conduct pre-bid meetings to insure that the subcontractors bidding the work fully understand the schedule, work plan, logistics, coordination and safety plan **necessary** to be competitive with their bids.
- **Procurement/subcontracts:** Turner /Sundt will advertise and receive bids for the work which will be reviewed for **errors** and to insure proper scope coverage. After selection of the successful responsive bidder contracts will be assembled for execution after notice to proceed. Insurance will be documented and confirmed before subcontractors are allowed on site.
- **Prepare Guaranteed Maximum Price:** Turner/Sundt **will** assemble the GMP from our successful bidders and our knowledge of the project scope, insuring that scope gaps, logistics and schedule issues are accounted for in the GMP.

Construction Phase Services

- **Supervision:** Turner/Sundt will provide the necessary supervision, construction equipment, labor, materials, tools, and subcontracted items to complete the work shown on the construction documents.
- **Scheduling:** Turner/Sundt will maintain the schedule developed during **preconstruction** during the course of construction, reporting the status monthly.
- **ODAC Meetings -** Turner/Sundt will conduct monthly Owner, Developer, **Architect**, Contractor (ODAC) meetings during construction to keep the team apprised of the status of the work and issues **affecting** the project
- **Safety:** Turner/Sundt shall take the necessary precautions for the safety and protection of project employees and the public in accordance with applicable Federal, State and Municipal safety laws. Turner/Sundt will execute the work in accordance with the project safety plan developed during preconstruction.
- **Pay Request:** Turner/Sundt will assemble a monthly pay request including required documentation, for review and approval by the Developer and the Owner.
- **Permits-** Turner/Sundt in coordination with DLR, and with the full cooperation of the Owner, will secure the building permits necessary for the construction of **the** project
- **Monthly Report:** Turner/Sundt will prepare and submit a monthly report describing the progress of **the** work as agreed by the Developer and Owner.
- **Cost Reporting:** Turner/Sundt will provide the Owner and Developer a monthly cost report describing the cost of completed work, projected cost of uncompleted work and changes to the work.

CONSTRUCTION MANAGER'S SCOPE OF SERVICES

A. Construction Management

1. Administer, manage, coordinate and monitor construction activities and executive oversight. At all times act as onsite team leader, facilitating and arranging necessary work sessions and meetings with the Owner, maintaining team continuity and representing the individual team players as one unit to the Owner.
2. Represent Owner's and Developer's interests throughout construction at all necessary functions and meetings until final acceptance of the facilities by the Owner. Provide the Owner with a comfort level and accessibility throughout the development.
3. Provide and review with the Owner regular **reports**, including monthly pay applications, featuring input from all team members outlining the status and schedule of the Project.
4. Maintain and review project schedule with the general contractor and design team as needed to ensure the most efficient and timely completion of the facilities.
5. Review and monitor contractor's RFI and ASIs/logs.
6. Review and coordinate distribution of all additional specifications and clarifications, work drawings, and shop drawings.
7. Monitor contractor's *daily* reports of all project activity, which will be provided to the owner on a monthly basis, detailing:
 - (i) Weather
 - (ii) Contractor(s) manpower
 - (iii) Contractor(s) equipment
 - (iv) Material & equipment deliveries
 - (v) General description of work performed & location
 - (vi) Pay items
 - (vii)** Problem areas
 - (viii) Safety issues, injuries and safety programs
8. Manage all other **day-to-day** changes and issues that may occur throughout the course of construction.
9. Verify with **contractor** and subcontractors completion of work for which payment is requested in monthly pay applications.
10. Evaluate, negotiate and provide recommendations for all change order requests.
- II. Constantly observe the contractor's safety procedures, quality assurance and contract compliance.
12. Monitor and maintain all materials testing and third party inspections as called for in the specifications.
13. Review and participate, as needed, in pay applications, punch list preparation, project closeout and release of warranties.
14. Cause the general contractor to coordinate and promptly correct and complete any incomplete work identified in punch list inspections.

15. Following the issuance of Certificate of Substantial Completion for each building or designated portion thereof, evaluate the completion of the work on the Owner's behalf and make recommendations to Owner and take such other further action as may be necessary or **desirable** to ensure final completion.
 16. Monitor the contractor's efforts to obtain final permits and approvals.
 17. Monitor contractor's efforts to obtain the Certificate of Occupancy.
 18. Obtain all **required** warranties and guarantees, per the contract requirements, from the General Contractor as well as their suppliers, manufacturers and subcontractors and turn over all information to the Owner.
 19. Observe, and assist as necessary, general contractor, operator and Owner in start-up and testing for readiness of utilities, operational systems and equipment.
 20. Coordinate delivery to Owner and operator of guarantees, warranties, affidavits, final unconditional releases, bonds, waivers, keys, operation and maintenance manuals, record drawings, maintenance records, as-built drawings, occupancy certificates and other project records and documents.
- B. Furniture, Fixtures and Equipment (FF&E), Operating Supplies and Equipment (OS&E), and Information Technology (IT)-(Voice, Data, Video, Audio & Security)
1. Coordinate and adjust, as necessary, the FF&E, OS&E, and IT schedules with the construction schedule and ensure purchase orders are placed within sufficient time to allow delivery in accordance with the overall project schedule.
 2. Review shipment and storage of FF&E, OS&E and IT; review and oversee inspection of FF&E, OS&E and IT; and handle all insurance adjustments and replacements.
 3. Review the selection of warehouse and installation contractor(s) for all applicable FF&E, OS&E and IT.
 4. Oversee the installation and operation of all FF&E, OS&E and IT.
 5. Maintain proper, accurate and complete records of proposals, purchase orders, purchasing receipts and disbursements made in connection with FF&E, OS&E and IT purchasing.
- C. Pre-Opening Management Oversight
1. Monitor operator's performance during the **pre-opening** and technical services phase, including budgeting, procurement and installation of operating supplies & equipment (OS&E), computer systems, initial inventory, and other information technology (IT).
 2. Coordinate the timely and efficient turnover of spaces to the operator and the resolution of any remaining punch list items.
 3. Coordinate with operator to **obtain** final project and opening approvals.
- D. Accounting
1. Maintain applicable accounting records for pay applications.
 2. Generate and process monthly pay applications.