



CITY OF SAN JOSE OFFICE OF THE CITY MANAGER

REQUEST FOR PROPOSALS

SAN JOSE CONVENTION AND/OR CULTURAL FACILITIES MANAGEMENT AND OPERATION AGREEMENT

MANDATORY PRE-PROPOSAL CONFERENCE:

Date: December 15, 2003

Time: 1:00 pm

at the

San Jose Convention Center

Meeting Room F

408 Almaden Blvd.

San Jose, CA 95110

PROPOSAL SUBMITTAL DUE DATE:

Date: Monday, February 23, 2004

Time: 12 noon (pacific standard time)

(see Section 1 for delivery directions)

RESPONSIBILITY AND PROHIBITIONS

RESPONSIBILITY

Please check your request for proposal packet immediately upon receipt to ensure that you are in possession of all documents listed in the table of contents.

The City of San José (the "City") will furnish proposers with a copy of any missing documents upon request, but assumes no responsibility should any of the required documents be missing from any proposals submitted to City in response to this "Request for Proposals".

Following is the City's "Request for Proposals" (RFP). Responses to the RFP are due no later than 12 noon Pacific Daylight Time (PDT), on Monday, February 23, 2004, as directed in section 1.0 of this RFP.

Please thoroughly review all parts of this RFP. It is important that each respondent follow the requirements set forth in the RFP. All information and material submitted by each respondent will be analyzed by the City and will be subject to independent verification. Inaccurate, incomplete or nonresponsive statements may be cause for rejection.

PROHIBITIONS

All contact prior to entering into contract negotiations by any potential proposer for the purpose of obtaining information not made available to all proposers or to exert influence with City staff, or individual evaluation panel members regarding this RFP **is expressly prohibited and may cause the disqualification of the proposer** from further consideration.

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1 GENERAL

This RFP is for the purpose of soliciting proposals from firms that have been selected to participate in the City's process for the purpose of selecting firm(s) to enter into negotiations with the City to operate, lease, or provide management services for the San Jose Convention Center and other Cultural Facilities located in San José, California. Presently, the City owns and operates these facilities. Current City Staff are aware that this process has been initiated, but we request that no staff be contacted, and that any communications and questions you may have at this time be directed to Kay Winer, Deputy City Manager. (See section 1.0 for contact information.)

Convention Facilities

The San Jose Convention Center is located at 408 Almaden Blvd in, San José, California. It is located in Downtown San Jose, connected to both the Marriott and the Hilton, and only approximately 5-10 minutes from the Norman Y. Mineta San José International Airport. In addition to the Convention Center, the Civic Auditorium and the Parkside Hall provide additional exhibit and general assembly space.

Framed by a 125-foot abstract tile mural, the **San Jose San Jose Convention Center** encompasses over 425,000 square feet of function space. Designed for convenience and versatility, it offers 143,000 square feet of column-free prime exhibit space divisible by three, an elegant 22,000 square foot ballroom, up to 30 meeting rooms capable of seating up to 2,400 theater-style, and can accommodate banquets to 5,000. In addition, the Convention Center has 30-foot-high finished ceilings, 12 loading bays with drive-on access to the exhibit hall floors, recessed utility boxes with electricity, water and drainage capabilities, complete audio-visual, sound and lighting services, cellular, standard and ISDN telephony services and fiber optic and copper cabling throughout the facility with DS-3 high-speed Internet access.

Built in 1936, the **Civic Auditorium** is a Spanish Mission style dual-level auditorium that hosts a variety of events including performing arts, general assembly, community and sporting events. Located directly across the street from the San Jose San Jose Convention Center, the Auditorium features 3,060 seats and four meeting rooms.

Parkside Hall hosts a variety of events including consumer shows, conventions, trade shows and corporate events. Located near the Convention Center with an entrance on Park Avenue, Parkside Hall is ideal for additional exhibit and general assembly space. Parkside Hall has 30,000 square feet of unobstructed exhibit space, 24-foot open ceilings, teak parquet floors, and can accommodate banquets to 1,800

Cultural Facilities

In addition to the Convention Center and its supporting facilities, San Jose is home of several other cultural facilities. These include the following:

Center for Performing Arts - Located on the corner of West San Carlos Street and Almaden Boulevard, the Center for the Performing Arts was designed by the Frank Lloyd Wright Foundation. Events at the Center for the Performing Arts are supported by full staging facilities, reception, box office, concessions, coat check for patrons, rehearsal rooms, and an elegant intimate after-theater area. The theater features continental seating with 2,665 seats and can accommodate up to 10 wheelchair seats. In addition, an infrared system for the hearing-impaired is installed through the in-house audio system.

Montgomery Theater - Built in 1936, the Montgomery Theater is an intimate "Old California" style-theater. Featuring full production capabilities, the theater offers theater, musical and cultural entertainment throughout the year. Located on the corner of San Carlos and Market Streets, the newly renovated theater has 523-seats including six wheelchairs and six transfer seats. In addition, an infrared system for the hearing-impaired is installed through the in-house audio system.

California Theatre - The California Theatre is scheduled to open in September 2004 as a performing arts facility accommodating performing arts groups as well as its traditional, historic use - the presentation of film. Opera San Jose will make the theatre its home venue, with a wide variety of other San Jose/Santa Clara County performing arts group filling out the schedule. Classic and current film series will be presented throughout the schedule, offering San Jose residents the widest variety of programming possible in this magnificent theatre.

2 INVITATION TO SUBMIT A PROPOSAL

Proposers will not receive compensation or reimbursement of expenses for submitting the proposal. Proposals shall be prepared and submitted in accordance with the provisions of these RFP instructions and specifications no later than **Monday, February 23, 2004, at 12 noon, Pacific Daylight Time.**

A. **RFP Options.** In order to facilitate, simplify, and expedite the evaluation process, the RFP will provide different proposal options for which firms may submit proposals. The options are as follows:

- Convention Center with Auditorium and Parkside Hall
- Cultural Arts Facilities – individually or as a group (Montgomery, CPA, California)
- All of the above

Please note clearly for which of these your firm is submitting a proposal.

B. **Eight (8) complete physical copies and one (1) electronic copy**, of the proposal in response to the RFP and its required exhibits. The electronic copy can be exclusive of any promotional or supplemental information to the extent it is not available in an electronic format. All eight physical copies along with the electronic copy shall be submitted to:

Kay Winer
Deputy City Manager
City of San José
City Manager's Office
801 North First Street, Room 436
San José, CA 95110
kay.winer@sanjoseca.gov
(408) 277-4674

The proposal should be firmly sealed in an envelope, which shall be clearly marked on the outside "Request for Proposals for the San Jose Convention Center and Other Cultural Facilities". The envelope must also contain the Proposer's return address. **The City reserves the right to accept late proposals ONLY in the event of unforeseen delays in delivery as a result of untimeliness on the part of the shipping company. For any proposal received after the due date and time, the Proposer will be required to provide the City proof of shipping from the company/shipper (i.e. FedEx/Airborne/UPS) that the proposal would have been received by the City by the required deadline, if a delay had not occurred as a result of the shipping company. Without proof of timely shipment, the proposal will be rejected and returned to the firm/company submitting the proposal (the "Proposer") unopened.**

The City will not accept a proposal if:

- A. Any of the RFP forms are left blank or are materially altered; or
- B. Any document or item necessary to the proposal is incomplete, improperly executed, indefinite, ambiguous, or is missing.

Additionally, factors such as, but not limited to, the following may also disqualify a Proposer without further consideration:

- A. Evidence of collusion among Proposers;
- B. Any attempt to improperly influence any member of the evaluation panel;
- C. A Proposer's default under any type of agreement, which resulted in the termination of that agreement;
- D. Existence of any unresolved litigation between Proposer and the City.

3 SELECTION PROCESS

Following City staff review of the proposal responses, meetings may be scheduled with all or any of the Proposers. During the review process, City staff will analyze qualifications, request written clarification and may hold discussions with Proposers.

After evaluating all proposals, the City may select one or more proposals for further evaluation based on the information contained in the responses to the RFP.

The City reserves the right to accept or reject any or all proposals, to alter the selection process in any way, to postpone the selection process for its own convenience at any time, to waive any defects in any proposal or to issue a new RFP at any time.

This RFP and the selection process shall in no way be deemed to create a binding contract or agreement of any kind between the City and any firm/company submitting a proposal. If the City selects a proposer to provide services contained in the RFP, it is expected that the City will enter into negotiations for an agreement to provide the described services. All legal rights and obligations between the successful Proposer, if any, and the City will come into existence only when an agreement is approved by the City Council and successfully executed by the respective parties. The legal rights and obligations of each party shall at that time be only those rights and obligations which are set forth in the agreement.

LOCAL BUSINESS ENTERPRISE

It is the policy of the City of San José to encourage business activity in San José. Effective July 1, 1993, the City adopted Resolution 64649, which established a Local Preference Policy for the procurement of supplies, materials, equipment

and general services.

Evidence of a legitimate business presence in San José shall include having a current San José business license; and having either of the following types of offices operating legally within the City of San José:

- i. contractor's principal business office; or
- ii. contractor's regional, branch or satellite office with at least one full time employee located in San José.

In determining the most advantageous proposal or most advantageous price quotation, consideration of performance and price shall take precedence over status as a Local Business Enterprise.

If you fail to submit the proper information with your proposal you will be denied consideration for local preference. The information cannot be submitted later.

4 PROPOSAL SCHEDULE

The key dates in the Request for Proposal process are outlined below. The City reserves the right to change any portion of this schedule including extension of submission deadline for responses and or cancellation of the RFP process.

November 25, 2003	Council review and approval of RFP
December 1, 2003	Request for Proposal (RFP) Distribution
December 15, 2003	Mandatory Pre-proposal Conference
December 19, 2003, close of business	Written questions due to City
January 15, 2004	Written responses distributed by City
February 23, 2004	RFPs due to City
Week of March 8, 2004	Interviews with proposers
Mid April 2004	Recommendation to Council of preferred proposer for 30 day exclusive right to negotiate
Late April 2004	Agreement Negotiations
May 2004	Execute agreement
July 1, 2004	Implementation of proposal

5 CONSEQUENCE OF SUBMISSION OF PROPOSAL

The City intends to enter into a Management and Operations Agreement (an "Agreement") with the firm whose proposal, in the sole judgment of the City, is most advantageous to the City.

- A. The RFP does not commit the City to pay any costs incurred in the submission of a proposal or in making any necessary studies or designs for the preparation thereof, nor the purchase or contract for the services. The City reserves the right to retain all copies of proposals.
- B. Should the successful Proposer fail to successfully negotiate and execute an Agreement with the City, the City shall have the right to negotiate and execute an Agreement with another responsive Proposer.
- C. Statistical information contained in this RFP is for informational purposes only. The City shall not be responsible for the complete accuracy of said data.

6 INQUIRIES AND/OR CLARIFICATIONS

Any requests for clarification of the RFP shall be made **IN WRITING** (via e-mail), and received no later than Tuesday, December 23, 2003, at close of business.

Kay Winer
Deputy City Manager
City of San José
City Manager's Office
801 North First Street, Room 436
San José, CA 95110
kay.winer@sanjoseca.gov
(408) 277-4674

Any City response to a request for clarification by a Proposer will be made in the form of an addendum to the RFP, and will be sent to all parties to whom the RFP has been issued not later than Friday, January 23, 2004, and will become a part of the RFP. The Proposer should await responses to inquiries prior to submitting a proposal.

7 AGREEMENT CONSIDERATIONS

There are several adopted Council policies as well as current contracts that do not expire until 2005 that will need to be retained in relation to this agreement. The City of San José Council has adopted Wage Policies with respect to certain City owned facilities (Appendix II). There are other Council-adopted Policies Rate that also apply to this RFP. These policies are described in Appendix III. The City Council may require these policies to be in effect with respect to the operation and management of the Convention and/or Cultural Facilities. Review these policies carefully and prepare your responses to the RFP, in accordance with the directions

provided.

In addition, “private activity” regulations (Appendix IV) of the IRS apply to this RFP as it relates to the San Jose Convention Center and the California Theatre. In general, when the City issues bonds for the purpose of constructing a governmental improvement or facility, the interest earned on those bonds is tax exempt. Since this results in less tax revenues for the federal government, the IRS has promulgated regulations to ensure that facilities built with tax-exempt bond proceeds, like the Convention Center, are truly used for a governmental purpose, and not for private use during the term of the bonds. Examples of “private use” include leases and management agreements.

The IRS, however, does recognize certain exceptions for qualified management agreements. In order to be a qualified management agreement, none of the compensation paid to the operator can be based on the profitability of the facility. Rather, the operator’s compensation must be based either solely on a fixed fee or upon a fixed fee and a percentage of gross revenues.

The percentage of gross revenues varies depending upon the length of the agreement. For example:

- ✓ Term is limited to lesser of 15 years or 80% of the useful life of the facility.
 - At least 95% of the compensation is a fixed fee.
- ✓ Term is limited to lesser of 10 years or 80% of useful life of facility.
 - At least 80% of the compensation is a fixed fee.
- ✓ Term is limited to 5 years and City must have right to terminate without penalty after 3 years.
 - At least 50% of the compensation is a fixed fee.

The other facilities do not have bonds outstanding and are not subject to these restrictions.

8 Term of Contract

The Contract shall be in effect for five years from the date of the Notice to Proceed and terminable at three years at the City’s option, with the City option to extend for two 5-year terms.

9 Scope of Services

The selected firm shall manage the operations, grounds, and area of the Convention and/or Cultural Facilities on which the firm has submitted a proposal. Specific services and expectations of the managing firm will include but are not limited to the following:

- **Sales and Marketing**

Provide, in conjunction with the Convention and Visitors Bureau, Sales and Marketing Services for all events. Please refer to the current agreement with

the Convention and Visitors Bureau, herein attached for more detail.

- **Operating and Maintenance Services** (Refer to Appendix VI (a) for a maintenance matrix of responsibilities)
 - Ordinary Repairs and Maintenance
 - Operator will be required to maintain the Facility in good order and condition consistent with the applicable standard, and shall make all necessary ordinary maintenance and repairs.
 - For the purposes of this section the term “ordinary maintenance and repairs” means that work which is required to keep the Facilities in a safe, clean and sanitary condition and which is made necessary due to the day-to-day operations.
 - Capital Repairs and Replacements
 - City shall be responsible for all capital repairs or replacements to the facilities including all improvements, equipment and systems.

- **Administrative Services**

Provide the following administrative services required in the operation of the Convention Center and other cultural facilities:

- Administering all contracts required in the ordinary course of business for services, events, concessions, catering, novelties/merchandise, advertising, equipment, etc. Insure that insurance requirements of the City are met by rental clients, and manage claims as required to contain risk to the City.
 - Annually developing prices, rates and rate schedules for any commitments that the manager will be responsible for negotiating. Rates and fees are subject to the approval of the City Council. *(Current Rate Schedules are attached for review)*
 - Preparing an annual operating budget for the facilities in the format and by scheduled due dates specified by the City. Comply with the spending limitations imposed by such budget, including supplements as authorized.
 - Maintaining current Council-approved Booking Policies.
 - Providing all security services for facilities and events as advised by the Police Department.
 - Collecting revenues generated through the operation of the Convention and/or Cultural Facilities.
- **Reporting/Audit Requirements**
 - Preparing monthly reports regarding the use and operations of the facilities.
 - Refer to Appendix VI for more information on auditing requirements.

- **Financial Responsibilities**

The City of San Jose will be responsible for all debt service payments as of date of Notice to Proceed, and will retain all Transient & Occupancy Tax (TOT) proceeds. The Contractor will be responsible for all operational cost items, including all routine and minor repairs, equipment servicing, building maintenance and preventative maintenance, and will also need to provide a Preventative Maintenance Plan with the submission of this RFP.

The Contractor will retain revenues for any pass through charges for centralized services.

- **Box Office**

Provide a box office staffing plan or other options to manage box office services in the facilities.

- **Existing Agreements**

This scope of work is subject to the following agreements and policies:

- Booking Guidelines
- Utility Service Agreement (Expires June 2004)
- Environmental Procurement Policy
- Use of current Facility Use Agreement
- Convention and Visitors Bureau Agreement (Expires 2005)
- Concessionaire Agreement (Expires 2005)
- Network Agreement (Expires 2005)
- Parking Facilities – owned and operated by the City of San Jose. Operator will be entitled to recognizing the net proceeds generated from the parking facilities.

10 INSURANCE

The successful Proposer, at its sole cost and expense and for the full term of the Agreement, shall obtain and maintain at a minimum all of the insurance requirements listed in Appendix V of this RFP. The successful Proposer shall satisfy these insurance requirements prior to any commencement of performance under the Agreement. The City currently maintains property insurance for the Convention Center and parking garage.

11 GENERAL AGREEMENT PROVISIONS

Appendix VI (General Agreement Provisions) outlines the City's standard terms and conditions as part of the agreement between the City and the successful

Proposer including financial responsibilities.

A sample indemnification clause and other general agreement provisions are included in Appendix VI to this RFP. It is anticipated that the Agreement resulting from this RFP shall include an indemnification clause and other terms and conditions similar to those referenced in Appendix VI.

12 PUBLIC RECORD: PROPOSALS BECOME PROPERTY OF CITY

Responses to this RFP become the exclusive property of the City. At such time as the City Manager's Office recommends a Proposer to the City Council, all proposals received in response to this RFP become a matter of public record and shall be regarded as public records, with the exception of those elements in each proposal which are defined by the Proposer as business or trade secrets and plainly marked as "Confidential," "Trade Secret," or "Proprietary." The City shall not in any way be liable or responsible for the disclosure of any such proposal or portions thereof, if they are not plainly marked as "Confidential," "Trade Secret," or "Proprietary" or if disclosure is required under the Public Records Act. Any proposal which contains language purporting to render all or significant portions of the proposal "Confidential," "Trade Secret," or "Proprietary," shall be regarded as non-responsive.

Although the California Public Records Act recognizes that certain confidential trade secret information may be protected from disclosure, the City may not be in a position to establish that the information, which a Proposer submits, is a trade secret. If a disclosure request is made for information marked "Confidential," "Trade Secret," or "Proprietary", the City will provide the Proposer who submitted the information with reasonable notice to allow the Proposer to seek protection from disclosure by a court of competent jurisdiction.

13 INSTRUCTIONS TO PROPOSERS

These instructions outline the guidelines governing the format and content of the proposal and the approach to be used in its development and presentation. Only that information which is essential to an understanding and evaluation of the proposal should be submitted. No limitation on the content of the proposal is intended in these instructions and inclusion of any pertinent data or information is permitted.

A proposal and all attachments shall be complete and free of ambiguities, alterations, and erasures. It shall be executed by a duly authorized officer or agent of Proposer. In the event of conflict between words and numerals, the words shall prevail.

Proposal shall be submitted in an organized manner, each copy separately bound in one volume with parts appropriately tabbed and identified for each of the following distinct sections:

Part A: Proposal Questions/Requirements (proposal must answer the questions in the order presented below, with each question and response clearly labeled)

- 1) Provide a term sheet that outlines and describes your proposed business relationship with the City, including recommended contract terms, conditions, and costs.
- 2) Describe how your firm will market and position the Convention and/or Cultural Facilities including the influence of the surrounding area, business demand generators, competitive properties, and your view of the ideal mix of business to achieve the optimum financial results.
- 3) Recommend food and beverage improvements or concept changes that would enhance the revenues of the Convention and/or Cultural Facilities.
- 4) Provide a proposed staffing plan for the Convention and/or Cultural Facilities that includes an organizational chart showing key management personnel and identification of onsite management personnel, as well as day-to-day manager(s).
- 5) Prepare two separate five-year financial proforma for the Convention and/or Cultural Facilities in the format provided in Exhibit D, (i) including the wage policy requirements as described in Appendix II, and (ii) without the wage policy requirements described in Appendix II. Classifications subject to the Prevailing Wage Policy and the Living Wage Policy are included in Appendix II.

Include this analysis as an Appendix to the RFP response. Additional detail at the subcategory level is encouraged. Additionally, provide a narrative discussion of the opportunities and challenges for the Convention and/or Cultural Facilities.

- 6) Provide a proposed plan for how your firm plans on managing box offices and ticket sales in the Convention Center and/or other Cultural Facilities.
- 7) Summarize what upgrading or capital improvements would be required within the first year of operations (if any).
- 8) Provide a transition plan, including an estimate of transition (takeover) costs associated with the City entering into a contractual relationship with your firm to lease, manage and/or franchise.
- 9) Provide a schedule of what corporate, home office or centralized service expenses will be charged to the Convention and/or Cultural Facilities.

- 10) Describe any proposed territorial protection for the Convention and/or Cultural Facilities thereby restricting your firm from involvement in competitive properties in the Center's specific market; and,
- 11) Any other pertinent or salient information or data that you feel would be helpful to the City as the City evaluates a possible business relationship with your firm.
- 12) Do you wish to claim status as a San José based vendor? YES () NO ()

If yes, please provide a copy of your City of San José Business License and written evidence of a principal business office or branch or satellite office with at least one full time employee located in San José with your submittal.

If you fail to submit the proper information with you proposal, you will be denied consideration for local preference. The information cannot be submitted later.

Part B: Proposal Forms and Information to submit (completed)

- I. Proposal Form (Exhibit A)
- II. Proposer's Questionnaire (Exhibit B)
- III. Work Environment Questionnaire (Exhibit C)
- IV. Five-Year Financial Proforma, including a detailed month-by-month presentation for the first 24 months of operations. Include in this discussion your firm's underlying assumptions used for projecting revenue and expenses, and verify that fees and expenses are included in your proforma. If not, please include information on those additional fees and expenses and how they are proposed to be paid. (Exhibit D)
- V. Preventative Maintenance Plan. As noted under Section 9 Scope of Services, the Contractor will be responsible for all operational cost items, including all routine and minor repairs, equipment servicing, building maintenance and preventative maintenance, and will also need to provide a Preventative Maintenance Plan with the submission of this RFP.

14 MANDATORY PRE-PROPOSAL CONFERENCE

A mandatory pre-proposal conference has been scheduled for Monday, December 15, 2003, at 1:00 pm (PDT) at the Convention Center. The pre-proposal conference will commence with an overview of the facility along with a presentation on the current financial status of the facility followed by a question and answer period. After the presentation, City staff will be available to facilitate a tour of the Convention Center and other Cultural facilities.

ALL POTENTIAL PROPOSERS ARE REQUIRED TO ATTEND THIS PRE –

PROPOSAL CONFERENCE.

Notify Kay Winer, Deputy City Manager at (408) 277-4674 of your attendance and number of individuals from your firm attending by Monday, December 8, 2003.

Oral responses given at the conference are not binding on the City. Only responses and clarification issued via a written addendum shall be binding to the City.

15 EVALUATION PROCEDURE AND CRITERIA

The evaluation panel will consist of City technical and management personnel and others designated by the City. The panel will consider proposals from such entities as authorities. This panel will evaluate all proposals based on criteria listed below:

- Quality of the proposal
- The ability of the Proposer to support and successfully perform so as to achieve the stated mission of the City's facilities, and the strategies and programs presented by the Proposer to increase the generation of transient occupancy tax, sales tax, and the economic impact generated for the community through delegate and visitor spending and the generation of jobs for the community.
- The ability of the Proposer to support vital local arts and entertainment programming and production and markets.
- The ability of the Proposer to provide flexible, quality services to the clients of the facilities
- The ability of the Proposer to provide a program for positioning the City of San Jose's Convention Center and Cultural Arts and Entertainment facilities within industry best practices and the Proposer's ability to maximize occupancy, create operational policies that will encourage bookings, good space utilization and customer satisfaction and maximum economic input to the community.
- The ability of the Proposer to support the current level of local production and programming in the cultural arts and entertainment, while maintaining reasonable access for the general public and for special incentives for students and others who may need support to gain access to the offerings of the arts and entertainment community.
- The quality of the proposed management personnel presented by the Proposer and the level of familiarity of these personnel with the community of San Jose and its culture.
- The quality of the Proposer's technical and management plans.
- The quality of the financial plan presented by the Proposer.
- The quality of the transition plan presented by the Proposer.
- The fee structure presented by the Proposer.
- The terms and conditions of the Proposer's sample contract.
- Proposed business relationship with the City.
- Marketing plan and strength of firm.

- Capability and expertise of the Proposer.
- Adherence to applicable Council policies.
- Expertise in the management of Convention and/or Cultural Facilities.

Proposers may be interviewed regarding specific areas of their proposals, as part of the evaluation process.

The following criteria are provided for information purposes only, and are not ranked in any particular order of importance.

- Information complete and understandable, forms prepared properly.
- Proposed business terms as outlined in Term Sheet.
- Perceived ability to implement a successful transition plan.
- Strong client references, particularly in breadth of operations of Convention Center and Cultural Facilities.
- Qualified and experienced general manager.
- Appropriate staffing levels for all services.
- Complete financial information provided.
- Reasonable financial documentation and details provided.

The panel will consider different management models such as an authority. In this case, the proposer will need to provide detailed information on the organization and operations of the model as well as an explanation of the advantages of using this model for the operations of the Convention Center and Cultural Facilities.

16 NON-DISCRIMINATION/PREFERENTIAL TREATMENT

The successful Proposer shall fully comply with Chapter 4.08 of the San José Municipal Code and shall not discriminate against or grant preferential treatment to any sub-consultant on the basis of race, sex, color, age, religion, sexual orientation, disability, ethnicity or national origin in the performance of City of San José contracts. Any Proposer who so discriminates or gives preferences shall be deemed not to be a responsible Proposer in accordance with City of San José Charter Section 1217.

17 CITY BUSINESS TAX

Successful Proposer shall pay a City Business Tax prior to commencement of the Agreement. Please contact Finance/Treasury at (408) 277-5051 for further information.

18 CONVENTION CENTER AND CULTURAL FACILITIES BACKGROUND

Appendix I of this RFP provides information on the facilities' events summaries, current operating data, and an organizational chart.

19 GOALS AND OBJECTIVES

The following goals and objectives have been established for the Convention Center and Other Cultural Facilities:

- A. **Customer Service**: To deliver a level of service consistent with the City's goals of exceeding customer expectations.
- B. **Financial Performance**: To provide a value-added experience for Convention Center customers.

Provide effective management to maximize occupancy and revenue producing capabilities of the Convention and/or Cultural Facilities and provide prudent financial management of the Convention and/or Cultural Facilities.

- C. **Employee Environment**: To be consistent with those service delivery standards which include the City's expectation of fair treatment of employees (current and future) whether or not the City's adopted wage policies are implemented for the Convention and/or Cultural Facilities. Employee working conditions will be a factor in the agreement negotiation process. (See Appendix II "Wage Policies")
- D. **City Use, Community Use and Public Access**:
 - 1. **City and Public Use** - The budget office allocates \$180,000 for City Departments to use Convention Center Facilities. It's known as the City Use Fund, which the City manages. There is no specific Public Use provision.

20 PERFORMANCE STANDARDS AND MEASUREMENTS

The minimum service and operating standards are:

- A. Service shall be prompt, courteous and efficient at all times. Operator/ Operator shall establish a procedure for the reporting of, and responses to, any Customer complaints and process for reporting to the City on a quarterly basis on acceptable measurements of customer satisfaction levels.
- B. Operator shall operate the Convention and/or Cultural Facilities in a manner that ensures safety of the public. The Convention and/or Cultural Facilities shall be available every day of the year.
- C. Operator shall employ highly-skilled professional full-time on site management staff possessing the necessary experience and expertise to

ensure a first class Convention and/or Cultural Facilities operation.

- D. Operator shall be responsible for the conduct, demeanor and appearance (properly attired and identifiable) of its officers, agents, employees and representatives.
- E. Operator is required to have an on-site General Manager at the Convention and/or Cultural Facilities at all times during the term of the Agreement.
- F. Operator will ensure that flexibility in terms of pricing and availability will be used to allow for a positive economic impact on the facilities and the City.
- G. Operator will maximize occupancy at the facilities by identifying customer needs and timelines.

Performance measures shall include but not be limited to the following and shall be subject to change:

- A. Direct delegate expenditures
- B. Tax benefit from delegate expenditures per dollar of operating costs
- C. % of operating expenses recovered from earned operating revenue (excluding TOT)
- D. % of customers who would return to the Convention Facilities
- E. % of customers rating overall service good to excellent based on satisfaction with facilities and services provided
- F. Number of events
- G. Total Attendance
- H. Number of Convention Delegates
- I. Tax Benefit (\$)
- J. Operating Expense (\$)
- K. Operating Revenue (\$)
- L. Exhibit Hall Occupancy
- M. Theaters Occupancy rate
 - i. # of seats filled
 - ii. # of seats

Appendix I

SAN JOSE CONVENTION & CULTURAL FACILITIES FISCAL YEAR 2002-03 EVENT SUMMARY

Convention Center	Number of Events	Event Days ¹	Total Use Days ¹	Exhibit Hall Occupancy ²	Event Attendees ³	Total Attendance ⁴
Conventions/Trade Shows	31	1,015	2,313	40%	148,777	446,331
Local Trade Shows	6	48	91	3%	51,556	154,668
Consumer Shows	6	130	213	6%	85,527	85,527
Community Events	72	349	487	8%	121,501	121,501
Food Functions	15	29	41	0%	9,037	9,037
	130	1,571	3,145	57%	416,398	817,064

¹Use of the Convention Center is calculated for 16 areas. There are potentially 5,840 event and use days annually.

²Exhibit Hall Occupancy is based on the use of 3 exhibit halls. There are potentially 1,095 use days annually

³Event attendees reflect the number of attendees and exhibitors who registered or purchased a ticket for an event

⁴Total attendance reflects repeat daily attendance for attendees and exhibitors registered for multi-day events

Parking Information

Marriott Hotel-----203 spaces

Hilton Hotel-----211 spaces

Hyatt Hotel-----77 spaces

All hotel spaces are in the lower level.

Reserved spaces for city employees-----38(all on street level)

Reserved handicapped-----20(all on street level)

Public/compact spaces----- 362

Public/full-size spaces-----243

Total public non-reserved spaces available daily-----605(110 on lower level / 495 on street level)

Civic Auditorium & Parkside Hall	Number of Events	Event Days ⁵	Total Use Days ⁵	Occupancy ⁶	Event Attendees ⁷	Total Attendance ⁸
Conventions/Trade Shows ⁹	10	46	107	10%	74,467	223,401
Local Trade Shows	5	27	43	4%	4,990	14,970
Consumer Shows	13	45	62	6%	22,019	22,019
Community Events	137	212	257	23%	156,469	156,469

Appendix I

Food Functions	5	8	15	1%	3,027	3,027
	170	338	484	44%	260,972	419,886

⁵ Use of Parkside Hall and the Civic Auditorium is calculated for 3 areas. There are potentially 1,095 event and use days annually.

⁶ Occupancy is based on the use of 3 areas. There are potentially 1,095 use days annually

⁷ Event attendees reflect the number of attendees and exhibitors who registered or purchased a ticket for an event

⁸ Total annual attendance reflects repeat daily attendance for attendees and exhibitors registered for multi-day events

⁹ Conventions/Trade Shows that also used the Convention Center

Appendix I

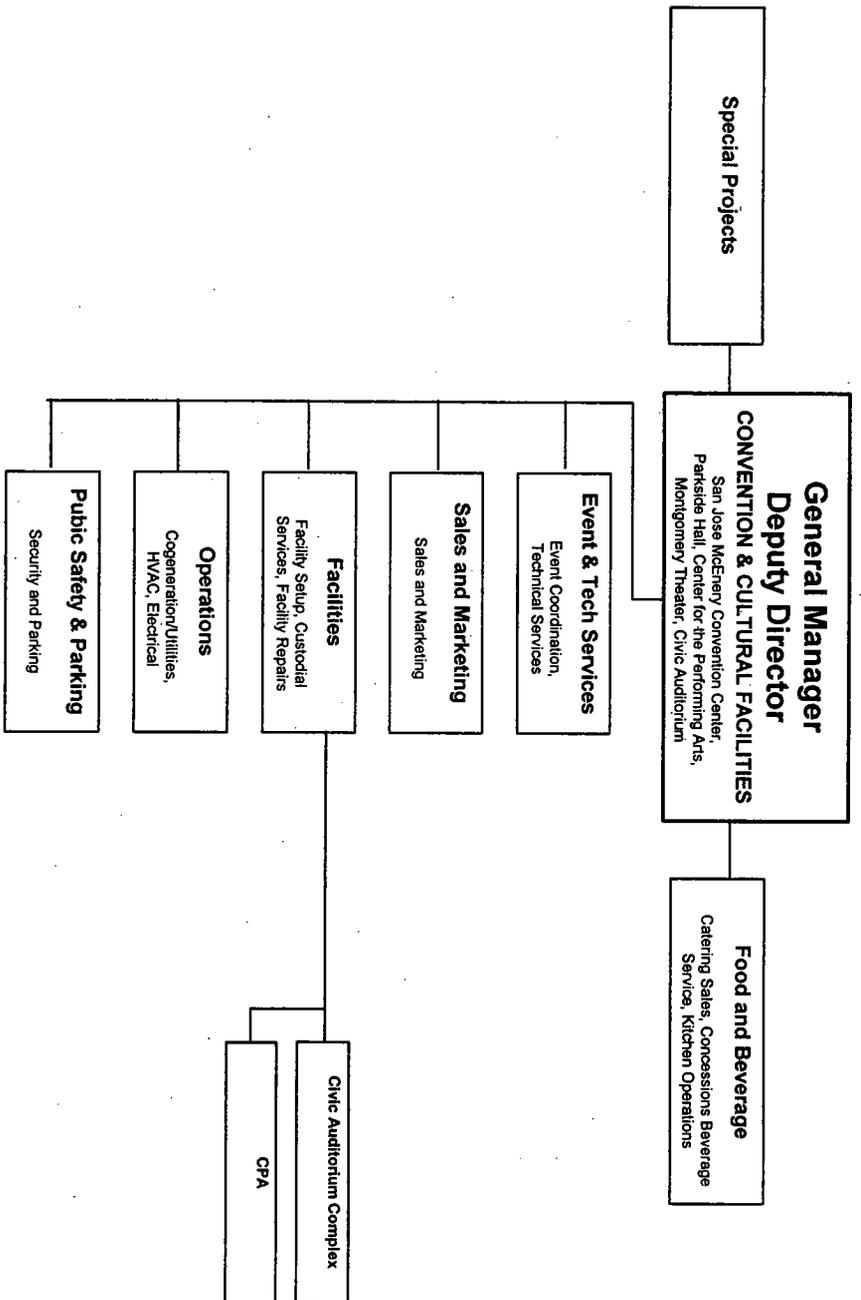
Center for the Performing Arts

Number of Performances	206
Number of Event Days ¹⁰	162
Number of Total Use Days ¹⁰	249
Occupancy ¹⁰	68%
Total Annual Attendance	306,063

Montgomery Theater

Number of Performances	207
Number of Event Days ¹⁰	170
Number of Total Use Days ¹⁰	290
Occupancy ¹⁰	79%
Total Annual Attendance	69,272

¹⁰Based on 365 days maximum potential use/occupancy



Appendix I
San Jose Convention and Cultural Facilities

Fiscal Year	2002/2003 (Actual)				2001/2002 (Actual)		
	Total Convention Facilities	Center for Performing Arts	Montgomery Theatre	Total all locations	Total Convention Facilities	Center for Performing Arts	Montgomery Theatre
Revenue							
Rent	3,437,277	535,230	130,500	4,103,007	3,376,244	468,400	122,827
* Other Operating Revenue	898,071	159,086	84,651	1,141,808	935,794	161,838	89,466
Food Services	944,834	62,599	11,283	1,018,716	1,189,864	53,360	11,661
Utilities	838,593	0	0	838,593	1,041,643	445	0
Parking	918,584	0	0	918,584	514,000	0	0
Total Revenue	7,037,359	756,915	226,434	8,020,708	7,057,545	684,043	223,954
Expenses							
Personal Services	6,137,147	553,405	202,905	6,893,457	5,984,996	555,341	210,934
Utilities	1,616,376	263,247	0	1,879,623	1,646,964	223,422	0
Other Non-Personal	1,654,275	113,678	7,593	1,775,546	2,144,388	125,505	13,064
Total Expenses	9,407,798	930,330	210,498	10,548,626	9,776,348	904,268	223,998
Net Income by Location	(2,370,439)	(173,415)	15,936	(2,527,918)	(2,718,803)	(220,225)	(44)
Undistributed Expenses							
Division Mgmt-PS				355,191			
Division Mgmt-NPS				99,815			
Admin-PS				885,361			
Admin-NPS				729,064			
Overhead	1,165,789	105,293	32,256	1,303,338	999,786	108,442	31,886
Subtotal Undistributed Expens	1,165,789	105,293	32,256	3,372,769	999,786	108,442	31,886
CCF Op Subsidy from TOT				3,406,052			

*Other Operating Revenue include: ATM, Advertising, Technical Services, Medical Services, Network Fees and Facilities.

Mkting acct budget not included

Appendix I
San Jose Convention and Cultural Facilities

Fiscal Year	2000/2001 (Actual)				1999/2000 (Actual)		
	Total all locations	Total Convention Facilities	Center for Performing Arts	Montgomery Theatre	Total all locations	Total Convention Facilities	Center for Performing Arts
Revenue							
Rent	3,967,471	4,015,167	588,511	136,500	4,740,178	3,634,997	578,320
* Other Operating Revenue	1,187,098	1,016,820	158,616	65,798	1,241,234	1,101,956	152,726
Food Services	1,254,885	1,950,214	48,109	12,433	2,010,756	1,671,980	46,189
Utilities	1,042,088	878,552	6,712	0	885,264	848,773	2,414
Parking	514,000	750,000	0	0	750,000	761,500	0
Total Revenue	7,965,542	8,610,753	801,948	214,731	9,627,432	8,019,206	779,649
Expenses							
Personal Services	6,751,271	5,227,927	595,229	159,274	5,982,430	4,793,183	668,669
Utilities	1,870,386	1,724,099	331,251	0	2,055,350	1,225,371	-19,419
Other Non-Personal	2,282,957	2,392,482	76,484	5,139	2,474,105	1,831,428	248,878
Total Expenses	10,904,614	9,344,508	1,002,964	164,413	10,511,885	7,849,982	898,128
Net Income by Location	(2,939,072)	(733,755)	(201,016)	50,318	(884,453)	169,224	(118,479)
Undistributed Expenses							
Division Mgmt-PS	317,602				108,223		
Division Mgmt-NPS	171,394				106,566		
Admin-PS	1,148,940				1,177,849		
Admin-NPS	626,799				406,388		
Overhead	1,140,114	870,000	108,442	31,886	1,010,328	1,093,430	82,698
Subtotal Undistributed Expenses	3,404,849	870,000	108,442	31,886	2,809,354	1,093,430	82,698
CCF Op Subsidy from TOT	6,865,609				6,801,757		

*Other Operating Revenue include: ATM, Advertising, Technical Services, Medical Services, Network Fees and Facilities.

Mkting acct budget not included

Appendix I
San Jose Convention and Cultural Facilities

Fiscal Year	1998/1999 (Actual)					
	Montgomery Theatre	Total all locations	Total Convention Facilities	Center for Performing Arts	Montgomery Theatre	Total all locations
Revenue						
Rent	131,875	4,345,192	3,162,662	497,755	97,665	3,758,082
* Other Operating Revenue	44,097	1,298,779	1,017,444	135,308	17,124	1,169,876
Food Services	12,362	1,730,531	1,176,976	68,544	7,569	1,253,089
Utilities	0	851,187	852,294	0	0	852,294
Parking	0	761,500	700,000	0	0	700,000
Total Revenue	188,334	8,987,189	6,909,376	701,607	122,358	7,733,341
Expenses						
Personal Services	118,919	5,580,771	4,446,172	620,239	113,173	5,179,584
Utilities	0	1,205,952	893,932	427,606	0	1,321,538
Other Non-Personal	8,640	2,088,946	1,660,331	106,260	21,488	1,788,079
Total Expenses	127,559	8,875,669	7,000,435	1,154,105	134,661	8,289,201
Net Income by Location	60,775	111,520	(91,059)	(452,498)	(12,303)	(555,860)
Undistributed Expenses						
Division Mgmt-PS		101,734				169,716
Division Mgmt-NPS		146,212				65,251
Admin-PS		1,065,023				1,005,259
Admin-NPS		554,587				454,645
Overhead	32,390	1,208,518	756,790	78,695	30,823	866,308
Subtotal Undistributed Expens	32,390	3,076,074	756,790	78,695	30,823	2,561,179
CCF Op Subsidy from TOT		5,211,365				5,945,887

*Other Operating Revenue include: ATM, Advertising, Technical Services, Medical Services, Network Fees and Facilities.

Mkting acct budget not included

Appendix II

WAGE REQUIREMENTS

Pursuant to City of San Jose Prevailing Wage and Living Wage policies, Contractor and any subcontractor shall be obligated to pay not less than the prevailing wage or living wage as indicated in this Exhibit.

I. CITY COUNCIL WAGE POLICIES

A. Living Wage Policy

Under City Council Resolution 68900, contractors who are awarded certain City service and labor contracts are required to pay a minimum level of compensation to covered employees who work on these projects.

Living wages shall mean the wages paid under a collective bargaining agreement between the Contractor and a recognized union representing employees who will perform services pursuant to the Agreement.

However, if the wage rates set forth in the collective bargaining agreement fall below the then current Living Wage Rate set by the City of San Jose, the required rate of pay shall be the Living Wage Rate, unless the collective bargaining agreement expressly provides that the agreement shall supercede the requirements of the Living Wage Policy.

If there is no collective bargaining agreement as described above, not less than the following Living Wage Rate must be paid to covered employees performing work identified in the applicable wage determination issued by the City of San Jose's Office of Equality Assurance.

1. If health insurance benefits are provided, a wage of not less than Ten Dollars and Thirty-One Cents (\$10.31) per hour.
2. If health benefits are not provided, a wage of not less than Eleven Dollars and Fifty-Six Cents (\$11.56) per hour.

B. Prevailing Wage Policy

Under City Council Resolution No. 61144, contractors for certain types of contracts are required to pay prevailing wages to their employees who work on City projects.

Prevailing Wages shall mean the wages paid under a collective bargaining agreement between the Contractor and a recognized union representing workers who perform services pursuant to this agreement; or

If there is no collective bargaining agreement as described above, not less than the prevailing rate of per diem wages for the employee craft/classification as determined by the City of San Jose's Office of Equality Assurance.

The Prevailing Wage will be subject to annual adjustment on the anniversary of the contract. Adjustment will be based on the United States Department of Labor, Bureau of Labor Statistics Consumer Price Index, All Items, for all Urban Consumers [CPI-U] for San Francisco-Oakland-San Jose).

C. Reports

The Office of Equality Assurance will monitor the payment of prevailing and living wages by requiring the Contractor and all Subcontractors to file a LABOR COMPLIANCE WORKFORCE STATEMENT and LABOR COMPLIANCE FRINGE BENEFIT STATEMENT with supporting documentation.

The Contractor and Subcontractors shall also report such other additional information, including certified payrolls, as requested by the Director of Equality Assurance to ensure adherence to the Policies.

Labor compliance statements must be filed in the Office of Equality Assurance within 10 days of execution of this Agreement at the address below.

City of San Jose
Office of Equality Assurance
4 North 2nd Street, Suite 925
San Jose, CA 95113
Phone: 408.277.4025

THIS EXHIBIT INCLUDES THE LABOR COMPLIANCE WORKFORCE STATEMENT AND LABOR COMPLIANCE FRINGE BENEFIT STATEMENT TO BE SUBMITTED BY THE AWARDED CONTRACTOR ONLY. DO NOT SUBMIT THESE FORMS WITH YOUR PROPOSAL.

II. LIVING WAGE POLICY PROVISIONS

On November 17, 1998, by Resolution No. 68554 and amended on June 8, 1999 by Resolution 68900, the San Jose City Council adopted its Living Wage Policy to meet the employment and economic development needs of low wage workers by mandating:

1. A minimum level of compensation for workers employed by contractors and subcontractors who are awarded certain City of San Jose service and labor contracts with an expenditure in excess of \$20,000 and recipients who receive direct monetary financial assistance from the City in the amount of \$100,000 or more in any twelve month period, excluding non-profit corporation;
2. The provision of health insurance benefits or the ability to afford health insurance;
3. Retention of employees when certain new contractors take over a continuing City service;
4. An environment of labor peace; and
5. Employee Work Environment Evaluation (Third Tier Review)

A. WAGE REQUIREMENTS

1. Covered Employees Defined

For the purpose of this provision, Covered Employees means any person employed by the Contractor or Subcontractor who meets the following conditions:

- a) The person does not provide volunteer services that are uncompensated except for reimbursement of expenses such as meals, parking or transportation;
- b) The person expends at least half of his/her time on work for the City.
- c) The person is at least eighteen (18) years of age; and
- d) The person is not in training for the period of training specified under training standards approved by the City of San Jose.

B. EMPLOYEE RETENTION REQUIREMENTS

One of the provisions of the Living Wage Policy is a requirement that on certain contracts over \$50,000, the new Contractor must retain the workers who have been performing the City services under the previous contractor. Employee retention is applicable to the Operator and all Subcontractors under the Agreement in two respects: (1) the Contractor will be obligated to adhere to these requirements in hiring; and (2) the Contractor will also be obligated to cooperate with the City in transitioning to a new contractor at the end of the term of the Agreement.

The following provisions are applicable to this RFP and will become part of the Agreement:

1. Qualified Retention Employee Defined

Qualified Retention Employee means any person employed by the predecessor contractor or any subcontractor to the predecessor contractor who meets the following requirements:

- i. The person provides direct labor or service on the City contract;
- ii. The person is not an “exempt” employee under the Fair Labor Standards Act (FSLA); and
- iii. The person has been employed on the City contract by the predecessor service contractor or subcontractor for at least a six-month period prior to the date of the new contract.

2. Current Eligible Retention Employee Defined

Current Eligible Retention Employee means a current employee of the new Contractor who meets the following requirements:

- i. The person has been employed by the Contractor for at least the six month period prior to the date of the new service or labor contract;
- ii. The person would otherwise need to be terminated as a result of the implementation of the City of San Jose Living Wage Policy; and
- iii. The Contractor chooses to designate the person as a Current Eligible Retention Employee.

The Contractor must establish requirements i. and ii. above by submitting payroll records or other reliable evidence satisfactory to the Director of Equality Assurance. If the Contractor cannot submit such evidence, the employee cannot be designated a Current Eligible Retention Employee.

C. EMPLOYMENT OF QUALIFIED RETENTION EMPLOYEES

The new Contractor shall offer continued employment to all Qualified Retention Employees who are interested in such continued employment.

The City will provide the new Contractor with information regarding which employees of the Predecessor are Qualified Retention Employees to the extent such information is available to the City of San Jose.

Notwithstanding anything to the contrary in this provision, the new Contractor may deem an employee not to be a Qualified Retention Employee if, and only if:

1. The employee has been convicted of a crime that is related to the job or to his/her job performance; or
2. The Contractor can demonstrate to the City that the employee presents a significant danger to customers, co-workers or City staff.

In the event that the new Contractor does not have enough positions available to hire all Qualified Retention Employees desiring continued employment and to retain its Current Eligible Retention Employees, the new Contractor shall hire Qualified Retention Employees and retain Current Eligible Retention Employees by seniority within each employment classification. For any positions that become available during the initial ninety (90) day period of the contract, the new Contractor shall hire Qualified Retention Employees and rehire its Current Eligible Retention Employees by seniority within each employment classification.

1. Retention Requirements

- a. Qualified Retention Employees hired by the new Contractor may not be discharged without cause during the initial ninety (90) day period of their employment.
- b. The new Contractor shall offer continued employment to each Qualified Retention Employee who receives a satisfactory performance evaluation at the end of the initial ninety (90) day period of employment. Such employment shall be offered under the same terms and conditions established by the new Contractor for all of its employees.

2. Third Party Beneficiary

Qualified Retention Employees are third party beneficiaries of this Agreement, which means that the employee has the right to enforce the provisions of the Agreement independent of the City's right to enforce the provisions of the Agreement. The third party rights will become effective only when the Agreement becomes effective. No third party rights are intended to apply to any employee regarding the RFP process.

3. Obligations Upon Termination

Upon termination of this Agreement Contractor shall fully cooperate with all City requests regarding contacts with Contractor's employees to enable a transition in the workforce to a new Contractor.

D. EMPLOYEE WORK ENVIRONMENT EVALUATION (Third Tier Review)

All service or labor contracts are required to undergo an Employee Work Environment Evaluation, commonly referred to as "Third Tier Review." This Review looks into a proposer's history as an employer and work condition commitments. Each proposer is required to complete an Employee Work Environment Questionnaire and return it with the proposal.

If the Questionnaire is not returned, the proposal will be deemed to be non-responsive. All proposals are required to address: employee health benefits; compensated days off; employee complaint procedures; compliance with state and federal workplace standards; Employee Retention requirements, if applicable; and Service Disruption/Labor Peace provisions, if applicable.

E. LABOR PEACE

The Office of Equality Assurance has determined that the level of vulnerability of the proposed contract to service or labor disputes is sufficient to warrant that labor peace is essential to the propriety interests of the City. The determination was based on considerations including, but not limited to the following factors:

1. The service or labor will be provided on City site or a site which is important to the propriety interests of the City;
2. The service provider relies on a significant amount of public patronage;
3. The economic effect of any disruption of City expenditures or revenues is significant;
4. The effect of any disruption on the citizens, tourists and businesses in the community is significant.

Proposers are to include in their proposal how they will assure that no labor dispute or unrest will occur during the term of the City contract. Failure to address this topic in the submission of the proposal will deem the proposal to be non-responsive.

Proposers are cautioned that the City contract will include details and requirements of Labor Peace based on the proposal response.

F. ENFORCEMENT

1. General

Contractor acknowledges it has read and understands that, pursuant to the terms and conditions of this Contract, it is required to pay workers either a prevailing or living wage (“Wage Provision”) and to submit certain documentation to the City establishing its compliance with such requirement. (“Documentation Provision.”) Contractor further acknowledges the City has determined that the Wage Provision promotes each of the following (collectively “Goals”):

- a) It protects City job opportunities and stimulates the City’s economy by reducing the incentive to recruit and pay a substandard wage to labor from distant, cheap-labor areas.
- b) It benefits the public through the superior efficiency of well-paid employees, whereas the payment of inadequate compensation tends to negatively affect the quality of services to the City by fostering high turnover and instability in the workplace.
- c) Paying workers a wage that enables them not to live in poverty is beneficial to the health and welfare of all citizens of San Jose because it increases the ability of such workers to attain sustenance, decreases the amount of poverty and reduces the amount of taxpayer funded social services in San Jose.
- d) It increases competition by promoting a more level playing field among contractors with regard to the wages paid to workers.

2. Remedies

The service contract or financial assistance agreement shall provide that if a violation of any provision of this Policy occurs and is not corrected after written notice, the City may, at its option, do any or all of the following:

- a) **Suspension or termination:** Suspend and/or terminate the contract or financial assistance agreement for cause;
- b) **Restitution:** Require the employer to pay any amounts underpaid in violation of the required payments and City's administrative costs and liquidated damages. and in the case of financial assistance to refund any sums disbursed by the City.
- c) **Debarment:** Debar the contractor or subcontractor from future City contracts and/or deem the recipient ineligible for future financial assistance.
- d) **Withholding Of Payment:** Contractor agrees that the Documentation Provision is critical to the City's ability to monitor Contractor's compliance with the Wage Provision and to ultimately achieve the Goals. Contractor further agrees its breach of the Documentation Provision results in the need for additional enforcement action to verify compliance with the Wage Provision. In light of the critical importance of the Documentation Provision, the City and Contractor agree that Contractor's compliance with this Provision, as well as the Wage Provision. is an express condition of City's obligation to make each payment due to the Contractor pursuant to this Contract. The City is not obligated to make any payment due the Contractor until Contractor has performed all of its obligations under these provisions. Any payment by the City despite Contractor's failure to fully perform its obligations under these provisions shall not be deemed to be a waiver of any other term or condition contained in this Contract or a waiver of the right to withhold payment for any subsequent breach of the Wage Provision or the Documentation Provision.
- e) **Liquidated Damages For Breach Of Wage Provision:** Contractor agrees its breach of the Wage Provision would cause the City damage by undermining the Goals, and City's damage would not be remedied by Contractor's payment of restitution to the workers who were paid a substandard wage. Contractor further agrees that such damage would increase the greater the number of employees not paid the applicable prevailing wage and the longer the amount of time over which such wages were not paid. The City and Contractor mutually agree that making a precise determination of the amount of City's damages as a result of Contractor's breach of the Wage Provision would be impractical and/or extremely difficult. Therefore, the parties agree that, in the event of such a breach, Contractor shall pay to the City as liquidated damages the sum of three (3) times the difference between the actual amount of wages paid and the amount of wages that should be paid.

G. AUDIT RIGHTS

All records or documents required to be kept pursuant to this Contract to verify compliance with the Wage Provision shall be made available for audit at no cost to City, at any time during regular business hours, upon written request by the City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Copies of such records or documents shall be provided to City for audit at City Hall when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records or documents shall be available at Contractor's address indicated for receipt of notices in this Contract.

H. COEXISTENCE WITH ANY OTHER EMPLOYEE RIGHTS

These provisions shall not be construed to limit an employee's ability to bring any legal action for violation of any rights of the employee.



Appendix II (a)
LABOR COMPLIANCE
FRINGE BENEFIT STATEMENT

CONTRACTOR NAME: _____

PROJECT: _____

I certify under penalty of perjury that fringe benefits are paid to the approved plans, funds, or programs as listed below:

Classification	Fringe Benefit Hourly Amount	Name of the Plan or Fund (Attach Premium Transmittal)
1. <div style="border: 1px solid black; padding: 5px; background-color: #f0f0f0;"> <p>Documentation of Plan contribution <u>must</u> be returned with this statement</p> <p>Please attach a copy of your most recent transmission into each medical, pension, or profit sharing plan account indicating worker name and amount of contribution.</p> </div>	Vacation	
	\$ _____	_____
	Health & Welfare	_____
	\$ _____	_____
	Pension	_____
	\$ _____	_____
	Apprentice	_____
\$ _____	_____	
Other (specify)	_____	_____
\$ _____	_____	_____
2. _____	Vacation	
	\$ _____	_____
	Health & Welfare	_____
	\$ _____	_____
	Pension	_____
	\$ _____	_____
	Apprentice	_____
\$ _____	_____	
Other (specify)	_____	_____
\$ _____	_____	_____
3. _____	Vacation	
	\$ _____	_____
	Health & Welfare	_____
	\$ _____	_____
	Pension	_____
	\$ _____	_____
	Apprentice	_____
\$ _____	_____	
Other (specify)	_____	_____
\$ _____	_____	_____

All (or some) fringes are paid as a cash payment in the employee's basic hourly rate.

 Company Name (Please Print)

 Name and Title (Please Print)

 Date

 Signature

Appendix II (c)



City of San Jose Wage Determination

SCOPE: OPERATION OF CONVENTION CENTER, CIVIC AUDITORIUM, PARKSIDE HALL, MONTGOMERY THEATER, CENTER FOR PERFORMING ARTS

Contracts governed by both the City of San Jose's Living Wage Policy (Resolution No. 68900) and its Prevailing Wage Policy (Resolution No. 61144) are subject to the Policy with the higher wage requirements. The following descriptions and work classifications are subject to prevailing wage or living wage requirements.

STATE OF CALIFORNIA PREVAILING WAGE

The following classifications are identified by the California Department of Industrial Relations. Rate of pay is included only as a courtesy. Proposers are cautioned that the rates contained in the General Prevailing Wage Determination Made by the Director of Industrial Relations (DIR) are subject to change.

Job Title Craft / Classification	Basic Hourly Pay Rate	Total Benefits	Total Hourly Pay
Air Conditioning Mechanic (City Job Code 3162) <hr/> Plumber, Service & Repair [Subtrades for Santa Clara County]	\$ 44.51	\$ 13.62	\$ 58.13
Electrician (City Job Code 3153) <hr/> Electrician, Inside Wireman, Technician [Subtrades for Santa Clara County]	\$ 42.57	\$ 13.80	\$ 56.37
Facility Sound & Light Tech (City Job Code 3236) <hr/> Electrician, Com & System Installer ---- Electrician Comm & System Technician [Subtrades for Santa Clara County]	\$ 24.32 ---- \$27.69	\$ 6.13 ---- \$ 6.23	\$ 30.45 --- \$33.92

Rate Information Updated 10.6.2003



City of San Jose Wage Determination

STATE OF CALIFORNIA PREVAILING WAGE continued

Job Title Craft / Classification	Basic Hourly Pay Rate	Total Benefits	Total Hourly Pay
Facility Repair Worker (City Job Code 3236) <hr/> Laborer Group 3 [Northern California Basic Trade Determinations, Pages 49-50]	\$ 22.39	\$ 10.03	\$ 32.42
Gardner (City Job Code 3424) <hr/> Laborer Group 3 [Northern California Basic Trade Determinations, Pages 49-50]	\$ 22.39	\$ 10.03	\$ 32.42
Groundswoker (City Job Code 3162) <hr/> Plumber, Landscape Tradesman II [Subtrades for Santa Clara County]	\$ 8.60	\$ 6.80	\$ 15.40

CITY OF SAN JOSE LIVING WAGE RATES

Job Classification	Basic Hourly Pay Rate	Medical Benefit	Total Hourly Pay
Custodian	\$10.31	\$1.25	\$11.56

The full amount of the total hourly wage must be paid directly to the worker, UNLESS the Contractor is making payments to a medical benefit plan.

The Living Wage Policy states that if wages set forth in a collective bargaining agreement fall below the current Living Wage set by the City of San José, the required rate of pay shall be the Living Wage Rate unless the collective bargaining agreement expressly provides that the Agreement shall supersede the requirements of the Living Wage Policy.

RATES WILL BE SUBJECT TO ANNUAL ADJUSTMENT ON THE ANNIVERSARY OF THE CONTRACT

Rate Information Updated 10.6.2003



City of San Jose Wage Determination

Hours and Days of Work*

(Industrial Welfare Commission Order No. 16-2001)

City of San José contracts subject to City prevailing wage or living wage policies will use the same guidelines for all covered classifications/employees.

Employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 ½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

- (a) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek; and
- (b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) on the seventh (7th) consecutive day of work in a workweek.

*The above Hours and Days of Work apply to Living Wage classifications. State prevailing wage requirements for weekend and holiday pay vary by craft. Please reference the California Department of Industrial Relations General Wage Determination for specific rates.

Instructions to Obtain State of California Prevailing Wage Determination

A copy of the current General Prevailing Wage Determination made by the Director of Industrial Relations may be obtained from the Office of Equality Assurance at:

Office of Equality Assurance
4 North 2nd Street, Suite 925
San Jose, CA 95113

Phone: 408.277.4025 Fax: 408.277.3885 TTY: 408.971.0134

For Internet access to current wage rates and benefit information, you may contact the California Department of Industrial Relations web site at <http://www.dir.ca.gov/>. Click on **Statistics & Research**. Scroll down to Current Prevailing Wage Determinations and click on the corresponding **General Prevailing Wage Determinations Menu (Journeyman)**. Scroll down and follow the directions until you locate the trade applicable to your contract. Prevailing wages for City of San Jose contracts will be found under:

- Step One **Statewide**,
- Step Two (A) **Northern California**, or
- Step Four for **Santa Clara County**

Rate Information Updated 10.6.2003

APPENDIX III

OTHER POLICY/CONTRACT REQUIREMENTS

This Appendix provides an overview and description of other Council-Adopted Policies for which Council *may* require the operation and management of the Convention Center and other Cultural Facilities to occur pursuant to these policies.

These policies include the following:

- **Theater booking guidelines**

The purpose of the Theater Guidelines is to establish criteria for scheduling events at the Center for the Performing Arts, and Montgomery Theater. The Guidelines provide: (1) the eligibility and production requirements for each tier, and (2) the scheduling timeframes for each tier. For example, a Tier 1 group at the Center for the Performing Arts may tentatively book dates as far as 3 years in advance of the Performing Arts Season (September - August), and must confirm the dates no later than 9 months in advance of the Performing Arts Season. Tier 2 groups may submit tentative bookings beginning 15 months in advance of each Performing Arts Season, and may challenge Tier 1 groups for dates they are holding on a tentative basis up to 15 months in advance of each Performing Arts Season.

The California Theatre is primarily designed as the home of Opera San Jose, which has first choice of dates for its productions. The guidelines are currently being drafted, and will establish criteria for booking the remaining dates based on the number of production days and performances.

All of the Booking Guidelines are attached for review.

- **Convention Center Booking Policy** (outlines what types of events can book long-term dates and short-term dates) - The booking policy for the Convention Facilities offers long-term priority dates to conventions and tradeshows that are international, national or regional in nature, have a significant impact in terms of hotel tax generated, and use a minimum of 500 peak or 1,500 total hotel room nights. These events attract out-of-town attendees that boost the local economy by bringing new dollars to San Jose. Second priority for date selection is offered within 18 months of the event based on the potential economic benefit and operating revenue to the City. Second priority events include conventions and tradeshows that use a minimum of 500 total hotel room nights, and multiple event-day, multiple-hall, local trade shows, consumer shows and community events. Single event-day and/or single hall local trade shows, consumer shows, and community events will be given third priority on dates and can be booked up to 12 months in advance for the Civic Auditorium and Parkside Hall, and up to 9 months in advance for the Convention Center. Dance concerts at the Convention Center can be booked up to 9 months prior to the event. All other events will be given dates on a space-available basis.

All of the Booking Guidelines are attached in their entirety for review.

- **Rates Resolutions**

Contractor will be responsible for annually developing prices, rates and rate schedules for any commitments that the manager will be responsible for negotiating. Rates and fees are subject to the approval of the City Council.

- **Electrical Services**

The selected proposer may give clients the option to use the City or any other utility contractor to provide utility services for any given event at the Convention Center, Civic Auditorium, and the Parkside Hall. There is however a standard Council-approved agreement that will be required to be used. A copy of this Agreement is attached for review.

- **Flexible Rates**

The Council-approved flexible rate structures for facility use and garage parking will need to be retained by the selected proposal. In order to remain competitive and capture greater market share, it may be necessary to reduce rates to less than 50 percent of the established rates, including reducing them altogether, or to reduce rates within the one-year timeframe for short-term business. In addition, when considering an event promoter's request to reduce the flat parking rate, the operator will assess the event's economic benefit, the projected number of parking spaces needed, and the demand for parking spaces at the convention center garage. For non-event days, the incremental rate will be in effect.

Following is a list of the standard incremental parking rates and the range for the flat parking rate for the convention center garage.

Standard Incremental Rate	\$1.00 per 20 minutes
Maximum Daily Incremental Rate	\$15.00
Maximum Daily Incremental Range	\$10.00 to \$18.00
Flat Rate Range	\$0.00 to \$18.00 per vehicle/entry
In and Out Daily Pass	Posted Flat Rate x 2/vehicle/day

The City of San Jose will continue to own, operate, and collect revenues from the parking facilities. The operator will be entitled to recognize the net proceeds generated from the garages.

- **Environmental Procurement Policy (EPP)**

The primary purpose of this policy is to minimize negative environmental impacts of the City's activities by ensuring the procurement of services and products that:

- reduce toxicity;
- conserve natural resources, materials, and energy;
- maximize recyclability and recycled content.

A collateral purpose is to support markets for recycled goods and other environmentally preferable products and services. A copy of the full Policy is attached.

- **Facility Use Agreement**

Contractor is required to use attached City Facility Use Agreement between Contractor and Clients of the Convention Center and/or other Cultural Facilities.

Existing Contracts - The following contracts will need to be retained.

- **Concessionaire contract**

The first 5-year term of the City's concessionaire agreement expires January 2, 2005. The City has the option to extend the agreement for an additional 5-year term, or search competitively for another concessionaire. The concessionaire is the exclusive provider for all food, beverage, and novelty services at the facilities.

- **Network services contract**

The network services agreement expires January 31, 2006. The network services contractor has the exclusive right to use the existing network infrastructure, but clients have the right to install and manage their own temporary networks. The network services agreement includes all network infrastructure, systems, and services necessary to provide high-speed local and wide-area network connectivity services that are made available for a fee to clients at or from the facilities through the SJCC Network.

- **Supply of Hot and Chilled Water**

The operator of the Convention Center will also need to honor the contract to supply hot and chilled water to the Hilton Hotel and hot and chilled water as well as electricity to the old MLK Library Building.

- **Convention and Visitors Bureau Contract**

Terms of the current agreement with the Convention and Visitors Bureau, which will expire in on June 30, 2005, will be retained. A copy of the full agreement is attached for review.

Appendix III(a)

Booking Guidelines

San José McEnery Convention Center, Civic Auditorium and Parkside Hall

The following guidelines will be used by the Operator to help determine booking priorities for the San José McEnery Convention Center, Civic Auditorium and Parkside Hall (Convention Facilities) when scheduling events. Other factors, such as financial performance and economic benefit may also be taken into consideration. The Operator shall have full and final authority to determine booking priorities and schedule events.

Mission

The mission of the Convention Facilities is to serve first as a venue that will attract national and international conventions and trade shows that will draw significant numbers of people to downtown San José that will contribute to the economic health of the City; and second, to serve as a significant venue for other kinds of activities that contribute to the cultural, social and economic vitality of the City.

Booking Guidelines

Long-term Bookings

Reservations more than 18 months before the event are normally handled by the San Jose Convention and Visitors Bureau and are subject to the guidelines below.

Conventions and Trade Shows, which are international, national or regional in nature, have a significant impact in terms of hotel tax generated and use a minimum of 500 peak or 1,500 total hotel room nights are given priority on dates.

Short-term Bookings

Reservations less than 18 months before the event are normally handled by the Operator and are subject to the procedures outlined herein.

1. Conventions and Trade Shows which are international, national or regional in nature, have a significant impact in terms of hotel tax generated and use a minimum of 500 total hotel room nights are given priority on dates. Returning annual events in good standing will be given priority over new events.
2. Multiple event-day, multiple-hall, local trade shows, consumer shows and community events will be given second priority on dates. Multiple event-day, multiple-hall, local trade shows and consumer events can be booked up to 18 months prior to the event. Returning annual events in good standing will be given priority over new events.

Appendix III(a)

Booking Guidelines

San José McEnery Convention Center, Civic Auditorium and Parkside Hall

Consumer shows shall be revenue-producing events from which the Operator receives a percentage of ticket sales. A consumer show is an event which either:

- a. Is open to the general consumer rather than being limited to a well defined group of persons who normally belong to a trade or professional association; OR
- b. Is advertised to the general consumer whether on television or radio, or in the newspapers or magazines of general publication without the advertising prominently stating that admission is limited to the trade; OR
- c. Involves selling and delivering merchandise by exhibitors or clients and also involves a significant number of attendees who are not registered at the door.

The Operator shall have the full and final authority for determining whether an event is, within the guidelines set forth above, a trade or consumer event.

3. Single event-day and/or single hall local trade shows, consumer shows, and community events will be given third priority on dates. Returning annual events in good standing will be given priority over new events.

Single event-day and/or single hall local trade shows, consumer shows, and community events to be held at the Civic Auditorium and/or Parkside Hall can be booked up to 12 months in advance. Events to be held at the Convention Center can be booked up to 9 months in advance.

4. Dance concerts at the Convention Center can be booked up to 9 months prior to the event and will be scheduled according to the attached Addendum A, Large Dance Policy.

Booking Process

Application

An Application must be submitted to reserve any part of the Facilities on either a tentative or definite basis. The Operator may decline to approve any application for any producer on the basis of the following:

1. The completeness and clarity of the application;
2. Whether the application has completely, accurately and in a timely manner provided information required or requested by the Operator;
3. Whether space is reasonably available for the use or occupancy requested;

Appendix III(a)

Booking Guidelines

San José McEnery Convention Center, Civic Auditorium and Parkside Hall

4. Whether the event falls within booking policy priorities, which give first priority to maximizing economic benefit to the entire City and its residents;
5. Any other more specific written guidelines or booking policies, which have been established by the City Council or the Operator for the particular type of event;
6. Whether the event adversely affects other scheduled events or the Operator's ability to service such events;
7. Whether the person desiring to use or occupy the facility has the ability to meet its financial obligation and other obligations in connection with the proposed use or occupancy;
8. The applicant's experience and ability to promote and manage the proposed event;
9. Whether the application was received at least thirty (30) days prior to the proposed date of use or occupancy;
10. Whether the person desiring to use the Facility has fully met its obligations with respect to prior events held or planned at either the Facility or at other facilities; and
11. Such other reasons as the Operator may reasonably determine.

Tentative Reservations

The purpose of a tentative reservation is to temporarily hold space while the Application is being completed and/or Facility Use Agreement is being processed.

1. Tentative reservations will be held for a maximum of 15 days for events that are scheduled less than 12 months prior to the event. Tentative reservations will be held for a maximum of 30 days for events scheduled more than 12 months in advance.
2. Tentative reservations that have been held for the maximum time are subject to release without notice.
3. Tentative reservations are cancelable by the Operator without notice if the terms of the Facility Use Agreement are not met and returned with payment.

Confirmed Reservations

A booking will be considered **confirmed** when a signed Facility Use Agreement has been

Appendix III(a)

Booking Guidelines

San José McEnery Convention Center, Civic Auditorium and Parkside Hall

fully executed and payment and all other requirements have been met.

Appendix III(a)

Booking Guidelines

San José McEnery Convention Center, Civic Auditorium and Parkside Hall

City Department Use of the Convention Facilities

City Use Funds

1. City Use funding is only available for City Department initiated and managed events that are free to all attendees. If admission is charged for the event, all revenues must be returned to the General Fund. The person coordinating the event must be a City Department staff person and must be on-site during the event.
2. Use of the facilities is limited to meetings with 50 or more attendees. Exceptions will be made for testing and other special needs.
3. The City Use request must be approved by the requesting City Department Director.

City Department Fees and Charges

1. City Use funding is limited to base room rental fees only. Base room rental fees include attendee seating, head table, podium, and use of a microphone. Use of any additional stages or audio-visual equipment, including the Civic Auditorium stage sound and lighting equipment will be charged to the City Department.
2. Event set-up information must be submitted to the appropriate event coordinator no less than 14 days prior to the first event day. Administrative fees for event coordination and appropriate labor fees for set-up changes, will be charged to the City Department when set-up information and/or changes to the set-up information are received less than 14 days prior to the first event day.
3. If an event is canceled after a Facility Use Agreement has been finalized, a cancellation fee equivalent to the base rental fee will be charged to the City Department charge.

Addendum A Large Dance Policy

This policy addresses eligibility requirements, and procedure for selection of Saturday dates for large general admission dances that use all three (3) exhibit halls at the San Jose McEnery Convention Center.

General Provisions

1. All interested promoters shall submit an application to the Operator no later than September 15 for available Saturday large dance dates for the following calendar year.
2. Each application will be evaluated to ensure the promoter meets the following eligibility criteria:

- a. **Experience:**

Each promoter shall provide documentation of experience promoting at least five (5) “comparable” events at any venue within the last five (5) years. “Comparable” events are any dances or concerts with 7,000 or more attendees.

- b. **Demonstrated Ability to Meet Financial and Contractual Obligations:**

Each promoter shall have met all financial and contractual obligations with the Operator and any other venues within the last five (5) years. A promoter may be deemed ineligible if the promoter has an overdue financial or contractual obligation to the City of San Jose or the Operator, and the overdue obligation is an indication that the promoter may not meet all financial and contractual obligations with the Operator.

- c. **Legitimate Business Presence in San Jose:**

Each promoter must submit the following documents with its application to demonstrate a legitimate business presence in the City of San Jose:

- i. copy of a San Jose business license for the current year and immediately prior two (2) years, and
 - ii. evidence of either of the following types of offices operating legally within the City of San Jose for the current year and the immediately prior two (2) years:
 - (a) the promoter’s principal office; or
 - (b) the promoter’s regional, branch or satellite office with at least one (1) full-time or part-time employee.
3. Promoters that meet the eligibility criteria, including demonstration of a legitimate San Jose business presence, will be considered Eligible Promoters.
 4. Promoters that do not meet the eligibility criteria, including the San Jose business presence criteria, will be notified in writing, and may appeal the decision as provided in the Appeals Process set out below.

Addendum A
Large Dance Policy

Selection Procedures

1. Each year, Eligible Promoters will be notified no later than October 20 of the Saturday dates available for Large Dances for the following calendar year.
2. The Convention Center Operator will conduct a lottery drawing among Eligible Promoters for available dates at a date selection meeting to be held no later than November 20 each year.
3. In order to select a date, each Eligible Promoter must attend the date selection meeting in person or send an authorized representative.
4. Eligible Promoters shall randomly draw numbers at the date selection meeting to determine the order in which they will select dates. At the date selection meeting, each Eligible Promoter must then select a date in the selection order drawn.
5. The process will be repeated until all available dates have been accepted, or all Eligible Promoters have refused available dates. If additional dates become available in the calendar year for which the selection order has been drawn, staff will offer the dates to the Eligible Promoters who were next in line, based on the number they drew at the date selection meeting.

Appeals Process

In the event a promoter has a dispute with the Operator's determination regarding the promoter's eligibility, including the promoter's San Jose business presence, the promoter may request a hearing with the Operator within the period set out in the Operator's written notification, which period shall not be less than five (5) days. The Operator shall not be required to schedule a hearing unless written notice of the request is received within the time period set out in the Department's notice to the promoter. The Operator shall hold a hearing within a reasonable time of receipt of the request for hearing, and shall give the promoter written notice of the time, date and location of the hearing. The Operator shall consider any relevant information given by the promoter at the hearing, and shall inform the promoter, in writing, of his/her decision and the reasons for the decision. The decision of the Operator shall be final.

Appendix III(b)

Booking Guidelines Center for the Performing Arts and Montgomery Theater

The Center for the Performing Arts and Montgomery Theater are owned by the City of San José. The following guidelines will be used by the Operator to determine booking priorities when scheduling events.

Mission

The mission of the Center for the Performing Arts is to serve first as a venue that will offer the residents of San José a variety of high-profile performing arts and cultural activities of the highest quality, drawn locally, as well as nationally and internationally, with the greatest potential to fill the CPA's large capacity while reaching out to the full breadth of the community and drawing significant numbers of people to downtown San José; and second, to serve as a significant venue for other kinds of activities that contribute to the cultural, social and economic health of the City, in general and of the downtown, in particular.

The mission of the Montgomery Theater is to serve first as a venue that will offer the residents of San José a wide variety of performing arts and cultural activities of the highest quality, drawn from the local region, that together reach out to the full breadth of the community; and second as a venue that offers local performing arts and cultural groups an affordable place to experiment, to hone their production skills, and to develop their audience potential.

Booking Guidelines

These guidelines provide a framework for scheduling events at the Center for the Performing Arts and Montgomery Theater, (the Theater(s)). To qualify for Tier 1 or Tier 2 priority booking as discussed below, each group must demonstrate to the satisfaction of the Operator, proven experience and the ability to meet or exceed the minimum eligibility requirements for each respective Tier. Such experience can include previous successful use(s) of the respective Theater(s) or use of comparable facilities.

Groups may qualify for Tier 1 or Tier 2 priority booking for one Theater only. Each group may specify the Theater for which it is seeking Tier 1 or Tier 2 priority booking. However, whether a group qualifies for Tier 1 or Tier 2 priority booking at a particular Theater, will be determined by the Operator. In addition to the eligibility requirements set forth below, the Operator may take into consideration criteria such as, but not limited to demonstrated ticket sales, economic impact on downtown restaurants, density of use, and diversity of artistic programming as defined by the mission of each respective Theater.

In September of each year, the Operator will release a calendar of available dates for use of the Theaters for the next 3 performance seasons (September – August) as indicated below. The City reserves the right to hold dates for City use of the Theaters for activities such as, but not limited to conventions, conferences, City sponsored events, maintenance and capital improvements.

Appendix III(b)

Booking Guidelines Center for the Performing Arts and Montgomery Theater

Resident Group Eligibility Requirements

To qualify for Tier 1 or Tier 2 priority booking in the Theaters a group must be designated a Resident Group. In order to be a Resident Group, each applicant must satisfy each of the following requirements:

- 1) The applicant's corporate headquarters or principal place of business must be located within the San José city limits.
- 2) The performing arts must be the exclusive focus, or at a minimum, a principal part of the applicant's mission and activities. If the performing arts are not the exclusive focus of its mission and activities, the applicant must consistently dedicate at least one-third of its overall budget to the direct cost of performing arts programs and activities (i.e., exclusive of administrative, overhead and other indirect costs).
- 3) The applicant must have at a minimum a three-year history of regularly producing and/or presenting performing arts activities to the public in San José.
- 4) The applicant must have paid all monies owed to the City of San José for the previous two (2) years.
- 5) The applicant must not be in payment default to the City of San José.
- 6) The applicant must not be in bankruptcy unless able to demonstrate to the Operator's satisfaction the ability to pay future obligations.
- 7) To qualify for Tier 1 priority booking each applicant must demonstrate to the Operator's satisfaction a proven ability to fill an average of 60% of the seats for the designated theater or a comparable facility per performance for the previous two years.
- 8) To qualify for Tier 2 priority booking each applicant must demonstrate to the Operator's satisfaction a proven ability to fill an average of 50% of the seats for the designated theater or a comparable facility per performance for the previous two years.

Tier 1 Program Requirements

To qualify for Tier 1 priority booking each Resident Group must produce and/or present the following in the designated theater in each performing arts season:

- 1) A minimum of 30 performances to the public;
- 2) Full week productions with a minimum of 5 performances per week, except for orchestras and other symphonic music ensembles which may be for less than a full week with fewer than 5 performances per week;
- 3) Each Resident Group must sustain average attendance of 60% of available seats at their events; and

Appendix III(b)

Booking Guidelines Center for the Performing Arts and Montgomery Theater

- 4) Weekend days (Fridays, Saturdays and Sundays) must be used as performance days with the exception of one Sunday per production, which may be used for a move-in day.

Tier 2 Program Requirements

To qualify for Tier 2 priority booking each Resident Group must produce and/or present the following in the designated theater in each performing arts season:

- 1) A minimum of 8 performances to the public;
- 2) Each Resident Group must sustain average attendance of 50% of available seats at their events; and
- 3) Weekend days (Fridays, Saturdays and Sundays) must be used by as performance days with the exception of one Sunday per production, which may be used for a move-in day.

Scheduling

- 1) The Operator will consider Tier 1 tentative schedules beginning 3 years in advance of each Performing Arts Season, which begins September 1. (For example, September 1, 2003 is the first day for which the Operator will receive bookings for the Performing Arts Season beginning September 1, 2006).
- 2) Tier 1 Resident Groups may negotiate between themselves to schedule dates and present a collaborative schedule of preferred dates to the Operator in a manner to be determined by the Operator, no later than 18 months in advance of the Performing Arts Season (For example, February 29, 2004 is the last day for which Tier 1 Resident Groups may submit a collaborative schedule of preferred dates for the Performing Arts Season beginning September 1, 2006).
- 3) Tier 1 Resident Groups shall provide the Operator with a confirmation of definite dates no later than 9 months in advance of the Performing Arts Season (For example, December 1, 2005 for the Performing Arts Season beginning September 1, 2006).
- 4) Scheduling conflicts between Tier 1 Resident Groups will be resolved by the Operator.
- 5) The Operator shall identify a minimum of 6 full weeks as available for Tier 2 Resident Groups to book their events in the Center for the Performing Arts and 10 full weeks for Tier 2 Resident Groups to book their events in the Montgomery Theater during each Performing Arts Season (September 1 to May 31). At least 50% of those weeks will be non-holiday weeks.
- 6) The Operator maintains the right to reserve up to 10 weeks for Tier 1 Resident Groups in the Center for the Performing Arts between June 1 and August 31 each year up to 12 months in advance.
- 7) Tier 2 Resident Groups may submit tentative bookings beginning 15 months in advance of each Performing Arts Season, which begins September 1. (For example, June 1, 2005 is the first day for which tentative bookings will be received by the Operator for the Performing Arts Season beginning September 1, 2006).

Appendix III(b)

Booking Guidelines

Center for the Performing Arts and Montgomery Theater

- 8) In addition to requesting dates that have not been tentatively held by Tier 1 Resident Groups, Tier 2 Resident Groups may challenge Tier 1 Resident Groups for dates they are holding on a tentative basis up to 15 months in advance of each Performing Arts Season as described in the Challenge Process below.

Appendix III(b)

Booking Guidelines Center for the Performing Arts and Montgomery Theater

- 9) Tentative holds placed less than 9 months in advance of the Performing Arts Season will be held for a maximum of 30 days.
- 10) All tentative holds can be challenged at any time by another user as described below.

Open Booking Eligibility Requirements

To qualify for use of the Theaters all other applicants must meet the following requirements:

- 1) The applicant must demonstrate to the Operators satisfaction, proven experience and the ability to produce or present the event. Such experience can include previous successful use(s) of the theater or use of a comparable facility.
- 2) The organization must have a minimum of two years demonstrated ability to pay all credit obligations within 30 days net.
- 3) The organization must have paid all monies owed to the City of San Jose and Operator for the previous two (2) years.
- 4) The organization must not be in payment default to the City of San Jose and Operator.
- 5) The organization must not be in bankruptcy unless able to demonstrate the ability to pay future obligations.

Open Booking Scheduling

- 1) Scheduling will be based on a first come first served basis.
- 2) All other users may request tentative holds beginning 12 months in advance of the Performing Arts Season. (For example, September 1, 2005 for the Performing Arts Season beginning September 1, 2006).
- 3) Tentative holds placed less than 9 months in advance of the Performing Arts Season will be held for a maximum of 30 days.
- 4) All tentative holds can be challenged at any time by another user as described below.
- 5) Scheduling conflicts will be resolved by the challenge process described below.

Challenge Process – All Users

The purpose of a tentative hold is to temporarily hold space for a specific event and/or user while the user secures artistic components necessary to the event and for the Operator to process the applications and execute a Facility Use Agreements for the event. Any user that does not have a fully executed Facility Use Agreement for their event may be challenged according to the following procedures:

- 1) If dates have been tentatively scheduled and another group requests those dates, then such other group (the “challenger”) may deliver a deposit of twenty-five percent (25%) or more of the estimated facility use fee to the Operator. The size of the deposit shall be determined by the Operator.

Appendix III(b)

Booking Guidelines Center for the Performing Arts and Montgomery Theater

- 2) Immediately upon receipt of the challenger's deposit, the group holding the original tentative reservation date (the "date holder") shall be notified by the Operator of the challenge.
- 3) In order to retain the date, the date holder must submit a deposit of twenty-five percent (25%) or more of the estimated facility use fee within 72 hours of receipt of notice from the Operator. The amount of the deposit shall be determined by the Operator.
- 4) If the date holder fails to submit the required deposit within 72 hours, then the date will be given to the challenger. The challenger must execute a facility use agreement within 5 working days after being notified by the Operator that the date holder failed to pay the required deposit. Unless the date holder submits the required deposit prior to the 72-hour deadline, the challenger's deposit will become non-refundable.
- 5) The Operator may at its sole discretion waive these requirements or extend the time limits for geographical, logistical, economic or community development considerations.

Appeal Process – All Users

An applicant, who believes that its application for a date or dates in the Theaters has been denied in breach of the booking guidelines, may submit an appeal and request a hearing with the Operator, or the Operator's designee within the period set out in the Department's written notification, which period shall not be less than five (5) days after notification of the decision from THE OPERATOR regarding its request for dates in the Theater(s). The Operator, shall not be required to schedule a hearing unless written notice of the request is received within the time period set out in the Department's notice to the applicant. The Operator shall hold a hearing within a reasonable time of receipt of the request for a hearing, where the applicant shall have the opportunity to present the basis for its belief that the date request was denied for reasons not in compliance with the booking guidelines. The applicant may be represented by counsel. The Operator shall issue its decision regarding the appeal within 7 days of the hearing. The decision of the Operator shall be final.

Appendix III(c)

Booking Guidelines California Theatre

The California Theatre will be owned by the City of San José. These guidelines (referred to hereafter as “Booking Guidelines”) provide a framework for scheduling events at the California Theatre.

In September of each year, the Operator will release a calendar of available dates for use of the California Theatre for the next two Performing Arts Seasons (September – August) as described in these Booking Guidelines. The City reserves the right to hold dates for City use of the California Theatre for activities such as, but not limited to, conventions, conferences, City sponsored events, maintenance and capital improvements.

A. Mission

The mission of the California Theatre is to serve (i) as the home of Opera San José, and (ii) as a venue that will offer the residents of San José a wide variety of performing arts, film, and other cultural activities appropriate for a historic theatre, drawn mainly from the local region, that together reach out to the full breadth of the community.

B. Opera San José Booking and Scheduling

Priority	Deadline to Submit Request To Reserve Dates	Deadline to Confirm And Contract (After Which Dates Will Be Released)
Opera San José	<u>No later than</u> 2 years in advance of the Season	<u>No later than</u> 18 months in advance of the Season

Opera San José shall have first priority of dates at the California Theatre, and shall submit its production schedule to the Operator as specified below:

- 1) Opera San José shall present a production schedule to the Operator no later than two (2) years in advance of the Performing Arts Season (the “Season”)¹. (For example, September 1, 2004 is the last day on which Opera San José may submit a schedule of preferred dates for the Season beginning September 1, 2006.)
- 2) Opera San José shall provide the Operator with a confirmation of definite dates no later than eighteen (18) months in advance of the Season. (For example, March 1, 2004 is the last day on which Opera San José may confirm dates for the Season beginning September 1, 2005.) Dates not confirmed by this deadline shall be considered as released by Opera San José.

¹ The Performing Arts Season begins September 1st and ends August 31st of each year.

Appendix III(c)

Booking Guidelines California Theatre

C. Open Booking Requirements and Scheduling

1. Eligibility Requirements

In order to reserve the California Theatre, users must demonstrate the ability to meet or exceed the following minimum eligibility requirements to the satisfaction of the Operator:

- a. The user must have paid in a timely manner all monies owed to the City of San José and/or Operator for the previous two (2) years.
- b. The user must not have any overdue payments or otherwise be in payment default to the City of San José and/or Operator.
- c. The user must not be in bankruptcy unless able to demonstrate, to the Operator's satisfaction, the ability to pay its future obligations.
- d. User must have complied with the terms of its Facility Use Agreement for City and/or Operator facilities over the past two years.

In general, all other factors being equal, preference shall be given to users that meet the following parameters:

- a. An annual returning event.
- b. The performing or film arts are the exclusive focus, or at a minimum, a principal part of the user's mission and activities.
- c. The user has a minimum three-year history of regularly producing and/or presenting performing or film arts activities to the public.
- d. The user demonstrates to the Operator's satisfaction a proven ability to fill an average of 425 seats per performance for the previous two years.

In addition, the Operator may take into consideration criteria such as, but not limited to, demonstrated ticket sales, economic impact on downtown restaurants, density of use, and diversity of artistic programming.

2. Scheduling Priority

Fridays and Saturdays must be used for performance days, and may not be used for move-in, move-out, or rehearsal days. Eligible theater users other than Opera San José shall be considered in the following order:

- a. First priority shall be given to users booking a minimum of five consecutive days, including at least three performance² dates.

² A "performance" means the use of the theater for an activity that is being conducted for an audience, e.g. the presentation of a music concert or the screening of a film for which members of the public may purchase tickets to attend. The term is used in these guidelines to distinguish a performance from use of the theater for moving in or out, for setting up the stage or auditorium, or for rehearsal.

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- b. Second priority shall be given to users booking a minimum of three consecutive days, including at least two performance dates.
- c. Third priority shall be given to all other users.

3. Scheduling

Priority	First Day User May Submit Request To Reserve Dates	First Day Operator May Begin Confirmation And Contracting of Dates	Last Day For Contracting After Which Dates Will Be Released
First Priority	2 years in advance of the Season	18 months in advance of the Season	12 months in advance of the Season
Second Priority	18 months in advance of the Season	12 months in advance of the Season	9 months in advance of the Season
Third Priority	12 months in advance of the Season	9 months in advance of the Season	30 days in advance of the Season

a. First Priority Users

- (i) Users that meet the requirement for first priority after Opera San José may submit a Facility Use Application requesting reservation of dates to the Operator beginning two (2) years in advance of each Season. (For example, September 1, 2004 is the first day on which such users may submit a reservation request for the Season beginning September 1, 2006). The Operator will place the user's requested dates (if available) on the calendar as a first priority tentative booking (a "T1 reservation").
- (ii) The Operator may begin to confirm and contract first priority users for their reserved dates beginning eighteen (18) months in advance of the Season. (For example, March 1, 2004 is the first day on which first priority users may contract for the Season beginning September 1, 2005.) Such users must confirm and contract for their reserved dates no later than 12 months in advance of the Season, or their dates may be released. Once contracted, the dates are firm.
- (iii) Beginning eighteen (18) months in advance of each Season, a first priority user may challenge another first priority user for reserved (but not contracted) dates. Beginning fifteen (15) months in advance of each Season, a second priority user may challenge first priority users for dates they are holding on a tentative basis (i.e. not contracted) as described in the Challenge Process below.

b. Second Priority Users

- (i) The second priority user may submit a Facility Use Application requesting reservation of dates to the Operator beginning eighteen (18) months in advance of the Season. (For example, the user may submit a reservation request on March 1,

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2004 for the Season beginning September 1, 2005). The Operator will place the user's requested dates (if available) on the calendar as a second priority tentative booking (a "T2 reservation").

- (ii) Beginning fifteen (15) months in advance of each Season, a second priority user may challenge first priority users for dates they are holding on a tentative basis (i.e. not contracted) as described in the Challenge Process below.
- (iii) In addition, in the instance of a successful challenge, the Operator may begin to confirm and contract second priority users for their reserved dates beginning twelve (12) months in advance of the Season. Such users must confirm and contract for their reserved dates no later than nine (9) months in advance of the Season, or their dates may be released. Once contracted, the dates are firm.

c. Third Priority Users

- (i) Third priority users may submit a Facility Use Application requesting reservation of dates to the Operator beginning twelve (12) months in advance of the Season. The Operator will place the user's requested dates on the calendar (if available) as a third priority tentative booking (a "T3 reservation").
- (ii) The Operator may begin to confirm and contract third priority users for their reserved dates beginning nine (9) months in advance of the Season. If a single date is available between two contracted events, the Operator may contract a third priority user beginning twelve (12) months in advance of the Season. Once contracted, the dates are firm.
- (iii) Beginning nine (9) months in advance of each Season, third priority users may challenge second priority users for dates they are holding on a tentative basis as described in the Challenge Process below.
- (iv) Reservations for dates less than nine (9) months in advance of the Season will be held for a maximum of 30 days only.

d. Scheduling Priority for Cancelled Dates

Once a user is contracted, the dates are firm. If a user subsequently cancels its event for whatever reason (bankruptcy, illness, etc.), the Operator will give reservation and contracting priority to multiple day/performance events.

D. Challenge Process – All Users

The purpose of a tentative hold is to temporarily hold space for a specific event and/or user while the user secures artistic components necessary to the event, and for the Operator to process the

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application and execute a Facility Use Agreement for the event. Any user that does not have a fully executed Facility Use Agreement for its event may be challenged according to the following procedures:

- (1) If dates have been tentatively scheduled and another user requests those dates, then such other user (the “challenger”) may deliver a deposit of twenty-five percent (25%) or more of the estimated facility use fee to the Operator. The Operator shall determine the amount of the deposit.
- (2) Immediately upon receipt of the challenger’s deposit, the group holding the original tentative reservation date (the “date holder”) shall be notified by the Operator of the challenge.
- (3) In order to retain the date, the date holder must submit a deposit of twenty-five percent (25%) or more of the estimated facility use fee within three (3) business days of receipt of notice from the Operator. The Operator shall determine the amount of the deposit.
- (4) If the date holder fails to submit the required deposit within three (3) business days, then the date will be given to the challenger. The challenger must execute a facility use agreement within 5 business days after being notified by the Operator that the date holder failed to pay the required deposit. Unless the date holder submits the required deposit prior to the three (3) business day deadline, the challenger’s deposit will become non-refundable.
- (5) The Operator may, at the Operator’s sole discretion, waive these requirements or extend the time limits for geographical, logistical, economic or community development considerations.

E. Appeal Process – All Users

An applicant, who believes that its application for a date or dates in the California Theatre has been denied in breach of the booking guidelines, may submit an appeal and request a hearing with the Operator, or Operator’s designee within the period set out in the Operator’s written notification, which period shall not be less than 5 business days after notification of the decision from the Operator regarding its request for dates in the California Theatre. The Operator, shall not be required to schedule a hearing unless written notice of the request is received within the time period set out in the Operator’s notice to the applicant. The Operator shall hold a hearing within a reasonable time of receipt of the request for a hearing, where the applicant shall have the opportunity to present the basis for its belief that the date requested was denied for reasons not in compliance with the booking guidelines. The applicant may be represented by counsel. The Operator shall issue his/her decision regarding the appeal within 7 business days of the hearing. The decision of the Operator shall be final.

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SAN JOSE CONVENTION & CULTURAL FACILITIES

RATE SCHEDULE A2: 2003 Conventions & Trade Shows with 500 Peak or 1500 Total, Proven, Traceable Hotel Room Nights Per Event. The Daily Use Fee shall be charged on a flat rate and not on a net square foot basis, whether or not the entire hall or room is actually used for the event.

	2003 DAILY USE FEE	2003 HOURLY OVERTIME FEE 12 mid – 8 am
AUDITORIUM COMPLEX	\$.20 SF	
Parkside Hall A	\$1,800	\$300
Parkside Hall B	\$1,200	\$300
Civic Auditorium	\$1,500	\$300
Room 1A	\$250	\$30
Room 1B	\$250	\$30
Room 2	\$100	\$30
Room 4	\$100	\$30
Room 5	\$75	\$25
Room 6	\$100	\$30
Plaza	\$500	\$75
Undefined Areas	\$.20 SF	15%
CONVENTION CENTER	\$.31 SF	
Exhibit Hall 1	\$6,750	\$1,100 hr/\$2,800 day
Exhibit Hall 2	\$7,750	\$1,200 hr/\$2,900 day
Exhibit Hall 3	\$7,750	\$1,200 hr/\$2,900 day
Ballroom A	\$6,800	\$1,100 hr/\$2,800 day
Room B	\$1,350	\$150
Room C	\$1,350	\$150
Room D	\$225	\$30
Room E	\$225	\$30
Room F	\$400	\$45
Room G	\$175	\$30
Room H	\$175	\$30
Room J	\$3,100	\$350
Room K	\$400	\$45
Room L	\$235	\$35
Room M	\$235	\$35
Room N	\$400	\$45
VIP Lounge	\$300	\$40
South Lot	\$.31 SF	15%
Undefined Areas	\$.31 SF	15%

UNDEFINED AREAS: The Daily Use Fee for undefined areas is determined by multiplying the square foot (SF) rate by the square feet used; hourly overtime fee shall be equal to 15% of the Daily Use Fee

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SAN JOSE CONVENTION & CULTURAL FACILITIES

MOVE-IN/MOVE-OUT RATE 8AM-12MID: Subject to availability; one day at no charge per event day, additional days and/or space at 50% of Daily Use Fee

SET-UP OF CHAIRS AND TABLES is included per event for exhibit halls, and set-up of chairs and tables per day for meeting rooms, as available, providing such equipment is not provided or used in areas where similar equipment is being provided by a decorator or other service contractor.

MEETING PLANNER CONVENTIONS: A 50% reduction from the appropriate rate will apply for meetings of associations of meeting planners

FEDERAL AGENCIES that cannot provide insurance coverage shall pay a facility use fee that is equivalent to the Daily Use Fee plus the cost to the City of purchasing insurance coverage for the event

COMPLIMENTARY MEETING SPACE: Complimentary meeting space (if not used for exhibits or banquets) in Ballroom A and rooms B-H and J-N in the Convention Center and in the Civic Auditorium will be based on exhibit space used and equivalent to one more than the number of exhibit show days; meeting room 1A/B in the Civic Auditorium Complex is complimentary with the use of either Parkside Hall A or B; subject to availability:

EXHIBIT SPACE

COMPLIMENTARY MEETING ROOM SPACE

Exhibit Hall 1	=< 22,000 Gross Square Feet
Exhibit Hall 2	=< 22,000 Gross Square Feet
Exhibit Hall 3	=< 22,000 Gross Square Feet
Exhibit Hall 1-2	=< 30,000 Gross Square Feet
Exhibit Hall 2-3	=< 30,000 Gross Square Feet
Exhibit Hall 1-2-3	=< 48,000 Gross Square Feet
Exhibit Hall 1-2-3 & Ballroom	=< 26,000 Gross Square Feet, plus Civic Auditorium

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SAN JOSE CONVENTION & CULTURAL FACILITIES

RATE SCHEDULE B2: 2003 Revenue/Consumer Shows and Non-Revenue Events (Revenue/Consumer Show Rates shall be the greater of the Daily Use Fee or 15% of Gross Ticket Sale Receipts, per event day)

	2003 DAILY USE FEE	2003 HOURLY OVERTIME FEE 12 mid – 8 am
AUDITORIUM COMPLEX	\$.20 SF	
Parkside Hall A	\$1,800	\$300
Parkside Hall B	\$1,200	\$300
Civic Auditorium	\$1,500	\$300
Room 1A	\$250	\$30
Room 1B	\$250	\$30
Room 2	\$100	\$30
Room 4	\$100	\$30
Room 5	\$75	\$25
Room 6	\$100	\$30
Plaza	\$500	\$75
Undefined Areas	\$.20 SF	15%
CONVENTION CENTER	\$.31 SF	
Exhibit Hall 1	\$6,750	\$1,100 hr/\$2,800 day
Exhibit Hall 2	\$7,750	\$1,200 hr/\$2,900 day
Exhibit Hall 3	\$7,750	\$1,200 hr/\$2,900 day
Ballroom A	\$6,800	\$1,100 hr/\$2,800 day
Room B	\$1,350	\$150
Room C	\$1,350	\$150
Room D	\$225	\$30
Room E	\$225	\$30
Room F	\$400	\$45
Room G	\$175	\$30
Room H	\$175	\$30
Room J	\$3,100	\$350
Room K	\$400	\$45
Room L	\$235	\$35
Room M	\$235	\$35
Room N	\$400	\$45
VIP Lounge	\$300	\$40
South Lot	\$.31 SF	15%
Undefined Areas	\$.31 SF	15%

UNDEFINED AREAS: The Daily Use Fee for undefined areas is determined by multiplying the net square foot (SF) rate by the square feet used; hourly overtime rate shall be equal to 15% of the Daily Use Fee

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GROSS TICKET SALE RECEIPTS shall equal the product of the number of tickets sold (exclusive of complimentary tickets authorized by City) multiplied by the ticket face value price

MOVE-IN/MOVE-OUT RATE (3 OR MORE EVENT DAYS): Subject to availability; one day at no charge per event day, to a maximum of 3 days, additional days at 50% of Daily Use Fee

MOVE-IN/MOVE-OUT RATE (1-2 EVENT DAYS): Subject to availability; 50% of Daily Use Fee

FILM & VIDEO PRODUCTION RATES FOR BOOKINGS MADE WITHIN 6 WEEKS PRIOR TO EVENT:
50% of Daily Use Fee

FEDERAL AGENCIES that cannot provide insurance coverage shall pay a facility use fee that is equivalent to the Daily Use Fee plus the cost to the City of purchasing insurance coverage for the event

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SAN JOSE CONVENTION & CULTURAL FACILITIES

RATE SCHEDULE C: Banquet Rates

Daily Use Fees will not be owed for the day of the event when used exclusively for banquet functions, when the following minimum dollar guarantees are paid for food service (not including alcohol, tax and gratuity) for banquet functions, provided banquet bookings made less than 120 days prior to event will be subject to only 50% of the minimum dollar guarantees:

MINIMUM DOLLAR GUARANTEES

LOCATION	BREAKFAST	LUNCH	DINNER
CONVENTION CENTER			
Exhibit Hall 1	\$25,000	\$30,000	\$45,000
Exhibit Hall 2	\$30,000	\$40,000	\$55,000
Exhibit Hall 3	\$30,000	\$40,000	\$55,000
Ballroom A	\$10,000	\$15,000	\$20,000
Meeting Room J	\$5,000	\$7,500	\$10,000
Meeting Rooms B , C	\$2,500	\$3,500	\$5,000
CIVIC AUDITORIUM COMPLEX			
Parkside Hall A	\$7,500	\$10,000	\$10,000
Parkside Hall B	\$3,500	\$5,000	\$5,000

Deposits equivalent to the prevailing daily use fees will be required for the City to reserve space on a definite basis. Any deposits collected will be applied by the City toward the final food and beverage bill due the licensed catering operation if the banquet food cost (not including alcohol, tax and gratuity) is within 2% of the minimum dollar guarantee.

If the banquet food cost (not including alcohol, tax and gratuity) is not within 2% of the minimum dollar guarantee, then prevailing use fees will be owed and any deposits collected will be applied toward the use fees.

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RATE SCHEDULE D: Center for the Performing Arts Facility Use Fees

American Musical Theatre of San Jose: \$2,000 per performance, with a maximum of four 22 continuous-day runs per fiscal year

San Jose Symphony Orchestra/San Jose Cleveland Ballet: \$2,000 per performance, with a maximum of 50 performance/rehearsal days per fiscal year each

Conventions/corporate meetings, 8 am-5 pm or 5 pm-12 mid: \$3,000 per day; 8 am-12 mid: \$4,000 per day

Other events: \$2,500 per performance

Non-Performance Day 8 am - 12 mid: 50% of applicable performance/day rate

Overtime 12am-8am: \$200 per hour

Ridder Lounge & Rehearsal Hall: \$200 per day; Stage Café: \$100 per day

FEDERAL AGENCIES that cannot provide insurance coverage shall pay a facility use fee that is equivalent to the per performance or daily rate plus the cost to the City of purchasing insurance coverage for the event

RATE SCHEDULE E: Montgomery Theater Facility Use Fees

Performance Day 8 am - 12 mid: \$500 per day

Performance Day 8am - 4pm or 4pm – 12 mid: \$400 per day

Non-Performance Day: \$400 per day

Overtime 12am-8am: \$75 per hour

FEDERAL AGENCIES that cannot provide insurance coverage shall pay a facility use fee that is equivalent to the daily rate plus the cost to the City of purchasing insurance coverage for the event

RATE SCHEDULE F: Civic Auditorium Facility Use Fees

Performance Day: \$1,500 per day

Non-Performance Day: \$750 per day

Overtime 12am-8am: \$300 per hour

FEDERAL AGENCIES that cannot provide insurance coverage shall pay a facility use fee that is equivalent to the daily rate plus the cost to the City of purchasing insurance coverage for the event

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SAN JOSE CONVENTION & CULTURAL FACILITIES

RATE SCHEDULE G: Equipment and Services

All rates are based on a per day basis except where noted (per performance, per item, etc.)

CONVENTION CENTER - AUDIO/VISUAL, SOUND AND LIGHTING EQUIPMENT RATES
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DESCRIPTION	ON-SITE/CROSS RENTAL RATE	RATE
AUDIO PLAYERS/RECORDERS		
a. Cassette deck	\$48	\$24
b. CD Player	\$70	\$35
PROJECTORS & ACCESSORIES		
a. 16mm Telex Projector	\$56	\$28
b. 35mm Kodak Ektagraphic Project	\$56	\$28
c. 35mm Caramate Projector	\$76	\$38
d. 35mm Wireless Remote Control	\$50	\$25
e. 35mm Remote Control Extension	\$10	\$5
f. 35mm Kodak Carousel Tray	\$4	\$2
g. Apollo or Da'Lite Overhead Pro	\$56	\$28
h. DVD Player	\$250	\$125
MONITORS		
a. 19" Color Monitor	\$120	\$60
b. 25" Color Monitor	\$200	\$100
c. 20" Color Monitor & VCR Combo	\$250	\$125
d. In-house monitor feed (pt to pt /patch)	\$200	\$100
e. In-house monitor feed with audio (pt to pt/patch)	\$400	\$200
SCREENS		
a. Wall Screens (in certain rooms)	\$30	\$15
b. 84" x 84" Tripod Screens	\$44	\$22
c. 9' x 12' Fastfold-Front	\$100	\$50
d. 9' x 12' Fastfold-Rear	\$116	\$58
e. Dress kit available by request	\$96	\$48
f. 10 1/2' x 14' Fastfold-Front	\$120	\$60
g. 10 1/2' x 14' Fastfold-Rear	\$144	\$72
h. Dress kit available by request	\$112	\$56
i. 12' x 16' Fastfold-Front	\$260	\$130
j. 12' x 16' Fastfold-Rear	\$300	\$150
k. Dress kit available by request	\$240	\$120

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SAN JOSE CONVENTION & CULTURAL FACILITIES

CONVENTION CENTER - AUDIO/VISUAL, SOUND AND LIGHTING EQUIPMENT RATES
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DESCRIPTION	ON-SITE/CROSS RENTAL RATE	RATE
SOUND EQUIPMENT		
a. Shure Microphones, 58 and 57	\$48	\$24
b. Audio Technica Wired Lavalier	\$48	\$24
c. Telex Wireless Handheld Mic	\$150	\$75
d. Telex Wireless Lavalier	\$150	\$75
e. Anchor Speaker	\$150	\$75
f. Mixer (4 channel)	\$150	\$75
g. XLR Microphone Cable	\$10	\$5
h. Whirlwind Microphone Snake-9ch	\$120	\$60
i. Whirlwind Microphone Snake-16ch	\$100	\$50
j. Microphone Stand	\$20	\$10
k. Portable Sound System (2 speakers)	\$400	\$200
l. Portable Sound System (4 speakers)	\$500	\$250
m. Renkus-Heinz Sound System	\$700	\$350
n. ADA Assistive Listening Device	\$150	\$75
VIDEO CASSETTE PLAYERS/ RECORDERS		
a. Panasonic S-VHS Camcorder	\$260	\$130
b. 1/2" VHS VCR	\$100	\$50
c. 1/2" VHS VCR w/repeat	\$120	\$60
d. 3/4" Sony Video Recorder	\$250	\$125
MISCELLANEOUS EQUIPMENT		
a. Pointer, Laser	\$60	\$30
b. Flipchart Easel	\$20	\$10
c. Safelock Stand	\$20	\$10
d. A/V Cart	\$20	\$10
e. A/V Cart Skirt	\$10	\$5
f. AC Extension Cord-25'	\$40	\$20
g. AC Extension Cord-50'	\$50	\$25
h. AC Power Strip	\$50	\$25
i. Gentner Telephone Interface System	\$150	\$75
j. 500W Par Can (with floor base)	\$20	\$10
k. Theatrical Lighting Bar (Rooms	\$300	\$150
l. Small Portable Lighting System	\$300	\$150
ITEMS AVAILABLE FOR PURCHASE		
a. Flipchart Paper Pad	\$12	\$12
b. Acetate Roll or Sheets	\$20	\$20
c. Tape (Approved for Use on Floors)	\$20	\$20
d. Cassette Tape-90min.	\$8	\$8
e. VideoTape VHS-120min.	\$15	\$15

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SAN JOSE CONVENTION & CULTURAL FACILITIES

RATE SCHEDULE G: Equipment and Services (Continued)

CONVENTION CENTER - MISCELLANEOUS EQUIPMENT/SERVICE RATES

DESCRIPTION	RATE
BLACKBOARDS/CORKBOARDS	\$10
CHAIRS - per day	
a. Exhibit use - padded chairs	\$7
b. Exhibit use - plastic chairs	\$3
c. Non-exhibit use - plastic chairs	\$1
DANCE FLOOR - per day	
a. 3' X 3' section	\$15
EASELS	\$10
EXTENSION CORDS - per event	
a. 25' extension cord	\$20
b. 50' extension cord	\$25
c. electrical strips	\$25
FORKLIFT or GENIE BOOM – per day, requires qualified operator provided by client	\$400
KEYS - if not returned, per key	\$100
MOVABLE WALLS - Per foot, per panel	\$1
PIANOS	
a. Upright - per day, excluding tuning	\$40
b. Tuning - per tuning	\$125
SECURITY LOCK - per lock - includes return to original lock	\$25
STAGING - per day, includes one (1) set-up per event	
a. 6' X 8' section	\$15
TABLES - per day	
a. Exhibiting	\$15
b. Meetings	\$5
c. Table, skirted	\$25

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SAN JOSE CONVENTION & CULTURAL FACILITIES

RATE SCHEDULE G: Equipment and Services (Continued)

CONVENTION CENTER - MISCELLANEOUS EQUIPMENT/SERVICE RATES

DESCRIPTION	RATE
TRASH REMOVAL - per bin	\$800
TELEPHONE SERVICE	
a. Single line service, per connection, per event, less than 15 days notice	\$275
b. Single line service, per connection, per event, 15 days or more notice	\$195
c. Unreturned telephone	\$75
d. Long distance calls, prevailing rate plus % per call	30%
e. Local calls, per call	\$.25
f. Cellular phone rental, per day	\$20
g. Unreturned cellular telephone, per phone	\$700
h. Surcharge, airtime charges, per minute	\$2
i. ISDN installation, per connection, per event, 15 days or more notice	\$400
j. ISDN installation, per connection, per event, less than 15 days notice	\$450
k. ISDN unusable configuration, due to client's incorrect order	\$200
l. Multi-line phone set, per event	\$100
m. Speaker phone, per event	\$25
n. Special feature (rollover, call waiting, restricted use), per feature, per event	\$25

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SAN JOSE CONVENTION & CULTURAL FACILITIES

RATE SCHEDULE G: Equipment and Services (Continued)

UTILITY RATES

DESCRIPTION	SERVICE/ INSTALLATION RATE
AIR CONDITIONING	
a. Per hall/non-event hours/8 hours	\$500
b. Ballroom A/non-event hours/8 hours	\$250
ELECTRICAL SERVICE CONNECTIONS	
LIGHTS	
a. 150 Watts Floodlight on Stanchion	\$120
b. Double 150 Watts Floodlight on Stanchion	\$205
c. 250/300 Watts Quartz on Stanchion	\$130
LIGHTING OUTLETS (Maximum of 2 connections per power outlet)	
a. 120 Volt/Outlet up to 500 Watts	\$120
b. 120 Volt/Outlet up to 1,000 Watts	\$210
c. 120 Volt/Outlet up to 2,000 Watts	\$280
MOTOR & EQUIPMENT OUTLETS (Maximum of one (1) connection per power outlet 120/208V)	
a. 120 Volt/5 Amp/1/4 H.P. or less	\$120
b. 120 Volt/10 Amp/1/3 H.P. or less	\$240
c. 120 Volt/15 Amp/1/2 H.P. or less	\$280
d. 120 Volt/20 Amp/3/4 H.P. or less	\$350
e. 208 Volt/10 Amp/1/2 H.P. or less/1-Phase	\$370
f. 208 Volt/15 Amp/1 H.P. or less/1-Phase	\$420
g. 208 Volt/20 Amp/1 1/2 H.P. or less/1-Phase	\$520
h. 208 Volt/30 Amp/2 H.P. or less/1-Phase	\$600
i. 208 Volt/40 Amp/3 H.P. or less/1-Phase	\$670
j. 208 Volt/60 Amp/5 H.P. or less/1-Phase	\$810
k. 208 Volt/100 Amp/10 H.P. or less/1-Phase	\$1,100
l. 208 Volt/150 Amp or less/1-Phase	\$1,465
m. 208 Volt/200 Amp or less/1-Phase	\$1,565
n. 208 Volt/10 Amp/1/2 H.P. or less/3-Phase	\$490
o. 208 Volt/15 Amp/1 H.P. or less/3-Phase	\$560
p. 208 Volt/20 Amp/1 1/2 H.P. or less/3-Phase	\$700
q. 208 Volt/30 Amp/2 H.P. or less/3-Phase	\$800
r. 208 Volt/40 Amp/3 H.P. or less/3-Phase	\$890
s. 208 Volt/60 Amp/5 H.P. or less/3-Phase	\$1,000

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SAN JOSE CONVENTION & CULTURAL FACILITIES

RATE SCHEDULE G: Equipment and Services (Continued)

UTILITY RATES

DESCRIPTION	SERVICE/ INSTALLATION RATE
t. 208 Volt/100 Amp/10 H.P. or less/3-Phase	\$1,470
u. 208 Volt/150 Amp or less/3-Phase	\$1,950
v. 208 Volt/200 Amp or less/3-Phase	\$2,430
w. 480 Volt/20 Amp/7 1/2 H.P. or less/3-Phase	\$845
x. 480 Volt/30 Amp/210H.P. or less/3-Phase	\$960
y. 480 Volt/40 Amp/15 H.P. or less/3-Phase	\$1,075
z. 480 Volt/60 Amp/20 H.P. or less/3-Phase	\$1,300
aa. 480 Volt/100 Amp/50 H.P. or less/3-Phase	\$1,785
bb. 480 Volt/150 Amp/75 H.P. or less/3-Phase	\$2,340
cc. 480 Volt/200 Amp/100 H.P. or less/3-Phase	\$2,920
GAS, WATER & DRAIN SERVICE CONNECTIONS	
a. 1/2" connection to source	\$160
b. 3/4" connection to source	\$170
c. 1" connection to source	\$175
d. 1-1/2" connection to source	\$200
e. 2" connection to source	\$225
f. 1/2" connection to booth	\$70
g. 3/4" connection to booth	\$90
h. 1" connection to booth	\$90
i. 1-1/2" connection to booth	\$110
j. 2" connection to booth	\$110
k. Air line connection to source	\$290
l. Air line connection to booth	\$70

ADVANCE RATE: 33% Discount per connection with 30 days or more advance notice

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SAN JOSE CONVENTION & CULTURAL FACILITIES

RATE SCHEDULE G: Equipment and Services (Continued)

CIVIC AUDITORIUM - EQUIPMENT AND SERVICES RATES

DESCRIPTION	RATE	
BLEACHERS - per set-up		
a. Civic Auditorium Stage	\$750	
b. Civic Auditorium Off-stage	\$1,100	
BOXING RING - per set-up	\$500	
LIFT - per day, requires qualified operator provided by client	\$400	
LIGHTING EQUIPMENT - per performance		
a. Overhead Stage Lights	\$75	
b. Front of proscenium light bar	\$150	
c. Followspots, Trouper (per day/per spot)	\$125	
LIVE BROADCAST OR PROGRAM REPRODUCTION - per event	\$250	
PIANOS		
a. Baldwin Grand - per day, excluding tuning	\$120	
b. Upright - per day excluding tuning	\$40	
c. Tuning - per tuning	\$125	
SOUND EQUIPMENT - per performance		
a. Sound System - 1 Mic / no mixer	\$75	
b. House Mixing Console	\$75	
c. Performance sound system	\$350	
UTILITY RATES	INSTALLATION	ADD'L DAY
100 AMP, 12 Circuit Distribution Panels		
a. 1 panel	\$75	\$10
b. 2 panels	\$150	\$25
c. 3 panels	\$225	\$35

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SAN JOSE CONVENTION & CULTURAL FACILITIES

RATE SCHEDULE G: Equipment and Services (Continued)

PARKSIDE HALL - EQUIPMENT AND SERVICES RATES
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DESCRIPTION	RATE
LIFT – per day, requires qualified operator provided by client	\$400
LIGHTING EQUIPMENT – per performance	
a. Overhead Stage Lights, per lighting bar	\$30
LIVE BROADCAST OR PROGRAM REPRODUCTION - per event	\$250
MOVIE SCREEN - per set-up	\$75
PIANOS	
a. Upright – per day, excluding tuning	\$40
b. Tuning – per tuning	\$125
SOUND EQUIPMENT - per performance	
a. Sound System - 1 Mic / no mixer	\$75
b. House Mixing Console	\$75
UTILITY RATES	INSTALLATION ADD'L DAY
100 AMP, 12 Circuit Distribution Panels	
a. 1 panel	\$75 \$10
b. 2 panels	\$150 \$25
c. 3 panels	\$225 \$35

Appendix III(d)

SAN JOSE CONVENTION & CULTURAL FACILITIES

RATE SCHEDULE G: Equipment and Services (Continued)

CENTER FOR THE PERFORMING ARTS - EQUIPMENT AND SERVICES RATES

DESCRIPTION	RATE
LIGHTING	
Followspots – weekly	\$350
Followspots – 2 days	\$200
Followspots – daily	\$125
Stage Lighting, Dimmers & Consoles - weekly	
a. 1-39 Lights	\$1,900
b. 40 - 60 Lights	\$2,212
c. 61 - 120 Lights	\$2,988
d. 121 - 230 Lights	\$4,937
e. 231 - 330 Lights	\$6,712
f. 331 - 430 Lights	\$8,475
g. 431 - 530 Lights	\$10,250
h. 531 - 630 Lights	\$12,000
Stage Lighting, Dimmers & Consoles - 2 days	
a. 1-39 Lights	\$1,425
b. 40 - 60 Lights	\$1,656
c. 61 - 120 Lights	\$2,238
d. 121 - 230 Lights	\$3,700
e. 231 - 330 Lights	\$5,031
f. 331 - 430 Lights	\$6,356
g. 431 - 530 Lights	\$7,688
h. 531 - 630 Lights	\$9,000
Stage Lighting, Dimmers & Consoles - daily	
a. 1-39 Lights	\$950
b. 40 - 60 Lights	\$1,106
c. 61 - 120 Lights	\$1,494
d. 121 - 230 Lights	\$2,469
e. 231 - 330 Lights	\$3,356
f. 331 - 430 Lights	\$4,238
g. 431 - 530 Lights	\$5,125
h. 531 - 630 Lights	\$6,000

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SAN JOSE CONVENTION & CULTURAL FACILITIES

RATE SCHEDULE G: Equipment and Services (Continued)

CENTER FOR THE PERFORMING ARTS - EQUIPMENT AND SERVICES RATES

DESCRIPTION	RATE
LIVE BROADCAST OR PROGRAM REPRODUCTION - per event	\$250
ORCHESTRA SHELL – per set-up	
a. Shell only, excluding labor	\$200
b. First 5 orchestra platform levels, excluding labor	\$100
c. First 5 orchestra platform levels, plus choral riser, excluding labor	\$200
PIANOS	
a. Steinway Grand - per day, excluding tuning	\$150
b. Baby Grand - per day, excluding tuning	\$50
c. Tuning – per tuning	\$125
SOUND EQUIPMENT - per performance	
a. Sound System - 1 Mic / no mixer	\$75
b. House Mixing Console	\$75
STAGE DRAPES -- per set-up	
a. Traveler	\$75
b. Black backdrop	\$25

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SAN JOSE CONVENTION & CULTURAL FACILITIES

RATE SCHEDULE G: Equipment and Services (Continued)

MONTGOMERY THEATER - EQUIPMENT AND SERVICES RATES

DESCRIPTION	RATE
LIFT – per day, requires qualified operator provided by client	\$325
LIGHTING	
Stage Lighting, Dimmers & Consoles - weekly	
a. 1-39 Lights	\$585
b. 40 - 60 Lights	\$900
c. 61 - 120 Lights	\$1,800
d. 121 - 175 Lights	\$2,625
Stage Lighting, Dimmers & Consoles - 2 days	
a. 1-39 Lights	\$273
b. 40 - 60 Lights	\$420
c. 61 - 120 Lights	\$840
d. 121 - 175 Lights	\$1,225
Stage Lighting, Dimmers & Consoles - daily	
a. 1-39 Lights	\$195
b. 40 - 60 Lights	\$300
c. 61 - 120 Lights	\$600
d. 121 - 175 Lights	\$875
LIVE BROADCAST OR PROGRAM REPRODUCTION - per event	\$250
PIANOS	
a. Upright – per day, excluding tuning	\$40
b. Tuning – per tuning	\$125
SOUND EQUIPMENT - per performance	
a. Sound System - 1 mic / no mixer	\$75
b. House Mixing Console	\$75

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SAN JOSE CONVENTION & CULTURAL FACILITIES

RATE SCHEDULE G: Equipment and Services (Continued)

STAFFING RATES - ALL FACILITIES

LABOR - per hour (does not include supplies & materials)

CCF STAFF – 1 hour minimum	Sun-Sat.	Holidays
a. Administrative staff	\$44	\$88
b. Non-trade staff	\$44	\$88
c. Trade staff	\$67	\$134

CONTRACTUAL STAFF	Hourly Rate	
a. First-Aid, Regular Hours	\$27	4 hours minimum
b. First-Aid, Overtime	\$32	
c. First-Aid, Holidays	\$36	4 hours minimum
d. First-Aid, Holiday Overtime	\$41	
e. Police Officer	\$37.50	3 hour minimum
Administrative Fee	\$15	per day
f. Traffic Control	\$39	3 hour minimum
Administrative Fee	\$15	per day

UNDEFINED EQUIPMENT, SUPPLIES, and MATERIALS AND THIRD PARTY RENTALS: Equivalent to prevailing industry standard rates

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SAN JOSE CONVENTION & CULTURAL FACILITIES

RATE SCHEDULE G: Optional Equipment and Services (Continued)

SIGNS AND BANNERS/ADVERTISING RATES – ALL FACILITIES
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DESCRIPTION	RATE
CONVENTION CENTER EXTERIOR BANNERS	
a. Front entrance, above doors, without sponsor advertising	\$1,000
b. Front entrance, above doors, with sponsor advertising	\$2,500
c. Front entrance portals, without sponsor advertising	\$500
d. Front entrance portals, with sponsor advertising	\$1,500
e. Almaden Boulevard entrance, without sponsor advertising	\$500
f. Almaden Boulevard entrance, with sponsor advertising	\$1,500
g. Market Street entrance, without sponsor advertising	\$500
h. Market Street entrance, with sponsor advertising	\$1,500
CIVIC AUDITORIUM EXTERIOR BANNERS	
a. Front entrance, without sponsor advertising	\$500
b. Front entrance, with sponsor advertising	\$1,500
PARKSIDE HALL EXTERIOR BANNERS	
a. Front entrance, without sponsor advertising	\$500
b. Front entrance, with sponsor advertising	\$1,500
c. Plaza gate, without sponsor advertising	\$250
d. Plaza gate, with sponsor advertising	\$500
ELECTRONIC MARQUEE ADVERTISING	
a. Sponsor/Exhibitor advertising – per advertiser, per screen, per event	\$500
INTERIOR BANNERS & SIGNS – ALL FACILITIES	
a. Banners, per banner location, per advertiser	\$300
b. Directional signage & banners without sponsor advertising	n/c
c. Directional signage & banners with sponsor advertising, per advertiser, per series	\$300
d. Other signs, kiosks, emblems, footprints, etc., per location, per advertiser	\$200
CCTV ADVERTISING	
a. Per slide, per advertiser	\$200

ADMINISTRATIVE FEES: Non-refundable, banner: \$500 or 50% of above rates, whichever is less.

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SAN JOSE CONVENTION & CULTURAL FACILITIES

RATE SCHEDULE H: Security and Cleaning Deposits

DESCRIPTION	RATE
SECURITY DEPOSITS	
Center for the Performing Arts	\$2,000
Montgomery Theater	\$2,000
Civic Auditorium	\$2,000
Parkside Hall A-B	\$2,000
Convention Center- Ballroom	\$2,500
Convention Center- One Exhibit Hall Used	\$3,000
Convention Center- Two Exhibit Halls Used	\$4,000
Convention Center- Three Exhibit Halls Used	\$5,000
CLEANING DEPOSITS	
Outdoor Events - Per event	\$500

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SAN JOSE CONVENTION & CULTURAL FACILITIES

RATE SCHEDULE I: Outside Service Contractor Utility Fees

These rates apply to outside service contractors who are neither employees of the City nor of the event promoter.

DESCRIPTION	RATE
Electrical Percent of amounts paid by event promoter to outside service contractors, excluding labor	20%
Air, Gas, Water, & Drain Percent of amounts paid by event promoter to outside service contractors, excluding labor	12%
Booth Cleaning Percent of amounts paid by event promoter to outside service contractors	20%

Appendix III(e)
CITY OF SAN JOSÉ
COUNCIL POLICY

TITLE	PAGE	POLICY NUMBER
Environmentally Preferable Procurement Policy	1 of 4	4-6
	EFFECTIVE DATE	REVISED DATE
	9/25/01	
APPROVED BY:		
Council Action: 09/25/01, Item 4.2		

BACKGROUND

The mission statement of the Environmental and Utility Services City Service Area (CSA) reflects a commitment to provide environmental leadership through policy development and program design.

By incorporating environmental considerations in public purchasing, the City of San José can serve this commitment by reducing its burden on the local and global environment, removing unnecessary hazards from its operations, protecting public health, reducing costs and liabilities, and potentially improving the environmental quality of the region. This policy is an effective way to direct the City's effort in procuring environmentally preferable products and services.

PURPOSE

The primary purpose of this policy is to minimize negative environmental impacts of the City's activities by ensuring the procurement of services and products that:

- reduce toxicity;
- conserve natural resources, materials, and energy;
- maximize recyclability and recycled content.

A collateral purpose is to support markets for recycled goods and other environmentally preferable products and services.

DEFINITIONS

The following terms shall have the assigned definitions for all purposes under this policy:

- A. **City of San José** means the City of San José elected officials, staff, and agencies.

- B. **Environmentally Preferable Products and Services** means products and services that have a lesser or reduced effect on human health and the environment when compared with competing products that serve the same purpose. This comparison may consider raw materials acquisition, production, manufacturing, packaging, distribution, reuse, operation, maintenance, or disposal of the product.
- C. **Life Cycle Cost** means the amortized annual cost of a product, including capital costs, installation costs, operating costs, maintenance costs, and disposal costs discounted over the lifetime of the product.
- D. **Practicable** means sufficient in performance and available at a reasonable price.
- E. **Recyclable Product** means a product which, after its intended end use, can demonstrably be diverted from the City of San José's solid waste stream for use as a raw material in the manufacture of another product.
- F. **Recycled Material** means material and byproducts that have been recovered or diverted from solid waste, and have been utilized in place of raw or virgin material in manufacturing a product. It is derived from post-consumer recycled material, manufacturing waste, industrial scrap, agricultural waste, and other waste material, but does not include material or byproducts generated from, and commonly reused within, an original manufacturing process.
- G. **Virgin Material** means any material occurring in its natural form. Virgin Material is used in the form of raw material in the manufacture of new products.

POLICY

The City of San José commits to:

1. Procure environmentally preferable products and services where criteria have been established by governmental or other widely recognized authorities (e.g. Energy Star, EPA Eco Purchasing Guidelines).
2. Integrate environmental factors into the City's buying decisions where external authorities have not established criteria. Examples:
 - replacing disposables with reusables or recyclables;
 - supporting eco-labelling practices by buying products bearing such labels in preference to others, where they are available and provide value for money
 - taking into account life cycle costs and benefits;
 - evaluating, as appropriate, the environmental performance of vendors in providing products and services;

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Effective Date: 9/25/01

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3. Raise staff awareness on the environmental issues affecting procurement by providing relevant information and training;
4. Encourage suppliers and contractors to offer environmentally preferable products and services at competitive prices;
5. Encourage providers of services to consider environmental impacts of service delivery.
6. Comply with all environmental legislative and regulatory requirements in the procurement of products and services.

Nothing in this policy shall be construed as requiring a department, agency or contractor to procure products that do not perform adequately for their intended use or are not available at a reasonable price in a reasonable period of time.

Procedures and Guidelines may be established as necessary to ensure the continuation of a strong Environmental Procurement Program.

Responsibility

All City of San José departments, offices and agencies shall identify and purchase the most environmentally responsible products and services that are available for the intended purpose and that meet the performance requirements. Factors that should be considered when determining the environmentally preferable good or service include, but are not limited to:

- Minimization of virgin material use in product or service life cycle
- Maximization of recycled products used in product or service life cycle
- Environmental cost of entire product or service life cycle
- Reuse of existing products or materials in product or service life cycle
- Recyclability of product
- Minimization of packaging
- Reduction of energy/water consumption
- Toxicity reduction or elimination
- Elimination of uncertified hardwoods in product or service life cycle
- Durability and maintenance requirements
- Ultimate disposal of the product

Purchasing Division Responsibilities:

1. Develop and maintain information about environmentally preferable products and recycled products containing the maximum practicable amount of recycled materials, to be purchased by departments, agencies, consultants and contractors whenever possible.

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2. Inform departments, agencies and contractors of their responsibilities under this policy and provide implementation assistance.
3. Institute product testing and trial service to evaluate environmentally responsible alternatives pursuant to established testing guidelines.
4. Require the use of recycled materials and recycled products by incorporating them in bid specifications where practicable;
5. Disseminate information on recycled and environmentally preferable product procurement requirements, specifications, and performance to assist vendors with procurement opportunities with the City.
6. Establish guidelines governing the review and approval of specifications for the procurement of selected materials based on considerations of recycling, energy and water conservation, life cycle costing and other environmental considerations.
7. Submit reports of policy impacts on an annual basis.

Environmental Services Department Responsibilities:

1. Support Purchasing in its implementation of this policy by providing training, information when requested, and assistance in the evaluation of the EPP status of a product or service.
2. Support departments and agencies in evaluation and analysis of products and services for EPP criteria.
3. Help establish and promote needed environmental procurement legislation.

Department and Agency Responsibilities:

1. Evaluate each requested product and service to determine the extent to which the specifications could include an environmentally preferable option.
2. Ensure that contracts issued by the departments and agencies include environmentally preferable products and recycled products wherever practicable;
3. Determine standard at which products are considered environmentally preferable and use in selective criteria.
4. Expand the awareness and use of environmentally preferable products.

Document Review

This policy must be reviewed every three years.

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AGREEMENT BETWEEN THE CITY OF SAN JOSE AND THE SAN JOSE CONVENTION & VISITORS BUREAU FROM JULY 1, 2000 TO JUNE 30, 2005

THIS AGREEMENT is entered into this _July 1_ day of _____ 2000, by and between the CITY OF SAN JOSE, a municipal corporation of the State of California ("City"), and the SAN JOSE CONVENTION & VISITORS BUREAU, a nonprofit corporation of the State of California ("Bureau").

RECITALS

A. The City Council of City desires to appropriate funds in order to promote the growth and enhancement of the community, to promote and encourage visitors to come to City, to promote the holding of conventions, conferences and trade shows in City, and to encourage film and television productions in City.

B. Bureau is located within City and has special knowledge, experience and facilities for promotion, advertising, sales solicitation and related work to be done and performed for City.

C. Bureau Board is the duly elected governing body of Bureau and wishes to fully involve and cooperate with City in marketing City's convention and cultural facilities. Bureau Board shall include, as ex-officio members, a City Council member liaison, the City Manager or a designee from that office, and, in addition, the Director of the Conventions, Arts and Entertainment Department.

D. City desires to hire and contract with Bureau, an independent contractor, for the services of Bureau to promote the growth and enhancement of City's community, to encourage visitors to come to City, to be responsible for the bringing of conventions, conferences and trade shows to City, and to promote the filming on location in San Jose.

E. The San Jose McEnery Convention Center, any expansion, and related facilities (collectively, the "Convention Center") serve as the keystone of public and

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private assembly events, providing (i) positive identity for City as the nucleus of conventions, trade shows, conferences and visitor industry, (ii) a leadership role in City's cultural, entertainment and recreational activities, (iii) local educational, social, athletic, cultural and artistic events on behalf of all citizens of City, and (iv) a means for generating funds for and promoting business within City.

F. City has designated the Director of the Conventions, Arts and Entertainment Department ("Director") as the person charged with the responsibility to administer and supervise the use of the Convention Center consistent with all applicable laws and regulations. City's Conventions, Arts and Entertainment Department (the "Department") is the department of City responsible for coordinating activities at the Convention Center, and also fulfills the ongoing liaison role of working closely with Bureau on City's behalf.

NOW, THEREFORE, in consideration of the following mutual promises, covenants and agreements, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, City and Bureau agree as follows:

SECTION 1. TERM OF AGREEMENT.

A. The initial term of this Agreement shall be from July 1, 2000 to June 30, 2005, inclusive, and the term of this Agreement shall be deemed to be automatically extended at the end of Fiscal Year 2000-2001 and thereafter at the end of each Fiscal Year, if City has acted upon Bureau's Marketing Plan as set forth in Section 3 below, and if City has allocated and appropriated monies for Bureau's budget as set forth in Section 6 below.

B. City shall have an option, at its sole discretion, to extend the Term of this Agreement for one additional term of five (5) years from the Expiration Date (the "Extended Term"). In the event that City decides to extend the term of this Agreement, City shall deliver written notice to Bureau no later than thirty (30) days prior to the Expiration Date. All terms and conditions of this Agreement shall remain in force and effect during the Extended Term.

C. For purposes of this Agreement, the term "Fiscal Year" shall coincide with City's budget year and, unless such budget year is otherwise changed by a City

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ordinance, shall mean a fiscal year during the term of this Agreement which commences on July 1 and continues through and includes the following June 30.

SECTION 2. GOALS AND OBJECTIVES.

During the term of this Agreement, Bureau agrees to provide a comprehensive marketing program to advertise, promote and publicize City to achieve, as City's first priority, the goal of booking conventions, trade shows, conferences and other events at the Convention Center and area hotels.

The Bureau also agrees to market to decision-makers and individual travelers to promote additional business and leisure travel for the City. Bureau will partner with other agencies such as, San Jose International Airport, San Jose Sports Authority, San Jose Arts Commission, San Jose Downtown Association and San Jose/Silicon Valley Chamber of Commerce, and local hotels and attractions to further extend its marketing efforts and reduce its dependency on City resources.

SECTION 3. MARKETING PLAN.

A. Development of Marketing Plan.

Each Fiscal Year during the term of this Agreement, Bureau will create and adopt, in cooperation with City, a Marketing Plan as described below in Section 3B. Bureau's Marketing Plan will include, but not be limited to, performance criteria and goals for occupancy of the Convention Center, delegate attendance, hotel night usage and delegate spending estimates, and will be at least as detailed as the Marketing Plan attached hereto as Exhibit B and will be based on the then available funding and resources. Bureau shall take all reasonable and necessary action to achieve the goals set forth in the approved Marketing Plan and this Agreement.

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B. Review Process

1. Each Fiscal Year during the term of this Agreement, to ensure City fully understands Bureau's marketing plan, goals, programs, and achievements, City agrees that the Department, will review the Bureau's marketing plan early in City's spring budget process. Bureau will welcome input from the Department regarding past and future Bureau marketing efforts on behalf of City.

2. Bureau, as it develops its Budget/Marketing Plan, will additionally involve the City through the official representatives, (ex-officio and staff liaison), serving on the Bureau's Board of Directors from the Mayor's Office, City Council, City Manager's Office and the Department.

3. Following Bureau Board approval, with input from and involvement as described above, Bureau's Marketing Plan and proposed budget will be presented annually to the full San Jose City Council on or before June 1st for action during City's budget process.

C. Amendment to Exhibit B.

Following City Council's action on the Marketing Plan for a Fiscal Year and adoption of Bureau's Budget in accordance with Section 6, a copy of such Marketing Plan will be labeled Exhibit B, signed by authorized representatives of City and Bureau, and filed with the City Clerk's Office by September 30th of that Fiscal Year. The City Manager or his or her designee is authorized to sign such revised Exhibit B on behalf of City. The revised Exhibit B as signed by each party and filed with the City Clerk's Office will replace and supersede Exhibit B attached hereto, and will be deemed a part of this Agreement.

D. Revisions to Marketing Plan and Budget.

1. City and Bureau agree that in any Fiscal Year during the term of this Agreement, City or Bureau may, by written notice to the other, request modifications to the Marketing Plan and Budget then in effect. City and Bureau may amend Exhibits A

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and B to reflect any mutually agreed upon modifications to the Budget and Marketing Plan.

2. The Bureau Board may, at its sole discretion, transfer amounts within its approved Budget from one category (i.e. Personnel, Non-Personnel or Marketing) to another during a Fiscal Year so long as: (i) the aggregate amount of the Budget is not changed; and (ii) the performance targets outlined in the Marketing Plan and Budget for the Fiscal Year are not altered and can still be met. Transfers which would modify the aggregate amount of the Budget must be approved by the City Council, and transfers which would negatively effect any performance target with more than a 5% variance in a Fiscal Year must be approved in advance by the City Manager or his or her designee.

SECTION 4. MARKETING, PROMOTION AND CONVENTION SERVICES TO BE PERFORMED BY BUREAU.

Subject to the provisions of Sections 3 and 5, Bureau shall perform the following marketing and promotion activities and convention services during the term of this Agreement:

A. Convention Sales and Services. Bureau shall pursue convention, meeting and trade show business for the Convention Center through sales and marketing activities, with a strong emphasis on booking the San Jose McEnery Convention Center. Bureau shall offer promotional brochures, delegate housing and other appropriate assistance to groups, associations and trade shows which have executed letters of intent and/or contracts with City to hold a function at the Convention Center ("Definite Groups") and to those associations, groups and trade shows which have contracted with hotels and/or motels in City to hold room blocks therein in connection with events to be held there and/or at other facilities (other than the Convention Center) in City ("Hotel Groups").

B. Film and Video. Bureau shall pursue film production companies through sales and marketing activities to film and/or produce full-length feature films, television shows and commercials in City.

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C. Tour and Travel. Bureau shall attract individual and group leisure travelers to City through sales and marketing activities. Bureau shall influence the individual business travelers to use San Jose International Airport and City hotels or motels over nearby facilities. Bureau shall provide visitor information and services.

D. Public Affairs and Administration. Bureau shall provide strategic support services for its marketing programs, including personnel, finance and office operations, as well as public relations, publicity, publication development and membership.

Bureau's Marketing Plan and Budget shall describe its annual goals, objectives, implementation plan, and performance measures as set out in the attached Exhibit A for each of the areas referred to in subparagraphs A through D above.

SECTION 5. LIMITATIONS ON RESPONSIBILITIES.

In performing the responsibilities and services listed in this Agreement, Bureau shall not do the following with funds provided by City:

1. Advertise, promote or publicize events, activities, facilities or establishments located outside of City, unless such advertising, promotion or publicity shall be directly related to and designed to carry out the goals and objectives set forth in Section 2; or

2. Advertise, publicize or promote hotel and motel facilities outside City for any specific convention, trade show, conference or other event unless a meeting planner using the Convention Center determines that there are insufficient hotel and motel facilities within City to accommodate the required aggregate room block for such event.

SECTION 6. BUREAU BUDGET AND PAYMENT BY CITY.

A. Payment by City. In consideration for services rendered by Bureau as provided in this Agreement, during each Fiscal Year, City will pay to Bureau an amount (the "City Payment") not to exceed the Bureau Budget as approved by City. Each such payment shall be made in accordance with this Section 6. Bureau acknowledges that funds provided by City for Bureau's activities under this Agreement are subject to

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appropriation each Fiscal Year by the City Council, in accordance with the Charter and all applicable laws.

B. City Budget Process. The City shall review and consider Bureau's budget proposal during City's budget cycle. Representatives of City and Bureau may meet and confer as needed in order to better understand Bureau's Budget proposal for the succeeding Fiscal Year. In accordance with the Charter and all applicable laws, the City Council shall determine, prior to the end of each Fiscal Year during the term of this Agreement, the amounts to be allocated and appropriated for Bureau's activities under this Agreement in the succeeding Fiscal Year.

C. Payment Procedures. City shall pay Bureau on a monthly basis, provided, however, that as a condition to each payment, Bureau must submit to the City Manager or his or her designee two (2) copies of an itemized statement of Bureau's reimbursable expenditures for the previous month. No payment shall be requested by Bureau, or paid by City, for Bureau overhead except as provided in this Section 6. In addition, Bureau shall clearly segregate on each monthly statement in a manner satisfactory to the Director those expenditures related to the promotion of the Convention & Cultural Facilities (Convention Center, Parkside Hall, Center for the Performing Arts, Montgomery Theater, Civic Auditorium, and any expansions or additions).

D. Advance Payment. On or shortly after July 1 of each Fiscal Year, and subject to an appropriation therefor, City shall provide Bureau with an advance of Five Hundred Thousand Dollars (\$500,000) (the "Advance") against the total compensation due Bureau in accordance with this Section 6. This advance shall be utilized by Bureau for paying its initial budget costs for such Fiscal Year. Bureau shall seek reimbursement from City as provided for in this Agreement, and thus replenish said advance, until such time in such Fiscal Year as Bureau has billed City and been reimbursed for an amount equal to the City Payment less the Advance, and at said time, Bureau shall utilize said advance for payment of its costs and expenses in accordance with this Agreement for the remainder of such Fiscal Year.

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E. Budget Development

1. Bureau's Budget will be developed and approved concurrent with City's budget cycle. City agrees to make all serious and reasonable efforts to provide Bureau, on or before March 1 of each Fiscal Year during the term of this Agreement, with an estimate of projected Transient Occupancy Tax Revenues and an estimate of projected General Fund Revenues which City anticipates will be allocated to Bureau's activities by City in the succeeding Fiscal Year.

2. On or before March 1 of each Fiscal Year, Bureau shall deliver to the City Manager's Budget Office and the Director a proposed budget in form at least as detailed as the Budget set forth in Exhibit A for the following Fiscal Year which includes:

- a. Bureau's revenue projections from the private sector for the following Fiscal Year;
- b. Totals for marketing, personnel and non-personnel expenditures for each Core Service and Strategic Support Services of Bureau for the following Fiscal Year;
- c. Categorical comparison of the proposed budget for the following Fiscal Year to the estimated expenses for the then Fiscal Year and to the actual expenses for the previous Fiscal Year; and
- d. Rent subsidies proposed for the Convention Center for the following Fiscal Year.
- e. Performance measures that include Actual Performance for the previous Fiscal Year, Projected and Estimated Performance for the current Fiscal Year and Targets for the following Fiscal Year.

Bureau may also submit to City, at the time it submits its proposed budget, any supplements or augmentations it would recommend to provide additional services to achieve the City's objectives under this Agreement.

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G. Amendment to Exhibit A. Subject to the adoption by City of Bureau's Budget for the succeeding Fiscal Year and any appropriation by City of monies for use by Bureau under this Agreement, a copy of such Budget will be labeled Exhibit A, signed by authorized representatives of City and Bureau, and filed with the City Clerk's Office by September 30th of that Fiscal Year. The City Manager or his or her designee is authorized to sign such revised Exhibit A on behalf of City. The revised Exhibit A as signed by each party will replace and supersede Exhibit A attached hereto, and will be deemed a part of this Agreement.

H. Additional Funding Sources. In addition to its obligations under this Agreement, Bureau is encouraged to develop additional funding sources, so long as such activities do not conflict with or impair Bureau's performance under this Agreement.

I. Repayment to City. Unless otherwise approved by City, Bureau shall repay to City, on or before July 31 of each Fiscal Year or the earlier termination of this Agreement, any and all moneys paid by City, excluding funds set aside for reserves, during such Fiscal Year which, upon the expiration of such Fiscal Year or the earlier termination of this Agreement, are unexpended or which are not necessary for the payment of reimbursable expenditures of Bureau for such Fiscal Year. City agrees that funds allocated in the Budget to Bureau and not expended by June 30 of a Fiscal Year may, with prior written approval of the City Manager or his or her designee, be carried over and used by Bureau for the subsequent Fiscal Year in accordance with this Section 6. On or before May 15 of each Fiscal Year, Bureau shall submit to the City Manager or his or her designee an outline of the program(s) with respective budget(s) for which Bureau wishes carried-over funds be expended. All such expenditures shall be otherwise in accordance with terms and conditions of this Agreement.

J. Agreement to Discuss Future Funding. Bureau and City agree to meet and engage in discussions during the term of this Agreement about long term Bureau funding needs and strategy to assist Bureau in attaining its goal of consistent base City funding from year to year to the extent reasonably feasible and consistent with applicable law.

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SECTION 7. BUDGET LIMITATIONS - ALL FISCAL YEARS DURING TERM.

A. Equipment Reimbursements. During the term of this Agreement (as it may be extended pursuant to Section 1), reimbursable expenditures of Bureau shall include reimbursement for items of equipment. City's prior written approval, which shall not be unreasonably withheld, shall only be required for the purchase of items of computer equipment hardware, the cost of which is One Thousand Dollars (\$1,000) or more, to ensure compatibility with Department's computer system. Upon the purchase of any such computer equipment hardware and reimbursement therefor by City, the ownership of each such item of computer equipment hardware shall be deemed automatically transferred to City. Bureau shall clearly mark and identify all such computer equipment hardware as City's property.

B. TOT Revenue Projections. It is understood by Bureau that any and all payments by City to Bureau in accordance with the Budget and this Agreement are dependent upon receipt by City of sufficient transient occupancy tax revenues ("TOT Revenues") to fund the Budget, and that during the term of this Agreement, it may be necessary for City to adjust the amount of monies available to fund the Budget to reflect any deficiencies that may occur. Bureau agrees that the total amount of City's payment to Bureau may be reduced if the amount of TOT Revenues actually collected by City during the term of this Agreement is less than the amount of TOT Revenues anticipated at the commencement of each Fiscal year.

In the event that, due to an actual or projected deficiency or shortfall in TOT Revenues in a Fiscal Year during the term of this Agreement, City shall, by written notice to Bureau, provide Bureau with revised information on the amount of TOT Revenues to be provided by City under this Agreement. Bureau may prepare a revised budget and modifications to its marketing plan for the City Council to act upon in light of the revised information; such revisions shall be reflected in a written modification to this Agreement. City and Bureau may, by mutual agreement in a succeeding Fiscal Year, agree to adjustments in the amount of TOT Revenues to account for any deficits in such Revenues in the then current Fiscal Year.

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SECTION 8. BOOKING RESPONSIBILITY.

A. Cooperation in Booking. Bureau and City shall cooperate with each other in booking events at the Convention Center so that the best interests of City are served. Bureau and the Department shall each exercise due diligence to ensure that no misunderstandings occur with clients on such items as fees, services and charges. Prior to the publication of the monthly Bureau report, Bureau and City will mutually determine which events are booked by Bureau, City, or are shared bookings. Bureau and City shall exclusively use, maintain and keep up to date the scheduling calendar for the Convention Center.

B. Booking Priorities - Bureau and City.

1. Bureau Primary Responsibility. In order to assure optimum flexibility in booking larger events of 750 or more peak hotel room nights, Bureau shall have the primary responsibility, and have first priority on dates, for booking such larger conventions, trade shows, and conferences at the Convention Center for the following periods:

- a. Eighteen (18) months or more from the then current month with respect to the San Jose McEnery Convention Center; and
- b. Thirty (30) months or more from the then current month with respect to the Civic Auditorium and Exhibit Halls A and B in the Civic Auditorium Complex.

Bureau and Department shall maintain appropriate communications with each other to ensure that proper tentative reservations can be made with Department's scheduling calendar for specific areas of the Convention Center and that duplicate bookings or unworkable overlaps will not occur when the tentative reservations become definite. Bureau shall coordinate with City to ensure scheduling availability and feasibility when converting tentative events into definite reservations or bookings.

If in an effort to accommodate additional events Bureau proposes to change any terms of a fully executed facility use agreement between City and a Definite Group,

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Bureau will first contact Department and reach a mutual agreement with Department regarding such proposed changes prior to contacting that group.

2. Local Shows. Recognizing the high priority on Convention Center bookings, while balancing community needs and events, City desires to accommodate certain local consumer shows which typically operate during non-peak convention seasons and which repeat each year and develop a three to five year cycle or pattern for their date preference. To assist City while preserving flexibility in its bookings, Bureau shall commit to make available to City for this purpose dates at the San Jose McEnery Convention Center Exhibit Halls as specified below:

- a. Eight (8) consecutive days (Monday through Monday) during the period from January 2 through January 31;
- b. Five (5) consecutive days (Wednesday through Monday) during the period June 1 through June 30; and
- c. Five (5) consecutive days (Wednesday through Monday) during the period November 1 through December 10.

Working around the already contracted events, Bureau shall reserve "target dates" for the then upcoming three (3) years for each event within the specified time period and may change those "target dates" between nineteen (19) and thirty-six (36) months from the then current month in order to maximize convention usage. At eighteen (18) months from the current month, the "target dates" become definite reserved dates and may no longer be moved or changed. The Department will select and book these local shows utilizing the dates reserved by Bureau within each time period, and will administer and manage the booking and event services for these shows. At any time, Bureau and City may, by mutual agreement, modify, amend or delete clauses "a", "b", or "c" above.

3. City Primary Responsibility. The Department shall have primary responsibility, and shall have first priority on dates, for booking conventions, trade shows, and other events for the following periods:

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- a. Events less than eighteen (18) months from the then current month with respect to the San Jose McEnery Convention Center; and
- b. Events less than thirty (30) months from the then current month with respect to the Civic Auditorium and Exhibit Halls A and B in the Civic Auditorium Complex.

4. Challenge of Bureau Tentative Groups. Certain associations, group or trade shows for which Bureau has tentatively reserved some or all of the Convention Center in accordance with this Section 8 ("Bureau Tentative Groups") may not have executed a letter of intent and/or a contract with City to become a Definite Group before the lapse of the time periods referred to in Section 8 B(1). If at any time during such time periods the Department has solicited another event which wishes to use the Convention Center (or a portion thereof) for some or all of the dates tentatively reserved by such Bureau Tentative Group, the Department by facsimile, telegram or other written notice, shall require such Bureau Tentative Group to submit an executed letter of intent or the requested deposit (in each case satisfactory to the Director) to hold its function at the Convention Center on the dates and for the portions so reserved. The Department may make such a challenge to a Bureau Tentative Group at any point in time after the time periods for Bureau's booking responsibility have lapsed. If the Department does so challenge a tentative booking, the Bureau Tentative Group shall submit the required letter of intent or deposit within fourteen (14) days of receipt of written notice. Where the Department is able to extend the times for a response from a Bureau Tentative Group without a loss of business for the Convention Center, the Department will consider doing so. Failure of a Bureau Tentative Group to respond within such time period shall be deemed a forfeiture of the tentative dates and any right to use the Convention Center on the tentative dates.

5. New Convention Bookings within Eighteen Months and Thirty Months. Bureau shall first determine from the Department if dates are available prior to soliciting new conventions, trade shows, conferences or other events within the eighteen (18) and thirty (30) month time periods for which the Department is responsible and shall coordinate with the Department in procuring all events within these periods. The

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Department shall review and book all new trade shows, conferences and other events within these periods.

6. **Smaller Conventions and Trade Shows.** It is desirable to schedule smaller conventions and trade shows around the larger ones, which maximize utilization of Convention Center space and City-wide hotel rooms. For that reason, Bureau shall work with Department to book conventions and trade shows utilizing less than 750 peak hotel room nights up to eighteen (18) months from the then current month.

7. **City Cultural Facilities.** The Department shall book all events in the City Cultural Facilities. Bureau shall not solicit any conventions, trade shows, conferences or other events at the City Cultural Facilities (e.g. the Center for Performing Arts or the Montgomery Theater) without the prior approval of the Director.

8. **Civic Auditorium Complex.** The Civic Auditorium Complex, including Parkside Hall, is deemed to be the "Community Facilities." City may, at its option and with no less than sixty (60) days advance written notice to Bureau, elect to withdraw these facilities from Bureau's primary responsibility. If such an election is made by City, City will examine each booking on a case-by-case basis with the intent of accommodating the definite bookings in a manner satisfactory to the client. City shall work collaboratively with Bureau to address tentative reservations on a case-by-case basis.

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SECTION 9. COMMUNICATIONS BETWEEN CITY AND BUREAU.

A. Communications between City and Bureau.

The Department and Bureau shall make reasonable efforts to coordinate marketing and public relations programs funded by the City. The parties mutually agree they will directly notify each other (either through an annual marketing plan or other appropriate manner) prior to the undertaking of any major promotional materials, public relations campaign or new program activity dealing with the promotion of San Jose. This mutual obligation is intended to coordinate efforts so all necessary parties are made aware of the activity of other to avoid duplication of financial and staff resources.

B. Communications with City's Department. Bureau and the Department shall continually maintain open and adequate lines of communications with each other. In furtherance thereof, Bureau shall:

1. Ensure that proper tentative reservations are entered on the scheduling calendar for specific portions of the Convention Center and that duplicate bookings or unworkable overlaps will not occur when the tentative reservations become definite;
2. Bring together convention and trade show executives, site committees, boards of directors and similar organizations with the Department and with designated representatives of other meeting and housing facilities in City at appropriate times in the on-going sales effort;
3. Assist, as requested by the Department's management, in the final negotiation of contracts for the Convention Center;
4. Involve the Department on various Bureau standing and ad hoc committees, as appropriate.

Department and Bureau shall mutually involve each other in their respective preparation of major material relating to the Convention Center during development and prior to

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implementation of such items, including, but not limited to, brochures, videos, advertising, and requests for proposals for consultants and specialized vendors.

SECTION 10. VISITOR INFORMATION CENTERS.

A. Bureau agrees, subject to available funding for the then current Fiscal Year, to establish and maintain at least two (2) visitor information centers (collectively, "Information Centers"). Two (2) Information Centers shall be located in kiosks at the San Jose International Airport, one each in Terminal A and Terminal C, for the benefit of air passengers. Bureau shall maintain the appropriate authorization to operate the kiosks at the Airport from City's Airport Department.

B. Bureau agrees to operate each Information Center at least six (6) days a week for at least forty-two (42) hours for each such calendar week. Accurate, comprehensive information on the things to do and see in the San Jose areas will be available for visitors and residents. Staff will be trained, competent, paid and volunteer personnel. Bureau shall maintain such Information Centers and pay all utility, telephones and other services necessary to operate them.

C. Upon ninety (90) days advance written notice to City, Bureau may close and terminate operations at an Information Center. Bureau shall immediately close and terminate operations at an Information Center upon receipt of written notice of closure and/or termination from the Director and/or the Director of Aviation, as appropriate.

D. Bureau may seek fees for the services of the employees and staff operating Information Centers to assist Bureau in the payment of the cost of operating Information Centers. Nothing in this Agreement shall prohibit Bureau from seeking voluntary investments to supplement Bureau in the payment of the cost of operating an Information Center.

SECTION 11. VISITOR INFORMATION & BUSINESS CENTER.

A. Bureau shall maintain the Visitor Information & Business Center at the Convention Center.

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B. Staffing. The number of persons staffing the Visitor Information & Business Center will vary depending on projected building activity and shall be mutually agreed upon by City and Bureau.

C. Hours of Operation. Hours of operation of the Visitor Information & Business Center shall vary depending on projected building activity and shall be mutually agreed upon by City and Bureau. Basic operating schedule year-round is Monday through Friday from 8:00 a.m. to 5:30 p.m. and Saturdays and Sundays from 11:00 to 5:00 p.m. Holiday hours, if necessary based on building activity, shall be arranged in advance.

D. Accounting Procedures. Monthly financial statements reflecting gross revenue on services, supplies and kiosk rentals shall be submitted to the City by the 15th day of the month immediately following such activity. Monthly financial statements shall be submitted to the Deputy Director of the Conventions, Arts and Entertainment.

E. Services and Supplies Provided. At a minimum services and supplies shall include:

1. BUSINESS SERVICES

(a) At a Charge

Facsimile transmittal/receiving

Photocopying

Light word processing

Computer transmission line (modem)

Computer/printer rental

Phone Cards

Transparencies

Daily newspapers (local)

Business supplies

Express delivery service

Wheelchair rentals

Booth delivery (faxes, light packages, etc.)

Stamps

Shipping Services

(b) No Charge

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U.S. Mail box
United Parcel Service (UPS)

2. VISITOR SERVICES

(a) At a Charge

Souvenirs
Street maps
San Jose Logo Merchandise

(b) No Charge

Brochures, guides, event calendars, and some maps
Restaurant Menus
Hotel/motel reservations
Promotional items (seasonal)
Restaurant reservations
Referrals
Transportation information
Street directions
Building directions

F. Promotion. Bureau shall promote and publicize the Visitor Information & Business Center through: distribution of promotional literature to convention planners/delegates; highlighting services in consumer and trade literature (as appropriate); press releases to appropriate media; and other promotional programs as needed.

G. Services and Supplies. Bureau will advise City, in advance, of all services and supplies to be provided by the Bureau at the Visitor & Business Center. City may review any of the foregoing and bring any concerns or suggestions to the Bureau's attention for mutual agreement; which in either case will not be unreasonably withheld.

H. City shall provide appropriate signage throughout the Convention Center. In addition, City agrees to provide for the Visitor & Business Center: utilities (water, electrical, and heating, ventilating and air conditioning); daily trash pick-up; floor carpeting, and basic maintenance of the facility.

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I. Payment. Bureau shall pay to City the greater of the following during the term of this Agreement:

- (a) Ten percent of monthly gross revenue on all services and merchandise sold at the Visitor Information & Business Center and kiosk rentals at the San Jose McEnery Convention Center; or
- (b) \$500 per month.

J. Payment /Reports Due Date. Bureau shall submit quarterly payments in conjunction with quarterly financial reports no later than the 15th day of the month immediately following the quarter in which such activity occurs, to the Director of the Conventions, Arts and Entertainment Department. Checks shall be made payable to the City of San Jose.

SECTION 12. BOOKS AND RECORDS OF BUREAU.

Bureau shall maintain the following books and records:

A. Bureau shall create and maintain a separate special fund, complete with a self-balancing set of accounts, wherein shall be recorded all moneys paid by City to Bureau. No other receipts, collections or money of Bureau shall be credited to, or recorded in, such special fund. All expenditures and disbursements charged to such special fund shall be supported by vouchers or other evidence showing that disbursements or expenditures were made or incurred by Bureau in performing or carrying out its obligations to City under this Agreement.

B. Bureau shall maintain all of its books and records in accordance with generally accepted accounting principles consistently applied.

C. Unless otherwise mutually agreed by City and Bureau, Bureau shall only be required to make available its books and records when City determines that it is necessary to inspect or audit such books and records in order to ascertain whether Bureau is expending the funds provided by City in accordance with this Agreement, is

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meeting its performance criteria and goals set forth in its marketing plan, and is otherwise acting in accordance with this Agreement. Promptly upon such a request by City, Bureau shall make available to City and its authorized agents, officers and employees for examination (i) any and all ledgers and books of account, invoices, vouchers, canceled checks and other records or documents evidencing or relating to the expenditures and disbursements charged against the account referred to in Section 12(A), (ii) Bureau's event booking calendar, and (iii) any and all other books and records of Bureau. Bureau shall also furnish to City and its authorized officers, agents and employees, promptly upon request, such other evidence or information as City may require including, without limitation, with respect to any expense or disbursement charged by Bureau to its accounts.

SECTION 13. REPORTS FROM BUREAU.

A. Monthly Reports. Bureau shall submit to the Director, on a monthly basis, reports, in the form currently used on the date of this Agreement or such other form acceptable to the Director and Bureau, which reports include, but are not limited to, the following information as available:

1. Estimated delegate expenditures for all Definite Groups and tentative groups scheduled by Bureau to hold events at the Convention Center after the end of the previous month, and detailed space requirements (as available), including gross square foot exhibit space, net space and number of booths, meeting space needs (number, types and capacities), and estimated attendance for all incoming Definite Groups and tentatives.
2. A list of all Definite Groups which held events at the Convention Center during the previous month, which list states for each group: the name of such group's event, the date(s) on which such event took place.
3. Once information is available, the actual hotel and motel room nights relating to such event (peak and total room nights), and the estimated economic impact of such event.

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B. Annual Report. In addition, no later than August 15 , the Bureau shall submit to Director a formal report detailing all accomplishments of Bureau in furtherance of this Agreement during the previous Fiscal year, state performance criteria and goals referred to in Sections 2 through 4 which were met during such year, and be in the form currently used on the date of this Agreement or such other form acceptable to the Director and Bureau. This report will accompany the Department's Annual Report to the City's Economic and Community Development Committee and will be forwarded with the Department's Annual Report to the City Council.

C. Membership and Officers List. Not later than August 1 of each Fiscal Year, Bureau shall deliver to the Director, without charge, one (1) copy of Bureau's "Membership and Officers List".

D. Financial Statement. Not later than one hundred twenty (120) days after the end of Bureau's fiscal year, Bureau shall deliver to each of the City Manager and the Director, without charge, one (1) copy of Bureau's audited financial statement as of the end of that fiscal year containing a balance sheet and a statement of income and expenditures. The statement of income and expenditures shall cover Bureau's total financial program for that fiscal year.

E. Property List. Not later than September 30 of each Fiscal Year, Bureau shall deliver to the Director, without charge, a list of all property owned by City and in the possession of Bureau as of June 30 of that Fiscal Year. This list shall include, for each item of property, the date of purchase, the inventory tag number, and the original cost of such item of property, and shall be otherwise in form and substance satisfactory to the Director.

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SECTION 14. INSURANCE REQUIREMENTS.

Bureau, at Bureau's sole cost and expense, and for the full term of this Agreement and any renewal thereof, shall obtain and maintain at least all of the following minimum insurance requirements prior to receiving any monies under this Agreement:

A. Minimum Scope of Insurance. Coverage shall be at least as broad as:

1. Insurance Services Office form number GL 0002 (Ed. 1/73) covering Comprehensive General Liability and Insurance Services Office form number GL 0404 covering Broad Form Comprehensive General Liability; or Insurance Services Office Commercial General Liability coverage ("occurrence" form CG 0001), including X, C, U where applicable.
2. Insurance Services Office form number CA 0001 (Ed. 1/78) covering Automobile Liability, code 1 "any auto", or code 2 "owned autos" and endorsement CA 0025. Coverage also to include code 8 "hired autos" and code 9 "non-owned" autos.
3. Workers' Compensation insurance as required by the Labor Code of the State of California and Employers Liability insurance.

B. Minimum Limits of Insurance. Contractor shall maintain limits no less than:

1. Comprehensive General Liability: \$1,000,000 combined single limit per occurrence for bodily injury, personal injury and property damage.
2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage.
3. Workers' Compensation and Employers Liability: Workers' Compensation limits as required by the Labor Code of the State of California and Employers Liability limits of \$100,000 per accident.

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C. Fidelity Bond. A fidelity bond issued by a licensed surety of the State of California and acceptable to City shall be provided by Bureau to City:

1. This bond shall name Bureau as the obligor and City as obligee;
2. This bond shall have a penal sum of not less than \$500,000; and
3. This bond shall be written on a continuous basis "GOOD UNTIL CANCELED".

D. Deductibles and Self-Insured Retentions. Any deductibles or self-insured retentions must be declared to, and approved by, City. At the option of City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects City, its officials, employees, agents and contractors; or Bureau shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by City.

E. Other Insurance Provisions. The policies are to contain, or be endorsed to contain, the following provisions:

1. General Liability and Automobile Liability Coverages.
 - a. City, its officials, employees, agents and contractors are to be covered as an additional insured as respects: Liability arising out of activities performed by, or on behalf of, Bureau; products and completed operations of Bureau; premises owned, leased or used by Bureau; or automobiles owned, leased, hired or borrowed by Bureau. The coverage shall contain no special limitations on the scope of protection afforded to City, its officials, employees, agents and contractors.
 - b. Bureau's insurance coverage shall be primary insurance as respects City, its officials, employees, agents and contractors. Any insurance or self-insurance maintained by City, its officials, employees, agents or contractors shall be excess of Bureau's insurance and shall not contribute with it.

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- c. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to City, its officials, employees, agents, or contractors.
- d. Coverage shall state that Bureau's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

2. All Coverages.

Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in limits except after thirty (30) days' prior written notice has been given to City.

F. Acceptability of Insurers. Insurance is to be placed with insurers acceptable to City's Risk Manager.

G. Verification of Coverage. Bureau shall furnish City with certificates of insurance and with original endorsements affecting coverage required by this clause. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Proof of insurance shall be mailed to the following address or any subsequent address as may be directed in writing by City's Risk Manager:

City of San Jose
Risk Management Division
152 North Third Street, Suite 904
San Jose, CA 95112-5509

H. Subcontractors. Bureau shall include any subcontractors authorized by City under this Agreement as insureds under its policies or shall obtain separate certificates and endorsements for each subcontractor.

SECTION 15. INDEMNIFICATION.

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Bureau shall defend, indemnify and hold harmless City, its officers, agents, and employees, from and against all claims, suits, actions, causes of action or liability of any kind, nature or description, brought by any and all persons for or on account of any loss, damage, death of or injury to persons, property or any interest, tangible or intangible, sustained by or occurring to any person or persons, howsoever the same may be caused, directly or indirectly, from the performance of Bureau under this Agreement or the failure of Bureau to perform under this Agreement, except as may arise from the negligence or willful act of City, its officers, agents, and employees.

To the extent permitted by applicable law, City shall defend, indemnify and hold harmless Bureau, its officers, agents and employees, from and against all claims, suits, actions, causes of action or liability of any kind, nature or description, brought by any and all persons for or on account of any loss, damage, death of or injury to persons, property or any interest, tangible or intangible, sustained by or occurring to any person or persons, howsoever the same may be caused, directly or indirectly, from the performance of City under this Agreement or failure of City to perform under this Agreement, except as may arise from the negligence or willful act of Bureau, its officers, agents and employees.

SECTION 16. TERMINATION OF AGREEMENT.

Upon the occurrence of any of the following events, City may, at its sole option and in addition to any other remedies available to City at law, in equity and/or under this Agreement, terminate this Agreement upon notice to Bureau:

A. The occurrence of any act or omission on the part of Bureau which operates to suspend, revoke or terminate any certificate, permit, franchise, approval, authorization or power necessary for the lawful conduct or operation of any of the business and/or activities of Bureau under this Agreement.

B. Any action taken or suffered by Bureau under any insolvency or bankruptcy acts, including, without being limited to, the filing by Bureau of any petition in bankruptcy (including arrangement or reorganization); or, upon the filing against Bureau of a petition in involuntary bankruptcy, an adjudication of Bureau as bankrupt.

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C. The appointment of a receiver to take possession of all or substantially all of the assets of Bureau.

D. A general assignment by Bureau for benefit of creditors.

E. The cancellation, expiration or termination of any policy of insurance required under Section 14, and Bureau's failure to provide the coverage required under Section 14 in lieu thereof on or before the effective date of such cancellation, expiration or termination.

F. Failure by Bureau to cure in a manner satisfactory to City any breach by Bureau of a term, covenant or provision of this Agreement applicable to Bureau following ninety (90) days written notice from City to Bureau of such breach.

G. Any material representation made by Bureau hereunder shall have been false or misleading in any material respect as of the date on which such representation was made.

SECTION 17. WAIVER OF BREACH.

The waiver by City of any breach of any term, covenant, condition or provision herein contained shall not be deemed to be a waiver of any subsequent breach of such term, covenant or condition. The consent or approval by City to any act of Bureau requiring City's approval shall not be deemed to waive or render unnecessary the need for City's consent or approval to or of any subsequent similar act of Bureau.

SECTION 18. EQUAL OPPORTUNITY AND NONDISCRIMINATION.

Bureau shall not exclude any person from employment at Bureau on any grounds prohibited by state or federal law. Furthermore, Bureau agrees that no person shall be excluded from participation, be denied the benefits of, or be otherwise subjected to discrimination in the performance of his or her employment activities at Bureau on any grounds prohibited by state or federal law.

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SECTION 19. APPROPRIATION OF CITY FUNDS.

This Agreement is subject to the fiscal provisions of Article XII of the Charter of City. This Agreement will terminate without penalty (i) at the end of any Fiscal Year in the event that funds are not appropriated for the following Fiscal Year, or (ii) at any time within a Fiscal Year in the event that funds are only appropriated for a portion of the Fiscal Year and funds for this Agreement are no longer available. This Section 19 shall control in the event of a conflict with any other provision of this Agreement.

SECTION 20. RECYCLED PRODUCTS.

In support of City's commitment to recycling, Bureau agrees to utilize all reasonable efforts to use recycled paper, plastic and other products wherever possible. The efforts by Bureau under this Section 20 apply to products or materials provided to City, provided by Bureau to a third party on City's behalf, or used in performing Bureau's activities required under this Agreement.

SECTION 21. SUBSIDY GUIDELINES

Bureau agrees that any subsidies of any fees for use of the Convention Center granted by the Bureau shall be made in compliance with Subsidy Guidelines mutually agreed to by City and Bureau.

SECTION 22. AMERICANS WITH DISABILITIES ACT.

Unless caused by alterations or changes made by Bureau's or caused by Bureau's negligence or willful misconduct, City agrees that City shall be responsible under Title II of the Americans with Disabilities Act ("ADA") for the following items: (i) structural fixtures, including the Facility's elevators and (ii) any doorway of the Convention Center or any common area of the Convention Center open to the general public.

Bureau shall be responsible for complying with the ADA in connection with (i) setting up and running the Visitor Information & Business Center including, without limitation, removing physical barriers created by Bureau, (ii) providing auxiliary aids and

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services where necessary to ensure effective communication to individuals with disabilities who participate or desire to participate in Bureau's programs, and (iii) modifying Bureau's policies, practices and procedure, as necessary, to enable individuals with disabilities to participate equally in the programs of Bureau. City shall make reasonable efforts to advise Bureau of any applicable changes or new requirements of the ADA. Notwithstanding, City's advice or approval of any aspect of Bureau's activities under this Agreement shall not be construed in any way as a representation that such item or activity complies with the ADA.

SECTION 23. STATEMENTS, RECORDS AND INFORMATION.

Bureau represents and warrants to City that all statements, records, reports, certifications and other information submitted by Bureau to City have been true and accurate, and covenants that all future statements, records, reports, certifications and other information submitted by Bureau to City will be true and accurate in all material respects.

SECTION 24. COMPLIANCE WITH LAWS.

Bureau shall, at its sole cost and expense, promptly and faithfully observe and comply with all requirements of all laws, statutes, ordinances, rules, regulations, orders and requirements of all governmental authorities (including but not limited to municipal, county, state and federal governments and their departments, bureaus, boards, commissions and officials) now in force or which may hereafter be in force.

SECTION 25. GIFTS.

Bureau is familiar with City's prohibition against the acceptance of any gift by a City officer or designated employee, which prohibition is found in the San Jose Municipal Code. Bureau agrees not to offer any City officer or designated employee any gift prohibited by said Code. The offer or giving of any gift prohibited by the Code shall constitute a material breach of this Agreement by Bureau. In addition to any other remedies City may have in law or equity, City may terminate this Agreement for such breach as provided in Section 16.

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SECTION 26. NOTICES AND COMMUNICATIONS.

Unless otherwise specified in this Agreement, all notices, statements, demands, requests, consents, approvals, authorizations, offers, agreements, appointments or designations hereunder to be given by either party to the other or the City Manager, shall be in writing and shall be sufficiently given and served upon the recipient if sent by U. S. mail, first-class mail, postage prepaid and addressed as follows:

If to the City Manager, the same shall be addressed to:

City Manager
City of San Jose
801 North First Street
San Jose, CA 95110

With a copy to the Director at the address set forth below.

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If to the Director or City, the same shall be addressed to:

Director
Department of Conventions, Arts and Entertainment
San Jose McEnery Convention Center
408 Almaden Blvd.
San Jose, CA 95110-2715

If to Bureau, the same shall be addressed to:

President
San Jose Convention & Visitors Bureau
333 W. San Carlos Street, Suite 1000
San Jose, CA 95110-2720

or to such other place as the City Manager, the Director, City or Bureau, respectively, may notify a party in writing.

SECTION 27. RETURN OF PROPERTY.

Upon the expiration or earlier termination of this Agreement, Bureau shall promptly return to City all property of City in the possession of Bureau or utilized by Bureau (including City property acquired in accordance with prior agreements between City and Bureau), including, without limitation, all equipment referred to in Section 7(A). All such property shall be in at least as good as condition as when acquired by Bureau, ordinary wear and tear excepted.

SECTION 28. MISCELLANEOUS.

A. Whenever the singular number is used in this Agreement and when required by the context, the same shall include the plural, and the masculine gender shall include the feminine and neuter genders.

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B. This instrument contains all of the agreements and conditions entered into and made by and between the parties and may not be modified orally, or in any manner, other than by an agreement in writing signed by all the parties hereto.

C. Time is and shall be of the essence of each term and provision of this Agreement.

D. This Agreement shall be deemed to have been made in, and be construed in accordance with, the laws of the State of California.

E. The headings of the several paragraphs and sections of this Agreement are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope or intent of any provisions of this Agreement and shall not be construed to affect in any manner the terms and provisions hereof or the interpretation or construction thereof.

F. In the event any covenant, condition or provision herein contained is held to be invalid by a court of competent jurisdiction, the invalidity of any such covenant, condition or provision shall in no way affect any other covenant, condition or provision herein contained, provided the invalidity of any such covenant, condition or provision does not materially prejudice either City or Bureau in its respective rights and obligations contained in the valid covenants, conditions and provisions of this Agreement.

G. All exhibits and addenda referred to herein, and any exhibits or schedules which may from time to time be referred to in any duly executed amendment thereto, are by such reference incorporated herein and shall be deemed a part of this Agreement as if set forth in fully herein.

H. Days, unless otherwise specified, shall be calendar days.

I. It is understood and agreed that Bureau, in the performance of the services agreed to be performed by Bureau, shall act as and be an independent contractor and not an agent or employee of City. Furthermore, it is understood that Bureau is subject

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to and must act in accordance with its articles, bylaws and the provisions of the California Corporation Code applicable to domestic nonprofit corporations.

J. Whenever in this Agreement the approval or consent of a party is required, such approval or consent must be in advance, shall be in writing, and shall be executed by a person having the express authority to grant such approval or consent.

K. The review, approval, inspection, examination or consent of City or to any item to be reviewed, approved, inspected, examined or consented to by City shall not constitute the assumption of any responsibility by City for either accuracy or sufficiency of any item or the quality or suitability of such item for its intended use. No third parties, including Bureau or persons claiming under Bureau, shall have any rights hereunder resulting therefrom or otherwise.

L. The rights and obligations of Bureau under this Agreement are personal to Bureau and may not be transferred, assigned or subcontracted, in whole or in part, without the prior written consent of City.

IN WITNESS WHEREOF, City and Bureau have executed this Agreement on the day and year first above written.

APPROVED AS TO FORM:

CITY OF SAN JOSE, a municipal corporation

KEVIN FISHER
Deputy City Attorney

By: _____
Name:
Title :

SAN JOSE CONVENTION & VISITORS
BUREAU, a California nonprofit corporation

By: _____
Chairman of the Board

By: _____
President and Chief Executive Officer

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EXHIBIT A
BUDGET

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EXHIBIT B

[Copy of Convention & Visitors Bureau Marketing Plan]

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ACKNOWLEDGMENT FOR BUREAU

State of California)
 : ss.)
County of Santa Clara)

On _____ before me, _____, personally appeared _____
_____, the _____ of the San Jose Convention & Visitors Bureau, a California
non-profit corporation, personally known to me (or proved to me on the basis of
satisfactory evidence) to be the person whose name is subscribed to the within
Agreement between the City of San Jose and the San Jose Convention & Visitors
Bureau and acknowledged to me that he/she executed the same in his/her authorized
capacity, and that by his/her signature on the Agreement the person, or the entity upon
behalf of which the person acted, executed the Agreement.

WITNESS my hand and official seal.

Signature

(Seal)

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ACKNOWLEDGMENT FOR BUREAU

State of California)
 : ss.)
County of Santa Clara)

On _____ before me, _____, personally appeared _____, the _____ of the San Jose Convention & Visitors Bureau, a California non-profit corporation, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within Agreement between the City of San Jose and the San Jose Convention & Visitors Bureau and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the Agreement the person, or the entity upon behalf of which the person acted, executed the Agreement.

WITNESS my hand and official seal.

Signature

(Seal)

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**AGREEMENT BETWEEN THE CITY OF SAN JOSE AND
THE SAN JOSE CONVENTION & VISITORS BUREAU
FROM JULY 1, 2000 TO JUNE 30, 2005**

DATED: _____

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**COMMUNICATION SERVICES MANAGEMENT AGREEMENT
BETWEEN THE CITY OF SAN JOSE AND
STREAMLINE COMMUNICATIONS CORPORATION
FOR THE SAN JOSE CONVENTION AND CULTURAL FACILITIES**

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**COMMUNICATION SERVICES MANAGEMENT AGREEMENT
BETWEEN THE CITY OF SAN JOSE AND
STREAMLINE COMMUNICATIONS CORPORATION
FOR THE SAN JOSE CONVENTION AND CULTURAL FACILITIES**

This Communication Services Management Agreement (“Agreement”) is made this ___ day of _____, 2000, by and between the CITY of San Jose, a municipal corporation (“CITY”), and StreamLine Communications Corporation, a California corporation (“OPERATOR”).

RECITALS

WHEREAS, CITY owns the San Jose Convention and Cultural Facilities, which include: San Jose McEnery Convention Center, Center for the Performing Arts, Parkside Hall, Civic Auditorium, Montgomery Theater and any other facilities managed by SJCCF (collectively, the “Facilities”); and

WHEREAS, CITY wishes to secure the services of a provider of Communication Services (as defined below) at the Facilities; and

WHEREAS, proposals for these Communications Services have been solicited and received by CITY; and

WHEREAS, OPERATOR has submitted the proposal deemed by CITY to be the most advantageous proposal submitted; and

WHEREAS, the San Jose City Council has determined that the execution of this Agreement with OPERATOR will enhance the quality of the Communication Services at the Facilities

NOW, THEREFORE, in consideration of the covenants, terms and conditions of this Agreement, the CITY and OPERATOR hereby agree as follows:

AGREEMENT

Section 1. Agreement Documents

The documents forming the Agreement between CITY and OPERATOR shall consist of this Agreement including:

- Exhibit A – Provider Terms and Conditions
- Exhibit B – SJCC Network Plan
- Exhibit C –Communication Services Fees and Charges
- Exhibit D - Insurance Requirements

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In the event any discrepancies or inconsistencies between the provisions of this Agreement and any of the above-referenced documents arise, the provisions of this Agreement will prevail.

This Agreement and the Exhibits set forth above, contain all of the agreements, representations and understandings of the parties hereto, and supersede and replace any previous understandings, commitments, or agreements, whether oral or written.

Section 2. DEFINITIONS

The words and phrases as used in this Agreement shall have the following meaning, unless the context clearly indicates otherwise.

“Clients” shall refer to the individuals or business entities that enter into a Facility Use Agreement with the CITY for the use of the Facilities, and their exhibitors, presenters, and service contractors.

“Commencement Date” shall mean the date this Agreement is signed by the San Jose City Clerk.

“Communication Services” shall mean and include all Network Infrastructure, Network Systems, Network Services, and Network Application Services necessary to provide high-speed local and wide-area network connectivity services that are made available for a fee charged by OPERATOR to Clients at or from the Facilities through the SJCC Network.

“Day” shall mean any calendar day. For purposes of this Agreement, the time in which any act is to be performed shall be computed by excluding the first day and including the last.

“Director” shall mean the Director of Conventions, Arts & Entertainment or such other person, division, department, bureau or agency as may from time to time exercise functions equivalent or similar to those now exercised by the Director of Conventions, Arts & Entertainment. The term also includes any person expressly designated to exercise functions with respect to the rights and obligations of the Director of Conventions, Arts & Entertainment under this Agreement.

“Effective Date” shall mean February 1, 1998, which is the date that OPERATOR commenced providing Communication Services to Clients at the Facilities.

“Event” shall mean any convention, trade show, meeting, conference, performance, or gathering to be held by a Client at the Facilities.

“Expiration Date” shall mean January 31, 2001. In the event that CITY elects to extend the Term of this Agreement pursuant to Section 3.2, “Expiration Date”

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shall mean January 31, 2006.

“Facilities” shall mean all buildings managed by the San Jose Convention and Cultural Facilities, including:

“Auditorium” shall mean the Civic Auditorium at 145 West San Carlos Street, San Jose.

“Convention Center” shall mean the San Jose McEnery Convention Center at 150 West San Carlos Street, San Jose.

“CPA” shall mean the Center for the Performing Arts at 255 South Almaden Boulevard, San Jose.

“Montgomery” shall mean the Montgomery Theater at the intersection of West San Carlos and South Market Streets, San Jose.

“Parkside” shall mean Parkside Hall at 160 Park Avenue, San Jose.

“Facility Use Agreement” shall mean the agreement between the CITY and the individuals or business entities that use the Facilities. The Facility Use Agreement includes terms and conditions regarding Communication Services to be provided to Clients at the Facilities.

“Financial Review” shall mean the monthly meeting between CITY and OPERATOR as described in Section 12.1 of this Agreement at which the Financial Statement and Operations Report will be reviewed.

“Financial Statements” shall mean and include the Revenue Report, Expense Report, SJCC Network Earnings Report, Financial Forecast, Operating Account, and Operating Account Report, each of which is described in Section 12.2 of this Agreement.

“Floor Box Extensions” shall mean the attachments to the Convention Center floor boxes in Exhibit Halls 1, 2 and 3 that house the copper and optical fiber terminations.

“Improvements” shall mean any addition, alteration, betterment, construction, or improvement to the SJCC Network.

“Laws” shall refer to any judicial decision, statute ordinance, resolution, regulation, rule, administrative order, constitution, or other requirement of any municipal, county, state, federal or other governmental agency or authority having jurisdiction over the parties or the Facilities, or both, in effect either at the time of execution of this Agreement or at any time during the term, including, without limitation, any regulation or order of a quasi-official entity or body.

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“Network Infrastructure” shall mean the copper and optical fiber cables, terminations, equipment racks, patch panels, cable trays, Floor Box Extensions, and all other materials necessary to connect Clients’ computers to and through the SJCC Network.

“Network Systems” shall include, but not be limited to, LAN routers, hubs, switches, firewalls, gateways, gatekeepers, and servers, ISDN distribution switches and servers, PBX switches and servers, WAN interfaces, cable television and satellite connectivity, wireless technology, and associated software, network management and terminal equipment necessary to provide Clients high-speed connectivity to the SJCC Network.

“Network Services” shall mean all current and future services made available for sale by OPERATOR to Clients at or from the Facilities which involve, but are not limited to, the physical and/or logical connection, transceiving, repeating, switching, and routing of Client specific communications applications and systems via the SJCC Network Infrastructure and Systems. Network Services shall also include access to Metropolitan Area Network (MAN), Wide Area Network (WAN) resources via T-1, T-3, OC-3, OC-12, OC-48 and other current or future options to meet Client leased line, Virtual Private Network (VPN), intranet, Internet, satellite up/down link, wireless and other communications requirements.

“Network Application Services” shall mean all current and future applications services made available for sale by OPERATOR to Clients at Facilities which utilize Network Infrastructure, Network Systems, or Network Services, including but not limited to: Internet Broadcasting and/or hosting, audio/video/data conferencing, IP telephony services, messaging, information kiosks, and cyber café(s).

“Operating Account” shall mean the entirety of the CITY’s financial accounts managed by Operator and related to providing Communication Services at the Facilities, including the checking account, accounts receivable, accounts payable, bad debt account, and earnings account.

“Operations Report” shall mean and include any operational reports described in Section 12.2.7 of this Agreement.

“Provider Terms and Conditions” shall mean and include the terms described in **EXHIBIT A** regarding access to the Network Infrastructure at the Facilities.

“Records Office” shall mean OPERATOR’s offices located at 50 Airport Parkway, San Jose, CA 95110-1011, unless OPERATOR notifies CITY otherwise pursuant to Section 24 of this Agreement.

“Remote Access Network Services” shall mean the use of the SJCC

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Network's Internet connection, when it is dormant or underutilized, to provide remote access to conventions, tradeshow, meetings, and other events held in private facilities such as the downtown hotels and the San Jose Arena.

"SJCC Network" shall mean all network infrastructure, network equipment, network services and network application services necessary to provide Communication Services for all Clients at the Facilities.

"Tax" shall mean and include any assessment, license, charge, fee, imposition, or levy imposed by any governmental body.

Section 3. TERM OF AGREEMENT

3.1 Term

The Term of this Agreement shall be retroactive from the Effective Date and shall continue for the Term of three (3) years from the Effective Date, unless unless sooner terminated in accordance with the terms of this Agreement.

3.2 Retroactive Services

It is understood and agreed that OPERATOR has provided Communication Services at the Facilities prior to the execution of this Agreement in anticipation of its execution. CITY hereby accepts and approves services provided by OPERATOR prior to the date of this AGREEMENT.

3.3 Option to Extend Term

CITY shall have an option, at its sole discretion, to extend the Term of this Agreement for one additional term of five (5) years from the Expiration Date (the "Extended Term"). In the event that CITY decides to extend the term of this Agreement, CITY shall deliver written notice to OPERATOR no later than ninety (90) days prior to the Expiration Date. All terms and conditions of this Agreement shall remain in full force and effect during the Extended Term.

3.4 Holdover

It is not the intent of this Agreement to create any rights of OPERATOR beyond the Expiration Date or earlier termination of this Agreement. Subject only to CITY's Option under Section 3.2 above, any holding over after the Expiration Date or earlier termination of this Agreement shall be subject to and conditioned on the approval of the CITY Council and on terms and conditions approved by the CITY Council.

Section 4. DUTIES OF OPERATOR

4.1 General Duties.

In consideration of, and subject to, the payment of compensation and expenses and the performance of all provisions of this Agreement and any amendments thereto by OPERATOR, CITY grants to OPERATOR the right to use the Facilities for the purposes of providing Communication Services to the Clients at the Facilities. Except as otherwise provided, the right of OPERATOR to use the Facilities shall be exclusive as to those portions of the Facilities in which OPERATOR maintains the SJCC Network or provides Communication Services, and to those portions of the Facilities which support connection to those service areas.

4.1.1 The exclusive rights granted to OPERATOR shall include the right to install, maintain, operate, and charge for the SJCC Network which includes the Network Infrastructure, Network Systems, Network Services, and Network Application Services.

4.1.2 The exclusive rights granted to OPERATOR shall not extend to the provision of Pacific Bell Centrex analog telephone service and BRI ISDN connectivity in those portions of the Facilities where Pacific Bell Centrex service is installed and operational as of the Commencement Date.

4.1.3 Clients shall have the right to select any outside communication services provider to provide high-speed connectivity for their Event at the Facilities. OPERATOR shall provide Clients with information regarding facility use policies and fees associated with SJCC Network resources.

4.2 Operating Expenses.

OPERATOR shall provide the supplies, equipment, and third party service agreements necessary to perform OPERATOR'S duties as provided in this Agreement. OPERATOR shall be reimbursed from the Operating Account for the expenses defined as Reimbursable Expenses in Section 11.7, provided that OPERATOR complies with purchase amount limitations and approval requirements in this Agreement.

4.3 Infrastructure Design and Deployment.

OPERATOR shall provide design and deployment engineering, maintenance, system management, and related work for the SJCC Network at the Facilities.

4.3.1 Network Infrastructure. If CITY elects to renew this Agreement, the Network Infrastructure shall be installed in accordance with the CITY-approved SJCC Network Plan as drafted by OPERATOR, which is attached to this Agreement as EXHIBIT B, prior to January 31, 2006. In

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addition to the provisions of the SJCC Network Plan, installation of the Network Infrastructure shall be subject to the following guidelines. In all instances, OPERATOR's compliance with the following guidelines shall be determined by Director:

4.3.1.1 Convention Center Communication Rooms 1.1, 1.6, 1.7, 1.8, and 1.9 shall have properly installed cable management systems, patch cords, equipment racks, optical fiber and copper distribution boxes, optical fiber and copper patch panels, optical fiber and copper connectors, and all other components necessary to install the SJCC Network Plan.

4.3.1.2 Convention Center Communication Rooms 1.6, 1.7 and 1.8 shall each have a minimum of 72 optical fiber strands connecting them to Communication Room 1.1 in the Convention Center parking garage. Each Floor Box Extension shall have 6 copper and 6 optical fiber strands to Communication Rooms 1.6, 1.7 or 1.8, as specified in the SJCC Network Plan. If this Agreement expires on January 31, 2001, each Communication Room 1.6, 1.7, and 1.8 shall be configured to support a minimum of 12 optical fiber strands connecting it to Communication Room 1.1 and Floor Box Extension shall be configured to support a minimum of 1 copper or optical fiber strand to Communication Rooms 1.6, 1.7 or 1.8.

4.3.1.3 Convention Center Communication Room 1.9 shall have a minimum of 36 optical fiber strands connecting it to Communication Room 1.1 in the Convention Center parking garage. Each partitioned section of the ballroom, conference rooms, and meeting rooms in the Convention Center shall have a minimum of one copper and one optical fiber connection to Communication Rooms 1.6, 1.7, 1.8 or 1.9, as specified in the SJCC Network Plan. The arcade registration area shall have a minimum of one copper and one optical fiber connection, and the concourse lobby shall have a minimum of one copper and one optical fiber connection in front of each exhibit hall. If this Agreement expires on January 31, 2001, Communication Room 1.9 shall be configured to support a minimum of 12 optical fiber strands connecting it to Communication Room 1.1.

4.3.1.4 All cables between the specified points shall have properly installed wire management systems, cable terminations, patching panels, connectors and other components necessary to install the SJCC Network Plan.

4.3.1.5 Copper and optical fiber patch cords shall be utilized for connections from Floor Box Extensions or wall jacks in the ballrooms, conference rooms, meeting rooms, concourse, and arcade to each Client location requiring Communication Services.

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4.3.1.6 OPERATOR shall provide any improvements, including but not limited to coaxial cable, single-mode fiber, and wireless systems and infrastructure necessary to support Client Communication Services requirements if funded by the Client, CITY or Operating Account pursuant to the terms of this Agreement.

4.3.1.7 All optical fiber cable, with the exception of patch cables, shall be 62.5/125 μ 2-fiber multi-mode with a UL rating of OFNR, and orange or black cable jacket. The cable shall provide a maximum attenuation of 3.5 dB/km @ 850nm and 1.0dB/km @ 1300nm. The bandwidth of the cable shall be 160 MHz/km @ 850nm and 500MHz/km @ 1300nm. The optical fiber cable shall be AMP part number 502986-1 or an approved equivalent.

4.3.1.8 All copper cabling, with the exception of patch cables, shall be 24 AWG, 4-pair UTP, UL/NEC CMR rated, with a gray PVC jacket. Copper cable shall be third party verified to comply with TIA Category 5 requirements.

4.3.1.9 All Network Infrastructure purchased under this Agreement and accounted for as a Reimbursable Expense under Section 11.7 of this Agreement, except as otherwise expressly provided in this Agreement, shall be the property of and titled in the name of the CITY of San Jose.

4.3.1.10 OPERATOR shall label all ends of cables.

4.3.1.11 Similar Network Infrastructure shall be deployed at other Facilities as appropriate to meet Client demand.

4.3.2 Network Systems. OPERATOR shall provide Network Systems to Clients in accordance with this Agreement and shall meet the following minimum standards. In all instances, OPERATOR's compliance with the following guidelines shall be determined by Director:

4.3.2.1 OPERATOR shall provide all Network Systems necessary to provide the service required under this Agreement to Clients. OPERATOR shall provide network management to the extent necessary to support the Network Systems at the levels of service required under this Agreement.

4.3.2.2 As Network Systems requirements change with changing market demands, OPERATOR will secure Network Systems which meet or exceed the ongoing requirements of the Clients.

4.3.2.3 All Network Systems purchased under this Agreement and accounted for as a Reimbursable Expense under Section 11.7 of this Agreement, except as otherwise expressly provided in this Agreement, shall be the property of and titled in the name of the CITY of San Jose.

4.3.2.4 All Network Systems owned by OPERATOR and used at

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the Facilities or on loan from any third party to OPERATOR for use at the Facilities shall remain the property and responsibility of OPERATOR.

4.3.3 Network Services. OPERATOR shall provide network services to Clients in accordance with this Agreement to meet the following minimum standards. In all instances, OPERATOR's compliance with the following guidelines shall be determined by Director:

4.3.3.1 As appropriate to meet Client needs and the ongoing requirements of the Director, OPERATOR shall provide all Wide Area Network ("WAN") services to respond to Client requirements via:

4.3.3.1.1 service agreements and term contracts for switched and routed communication services such as DS-3 telecommunication facilities; and

4.3.3.1.2 Internet service.

4.3.4 Network Application Services. OPERATOR shall provide all Network Application Services to Clients in accordance with this Agreement to meet the following minimum standards. In all instances, OPERATOR's compliance with the following guidelines shall be determined by Director:

4.3.4.1 OPERATOR shall be the sole provider of Network Application Services at the Facilities for the term of this Agreement. As appropriate to meet Client needs and the ongoing requirements of the Facilities, OPERATOR shall have the right to provide all Network Application Services to Clients at the Facilities. However, Clients shall have the right to select any outside communication services provider to provide any temporary Network Application Services at the Facilities only for their event upon the approval of Director.

4.3.4.2 As network service and application requirements change with changing market demands, OPERATOR shall meet or exceed the ongoing requirements of CITY's Clients.

4.3.5 Documentation and Labeling. The OPERATOR shall fully document and label the SJCC Network, and its maintenance and operating procedures. OPERATOR shall prepare and maintain written documentation and electronic files containing network systems and wire diagrams, cable and patch numbering schemes, and inventory.

4.3.5.1 OPERATOR shall produce detailed drawings of the complete SJCC Network as deployed.

4.3.5.2 OPERATOR shall label each Floor Box Extension, and every termination in the SJCC Network.

4.3.5.3 OPERATOR shall document and maintain detailed

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records of all repairs, maintenance, and service records for the SJCC Network.

4.3.5.4 OPERATOR shall provide comprehensive procedures for connecting Clients to the SJCC Network, address programming, and Internet access.

4.4 Relationship with Clients' Service Contractors

OPERATOR shall attend all meetings between CITY and Clients' service contractors, as requested. OPERATOR shall abide by all labor union jurisdictions, unless notified otherwise in writing by Director.

4.5 Written Correspondence.

Unless otherwise instructed by the Director, OPERATOR shall handle Client correspondence as follows:

4.5.1 Except as otherwise provided in this Agreement, OPERATOR shall respond to all written Client correspondence within three (3) business days of receipt.

4.5.2 Copies of correspondence and OPERATOR's responses regarding services, fees, or charges thereto shall be forwarded at the end of each week to the Director.

4.6 Quality of Service (QoS).

During the term of this Agreement, OPERATOR covenants and agrees to maintain, operate and keep or cause the maintenance and operation of the Communication Services in accordance with the Provisions of this Agreement in a first-class manner and in a safe, clean, and orderly condition at all times to the satisfaction of the Director and in strict accordance with all applicable Laws. QoS shall be offered in accordance with the provisions stated below.

4.6.1 CITY and OPERATOR will jointly define, document, and measure appropriate QoS metrics for network services which meet or exceed the QoS metrics of comparable facilities in the greater San Francisco Bay Area.

4.6.2 OPERATOR, periodically, shall meet with the Director at the Director's request to discuss any and all aspects of operations. The Director reserves the right at all times to object to the quality of Communication Services offered by OPERATOR, the method by which operations are conducted by OPERATOR, and the appearance and condition of the Facilities wherein OPERATOR operates. Upon receipt of notice, OPERATOR covenants and agrees to correct the objectionable service, method, or appearance within three (3) business days.

4.6.3 All written or verbal disputes and complaints concerning the quality

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of Communication Services shall be forwarded immediately to the Director. Director will instruct OPERATOR how to proceed for disputes not covered by the Provider Terms and Conditions, the Facility Use Agreement between the CITY and Client, and any other SJCC Network policies.

4.6.4 OPERATOR shall return Client telephone calls within one (1) business day.

4.6.5 Due to the nature of the Events at the Facilities, it is essential that any deficiency of the SJCC Network or Communication Service be remedied immediately. Therefore, OPERATOR shall respond to all Communication Service complaints within one (1) hour of notification by Director or Client during scheduled events when the Client has ordered services in advance.

4.6.6 OPERATOR shall immediately cure any objectionable service or situation that, in the Director's opinion, affects the safety of the Facilities' Clients, employees, or public.

4.6.7 The failure of OPERATOR to promptly cease any Communication Service which has been disapproved by Director shall constitute an event of default pursuant to this Agreement, for which CITY may terminate this Agreement for cause.

4.6.8 OPERATOR shall be held strictly accountable for furnishing complete and adequate QoS for the duration of each Event for the Communication Services that Clients have contracted OPERATOR to provide.

Section 5. Marketing Plan.

5.1 Development of Marketing Plan

OPERATOR shall develop, in cooperation with CITY, a three (3) year marketing plan. The marketing plan will include, but not be limited to, performance criteria and goals for the provision of the Communication Services to Clients at the Facilities. To facilitate OPERATOR's preparation of the marketing plan, CITY will provide OPERATOR reasonable access to Facility marketing plans and information compiled by CITY.

5.2 Minimum Requirements for Marketing Plan

OPERATOR's marketing plan shall, at a minimum, include strategies for CITY and OPERATOR to mutually achieve the following objectives:

5.2.1 Promote awareness of the Communication Services, and the systems and infrastructure offered and supported by OPERATOR at the

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Facilities.

5.2.2 Promote OPERATOR's expertise in providing Communication Services at the Facilities.

5.2.3 CITY's SJCC Network marketing activities may include, but are not limited to the following:

5.2.3.1 Print collateral materials such as press releases, advertisements in convention industry periodicals, convention facility brochures, SJCC Network brochure, service order forms, and article placement.

5.2.3.2 Web site development to include html version of SJCC Network brochure, and electronic service orders.

5.2.3.3 Joint sales calls to selected Clients, sponsorship signs, and coordination of other sales activities.

5.2.4 Consistent with CITY's governing policy, the marketing plan will recognize the contributions of Network Infrastructure, Network Systems, Network Services and Network Application Services suppliers.

5.2.5 Where deemed appropriate in the sole discretion of Director, the marketing plan will integrate the marketing of Communication Services at the Facility with other CITY marketing programs.

5.3 Marketing Plan Subject to Director's Approval

OPERATOR shall submit its marketing plan to the Director within thirty (30) days after the Commencement Date. The Director shall have, at a minimum, thirty (30) days to review and comment on the marketing plan.

Section 6. OPERATOR's Use of the Facilities.

OPERATOR is granted the right to use the designated portions of the Facilities for the purpose of providing Communication Services to Clients as follows:

6.1 Convention Center

CITY and OPERATOR shall have exclusive access to parking garage overhead cable trays, Communication Room 1.1, and all intermediate Communication Rooms. OPERATOR shall have access to all exhibit halls, meeting rooms, and lobbies for which Clients have requested OPERATOR to provide Communication Services. OPERATOR shall not enter Clients' secured locations without the prior consent of Clients.

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6.2 Auditorium, Parkside, CPA & Montgomery

OPERATOR shall have access to all communication cabinets and unsecured locations as needed to provide Communication Services. OPERATOR shall not enter Clients' secured locations without the prior consent of Clients.

6.3 Badges, Keys and Authorizations

OPERATOR will be provided with badges, keys and right of way authorizations required to fulfill its duties as specified in this Agreement.

6.4 Access to Secured Areas

Subject to the concurrence of Clients, when applicable, OPERATOR will be provided with access to secured on-site meeting room(s), storage space, and equipment rooms as reasonably necessary for OPERATOR'S performance under this Agreement.

6.5 Office Space

OPERATOR will be provided office space from which to conduct Communication Services for the Facilities' Clients. Upon the Director's request, OPERATOR shall vacate the office space. The office space shall be returned to the CITY in good repair. Reasonable notice will be provided of any required changes and any and all costs associated with vacating the office space will be borne by the OPERATOR.

Section 7. Limitations on OPERATOR's Use

7.1 Signs and Advertising

OPERATOR shall not install, erect, affix, paint, or place or permit the installation, erection, affixation, painting, or placement of any sign, lettering, or other advertising device or media in, on, or about the Facilities, or any portion thereof, without the prior written consent of the Director.

7.2 No Conflict with Laws or CITY's Insurance

OPERATOR shall not do or permit anything to be done in, on or about the Facilities, nor bring or keep or permit to be brought or kept therein, anything which is prohibited by or will in any way conflict with any Laws now in force or which may hereafter be enacted or promulgated, or which is prohibited by a standard form of fire insurance policy or will in any way increase or affect the then existing rate of any fire or other insurance required to be carried by OPERATOR, or which will cause a cancellation of any insurance policy covering the Facilities or any part thereof or any of its contents; and

7.3 No Interference with Other Uses

OPERATOR shall not do or permit anything to be done in, on, or about the Facilities or to omit that which will in any way obstruct or interfere with the rights of other occupants located in or at the Facilities, or injure them, or use or allow the Facilities to be used for any improper or unlawful purpose. Further, OPERATOR shall not commit, cause, maintain or permit nor suffer, or allow to be committed, caused, maintained or permitted, any waste upon the Facilities, nor any public or private nuisance, nor any other act or thing which may disturb the quiet enjoyment of any other occupant of the Facilities.

7.4 No Unauthorized Activities

OPERATOR understands and agrees that the sale of any merchandise and the rendering of any service not specifically included in this Agreement is hereby prohibited, unless OPERATOR has first obtained the prior written consent of the Director.

7.5 No Property Interest

OPERATOR agrees that this Agreement shall not be construed as granting any right of possession, estate, title or interest in the Facilities.

Section 8. Communication Services Fees and Charges.

A schedule of approved Communication Services Fees and Charges is attached to this Agreement as **EXHIBIT C**. OPERATOR shall be responsible for processing service orders, billing Clients in accordance with the approved Communication Services Fees And Charges listed in **EXHIBIT C** as updated by OPERATOR and approved by Director pursuant to Section 8 of this Agreement, and collecting Communication Services Fees and Charges from Clients.

8.1 Competitive Rates/Adjustments

As a material inducement to CITY to enter into this Agreement, OPERATOR covenants and agrees to offer Communication Services to clients during the term of this Agreement at prices which shall be comparable to those charged for the same QoS at comparable convention center facilities.

8.1.1 Not more frequently than twice each year during the Term and any Extended Term of this Agreement, Director shall have the right to request that OPERATOR conduct a survey of communication services fees and charges which are charged at other comparable convention center facilities. For the purpose of this Agreement, a "comparable" convention center facility shall be a convention center facility located in California that has the capacity to hold conventions, consumer shows and trade shows that are held at the Facilities. The Director shall provide OPERATOR with a list of comparable facilities for each survey. Within thirty days following

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receipt of written notice from the Director, OPERATOR shall submit a modified schedule of Communication Services Fees and Charges, based on a survey of comparable convention center facilities and the cost to provide the service in San Jose.

8.1.2 Director shall review and approve the proposed schedule of Communication Services Fees and Charges submitted by OPERATOR. If the proposed schedule of Communication Services Fees and Charges is unacceptable to the Director, Director shall meet with OPERATOR to determine what modifications are necessary to make the proposed schedule of Communication Services Fees and Charges acceptable to both parties.

8.1.3 Until approval of the proposed schedule of Communication Services Fees and Charges, OPERATOR shall use the then current schedule of Communication Services Fees and Charges as approved by Director.

8.2 Marketing Communication Services to Clients

OPERATOR shall communicate directly with the Client's Event representative to promote use of the Communication Services and to quote Communication Services Fees and Charges. OPERATOR shall copy the Director on all correspondence regarding Communication Services Fees And Charges, and all Letters of Agreement within two (2) business days of the date of the correspondence.

8.3 Service Orders

OPERATOR shall prepare service order forms, distribute forms to Clients, and receive and process service requests. Service orders shall be addressed to:

Streamline Communications Corporation
50 Airport Parkway
San Jose, CA 95110

8.4 Deposits, Advance Payment and Accounts Receivable

OPERATOR shall minimize potential collections problems by obtaining deposits and advance payment for services where possible. OPERATOR shall collect on outstanding accounts promptly in a courteous manner. OPERATOR shall report all unpaid bills monthly to Director.

8.5 Disputes Regarding Communication Services Fees or Charges

Unless otherwise instructed by the Director, OPERATOR shall handle disputes regarding Communication Services Fees or Charges as follows:

8.5.1 All written or verbal disputes and complaints involving a

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Communication Services Fee or Charge shall be referred immediately to the Director for further action. Director will instruct OPERATOR how to proceed for disputes not covered by the Provider Terms and Conditions, the Facility Use Agreement between the CITY and Client, and any other SJCC Network policies. Any and all refunds shall be subject to the approval of the Director. The Director may institute additional procedures for dealing with Communication Services Fee and Charge disputes upon prior written notice to OPERATOR.

8.5.2 The Director reserves the right at all times to object to the Communication Services Fees And Charges not listed in **EXHIBIT C**, as it may be updated from time to time during the term of this Agreement as provided in Section 8.1 of this Agreement. Upon receipt of notice, OPERATOR agrees to provide the Director with documentation supporting the questioned Fee or Charge within one (1) business day. Director shall provide OPERATOR with the Director's determination regarding the questioned Fee For all other disputes, the Provider Terms and Conditions shall apply.

8.5.3 All disputes that are to be handled by OPERATOR shall be handled by OPERATOR's manager only.

Section 9. OPERATOR's Employees.

9.1 General

OPERATOR shall be solely responsible for selecting, hiring, employing, paying, supervising, training, and discharging its personnel pursuant to the following terms and conditions:

9.1.1 OPERATOR shall select and hire only persons who are well-qualified to perform the job duties for which they are being hired.

9.1.2 OPERATOR shall employ at least one individual who will be primarily responsible for the day-to-day management and operation of the Communication Services at the Facilities. This individual shall be a person of good reputation and have expertise in the operation, management and maintenance of Communication Services in a market similar to the market in with the Facilities are located.

9.1.3 OPERATOR shall comply with all applicable Laws, rules and regulations concerning worker's compensation, social security, unemployment compensation, employment discrimination, hours of labor, wages, working conditions and other employer/employee-related subjects.

9.1.4 OPERATOR shall control and be responsible for the conduct, demeanor and appearance of its employees and officers while on or about

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the Facilities and while acting in the course and scope of employment.

9.1.5 OPERATOR's employees shall wear a conspicuous badge identifying such persons as Communication Services employees of OPERATOR.

9.1.6 OPERATOR shall ensure that at least one (1) employee having decision-making authority with regard to the operation, management and maintenance of the Communication Services shall be available to the CITY by pager twenty-four (24) hours a day, seven (7) days a week.

Section 10. OWNERSHIP OF EQUIPMENT

10.1 CITY's Property

All SJCC Network components (Network Infrastructure, Network Systems, and any equipment purchased to provide Network Services or Network Application Services) purchased by OPERATOR for the Facilities from the Operating Account and reimbursed as Reimbursable Expenses as described in Section 11.7, shall be CITY's property.

10.2 No Assignment or Transfer

OPERATOR shall not assign or transfer ownership of any part of the SJCC Network to any third party without the prior written consent of Director. Any such assignment or transfer of ownership of any part of the SJCC Network shall not include any maintenance agreements or other service agreements for which OPERATOR has entered into, unless Director requests the transfer of OPERATOR's maintenance agreements or service agreements in writing. If CITY assigns the operation of its Facilities, OPERATOR shall not be prevented from, or charged for, use of SJCC Network assets for the duration of the Agreement.

Section 11. COMPENSATION AND EXPENSES

11.1 Operating Account.

OPERATOR shall, within three (3) days after the execution of this Agreement, open a commercial checking account for Communication Services monies with a bank acceptable to Director into which all Gross Revenue collected by OPERATOR from Clients for the Communication Services. Gross Revenue collected shall be deposited prior to the last day of Client move-out (the "Operating Account"). OPERATOR shall be responsible for the billing and collection of all Client fees and charges for Communication Services, and depositing cash receipts in the Operating Account.

11.2 Gross Revenue.

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11.2.1 Gross Revenue shall mean any revenues paid in cash in United States or foreign currency, by electronic transfer, by personal check or bank cashier's check or other form of negotiable instrument, or on credit to OPERATOR for any Communication Service rendered either at or from the Facilities, or from any source related directly to the operations at the Facilities, regardless of when or where the order therefore is received, or outside the Facilities, if the order therefore is received at the Facilities, and any other revenue of any type arising out of or in connection with OPERATOR's operations at the Facilities, including, but not limited to:

11.2.1.1 The full amount of any and all deposits that are forfeited by Clients in connection with the conduct of business of OPERATOR at or from the Facilities;

11.2.1.2 The full amount of any and all insurance proceeds that are paid on any Reimbursable Expense or Gross Revenues from business interruption insurance policy to OPERATOR; and

11.2.1.3 The full amount of any and all remote access fees, as described below in Section 11.3, for use of unutilized SJCC Network resources, which shall be for the specific use of the Remote Access Network Service.

11.2.2 However, there shall be excluded from Gross Revenues the following items:

11.2.2.1 Any and all federal, state, county, municipal or other sales or use tax now or hereafter collected by OPERATOR on behalf of any Clients and required to be paid by OPERATOR to any governmental agency; and

11.2.2.2 Any and all receipts of OPERATOR that arise solely from its operations under any other agreement with CITY at any other CITY facility and that is subject to compensation under that agreement; and

11.2.2.3 Any legitimate refund made to Clients on an authorized sale of Communication Services by OPERATOR.

11.2.2.4 Gross Revenue shall not include work at other facilities or work that is derived out of relationships to Clients for work that is not directly related to events being held at Facilities, including, but not limited to, OPERATOR revenue derived from hotels, consulting, marketing or from providing communication services for Clients at other facilities.

11.3 Remote Access Network Service.

OPERATOR may remotely access unutilized SJCC Network resources from other locations only upon the prior written consent of Director per event detailing the days of use. Provision of remote Internet access from the SJCC

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Network's Internet connection to non-CITY Facilities shall be the sole responsibility of OPERATOR. In addition to any other reasonable conditions that Director may place upon OPERATOR'S remote access pursuant to this section, OPERATOR'S remote access shall be subject to the following minimum conditions:

11.3.1 OPERATOR shall develop a separate agreement from this Agreement for its clients, and any such agreement shall expressly provide notice to OPERATOR'S clients that CITY shall have no liability of any kind for any service performed or not performed by OPERATOR at off-premise locations which remotely access unutilized SJCC Network resources.

11.3.2 OPERATOR shall pay the remote access fee in accordance with the approved Communication Services Fees And Charges listed in **EXHIBIT C**.

11.4 Undercharged/Uncollected or Overcharged Amounts.

11.4.1 The amount of any Communication Services Fees And Charges undercharged or uncollected shall be invoiced by OPERATOR to the Client utilizing the service provided. All Communication Services Fees And Charges not collected or otherwise owing shall be considered accounts receivable in the Operating Account. Director and OPERATOR can jointly agree to move any accounts receivable item to bad debt.

11.4.2 Subject to Section 11.2.2.3, all amounts overcharged by OPERATOR and all overages (amounts received by OPERATOR in excess of amounts reported) shall be considered Gross Revenue irrespective of amount or reason for the overcharge.

11.4.3 OPERATOR and CITY shall require Clients to provide full payment of any uncollected accounts prior to receiving any Communication Services.

11.5 Management Fee

As compensation to OPERATOR for providing Communication Services at the Facilities, CITY agrees to pay OPERATOR from the Operating Account a management fee in the amount of Five Thousand Dollars (\$5,000.00) per month. Except for the Service Fee payable to OPERATOR pursuant to subsection 11.6 and those Reimbursable Expenses specifically identified as being reimbursable in subsection 11.7, and 50 percent of Network Earnings as described in Section 10, the Management Fee shall be full compensation for all services, materials and supplies required to be provided by OPERATOR under this Agreement, including, but not limited to, operating supplies, employee uniforms and maintenance of those uniforms, equipment and vehicles.

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11.6 Service Fee

In addition to the Management Fee, CITY agrees to pay OPERATOR from the Operating Account a per show service fee. The per show service fee is Zero Dollars (\$0.00) for events with less than ten (10) network drops, or less than Eight Thousand Nine Hundred Fifty Dollars (\$8,950) in total network services to the Client; Three Thousand Dollars (\$3,000.00) for events with ten (10) to nineteen (19) network drops, or less than Seventeen Thousand Five Dollars (\$17,005) in total network services to the Client; Eight Thousand Five Hundred Dollars (\$8,500.00) for events with twenty (20) to seventy-five (75) network drops, or greater than Seventeen Thousand Five Dollars (\$17,005) in total network services to the Client; and Eighteen Thousand Five Hundred Dollars (18,500) for events with greater than seventy-five (75) network drops. OPERATOR and CITY will agree in advance on fixed service fees for total network services for large events of unexpected complexity. A network drop is the sum total of Internet connection fees, copper/fiber cable extensions, and copper/fiber backbone links that are ordered for a particular event. Total network services includes revenue from network drops and other network services such as those billed to Client and their customers for private/custom WAN, LAN, satellite up/downlink, wireless, IP streaming, or live or stored video programming. During any single year, the maximum amount of Service Fees payable by CITY to OPERATOR pursuant to this Agreement shall not exceed \$500,000. OPERATOR shall not be required to provide services that would cause Service Fees to exceed this maximum amount.

11.7 Reimbursable Expenses.

All Reimbursable Expenses shall be paid from the Operating Account and will be deducted from Gross Revenue for purposes of determining SJCC Network Earnings. Reimbursable Expenses payable to OPERATOR pursuant to this Agreement include the following:

11.7.1 Network Infrastructure. CITY agrees to reimburse OPERATOR from the Operating Account for the actual costs of all SJCC Network Infrastructure including, but not limited to, cable expansion that OPERATOR is required to obtain, and actually obtains, in order to provide the Communication Services required pursuant to this Agreement.

11.7.2 Network Systems. CITY agrees to reimburse OPERATOR from the Operating Account for the actual costs of all routers, hubs, switches and servers, interfaces, wireless technology, and associated software, network management and terminal equipment that OPERATOR is required to obtain, and actually obtains, and for which OPERATOR submits a reimbursable expense form, in order to provide the Communication Services required in accordance with this Agreement.

11.7.3 Network Services. CITY agrees to reimburse OPERATOR from the

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Operating Account for the actual costs of all WAN service agreements to include, but not be limited to Internet access, Cable/Satellite broadcast, wireless and switched digital services that OPERATOR is required to obtain, and actually obtains, and for which OPERATOR submits a reimbursable expense form, in order to provide the Communication Services required by this Agreement.

11.7.4 Network Application Services. CITY agrees to reimburse OPERATOR from the Operating Account for the actual costs of service agreements and equipment that OPERATOR is required to obtain, and actually obtains, and for which OPERATOR submits a reimbursable expense form, in order to provide all network application services to include, but not limited to Event web casting, Event web hosting, IP telephony, messaging services, information kiosks, and Internet cyber café(s)/terminals on the SJCC Network as required by this Agreement.

11.7.5 Administrative Supplies and Equipment. CITY agrees to reimburse OPERATOR from the Operating Account for equipment and supplies required to perform Communication Services including, but not limited to, signs, service order forms, equipment and other expenditures properly incurred and paid.

11.7.6 Licenses. CITY agrees to reimburse OPERATOR from the Operating Account for the actual costs of all licenses and permits that OPERATOR is required to obtain, actually obtains and would not have otherwise been required to obtain but for OPERATOR's provision of Communication Services to Clients at the Facilities as required by this Agreement.

11.7.7 Other Reimbursable Expenses. As a condition to CITY's reimbursement to OPERATOR for any other expenses not expressly provided for in Sections 11.7.1 through 11.7.6 above, including but not limited to marketing, travel, any income taxes incurred by OPERATOR on CITY's share of Network Earnings, or other costs related to providing Communication Services at the Facilities, must be mutually agreed to in writing by both parties prior to OPERATOR's reimbursement.

11.7.8 General Conditions to Reimbursement. CITY shall reimburse OPERATOR from the Operating Account to the extent that such Reimbursable Expenses are necessarily incurred in providing the Communication Services, do not exceed the amounts set forth in this Agreement, do not exceed the sum of the Operating Account and comply in all respects to the following:

11.7.8.1 OPERATOR shall acquire and provide all services, supplies and equipment necessary to perform the duties specified in this Agreement without prior written approval from Director when the cost of such services, supplies, and equipment is less than one

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thousand dollars (\$1,000.00). OPERATOR shall pay all bills for the foregoing from the Operating Account pursuant to the terms of this Agreement.

11.7.8.2 OPERATOR shall pay all bills for monthly network services to the CITY's contracted third party providers, such as Internet service carriers. OPERATOR shall pay all monthly bills for the foregoing from the Operating Account pursuant to the terms of this Agreement. If CITY pays for third party provider, OPERATOR shall reimburse CITY.

11.7.8.3 OPERATOR may acquire and provide services, supplies and equipment necessary to support late service requests or respond to an emergency situation, when the cost of such services, supplies, and equipment is less than five thousand dollars (\$5,000.00) under the following circumstances:

11.7.8.3.1 OPERATOR shall notify Director immediately of the circumstances; and

11.7.8.3.2 the services, supplies or equipment are part of the SJCC Network Plan.

11.7.8.4 Except as allowed above in Section 11.7.8.3 above, OPERATOR shall give the Director prior written notification of the estimated cost of any particular general services, supplies, or equipment item necessary to perform the duties specified in this Agreement whenever it reasonably appears that the cost may meet or exceed one thousand dollars (\$1,000.00). OPERATOR shall give and await written direction from the Director before proceeding. At the Director's discretion, the Director may proceed as follows:

11.7.8.4.1 If the estimated cost of the general services, supplies and equipment exceeds twenty thousand dollars (\$20,000.00), the Director will not direct OPERATOR to acquire the general services, supplies and equipment, but will either:

11.7.8.4.1.1 Undertake to have CITY personnel do the work or furnish the general services, supplies or equipment in accordance with applicable law; or

11.7.8.4.1.2 Award a contract, pursuant to CITY procedures, for the general services, supplies, or equipment.

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11.7.8.4.2 If the cost of general services, supplies and equipment is under twenty thousand dollars (\$20,000.00), but is one thousand dollars (\$1,000.00) or more, the Director may either:

11.7.8.4.2.1 Authorize the OPERATOR to purchase the supplies, equipment or general services in accordance with the then current provisions of the San Jose Municipal Code. OPERATOR shall pay all bills for the foregoing from the Operating Account pursuant to Section 6 of this Agreement.

11.7.8.4.2.2 Award a contract, pursuant to CITY procedures, for the general services, supplies or equipment and so inform OPERATOR.

11.7.8.4.2.3 Undertake to have CITY personnel do the work or furnish the general services, supplies or equipment and so inform OPERATOR.

11.7.8.5 During any single year, the maximum amount of Reimbursable Expenses payable by CITY to OPERATOR pursuant to this Agreement shall not exceed \$500,000. OPERATOR shall not be required to provide services that would cause Reimbursable Expenses to exceed this maximum amount.

11.8 Nonreimbursable Expenses.

Nonreimbursable Expenses will not be considered for purposes of determining SJCC Network Earnings. OPERATOR agrees that it shall not be reimbursed by CITY or Operating Account for, and that it assumes exclusive liability for, and shall indemnify, protect and hold harmless CITY from and against, the payment of the following costs and expenses:

11.8.1 All bookkeeping fees, accounting and audit fees and costs, travel expenses of home office or regional managers, legal or professional fees and expenses, contract negotiation expenses, costs of settling legal disputes, insurance claims, taxes on OPERATOR's personal or real property, and any manager's gasoline or auto allowance or entertainment allowance or other expenditure not included in Section 11.7 of this Agreement.

11.8.2 All pension, welfare, annuity and other union benefit contributions, if any, payable under or in connection with labor agreements with respect to all persons, by whomever employed, engaged in the Communication Services to be performed and furnished under this Agreement.

11.8.3 All other costs and expenses not specifically set forth in Section

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11.7 of this Agreement.

11.9 Expenses Paid Directly by CITY.

Expenses paid directly by CITY will not be considered for purposes of determining SJCC Network Earnings. CITY shall be responsible for, and shall directly pay, the expenses actually incurred for the following items in the operation of the Communication Services:

11.9.1 Utilities used to light the Facilities and to operate any and all equipment and fixtures employed in the operation of the SJCC Network and Communication Services.

11.9.2 Three telephone lines to operate any equipment in OPERATOR's office located in the Facilities, and one telephone line for operation of the Service Desk during Events. At the Director's discretion, additional lines may be provided to OPERATOR.

11.9.3 All general services, except as allowed above in Section 11.7.8.3, maintenance, repairs, improvements or replacement of any or all portion(s) of any of the SJCC Network exceeding Twenty Thousand Dollars (\$20,000), except that OPERATOR shall directly pay, without reimbursement from CITY or the Operating Account, for any such general services, maintenance, repairs, or improvements necessitated by the careless or negligent acts of the OPERATOR.

11.9.4 Any stolen or damaged SJCC Network equipment owned by the CITY shall be paid from the CITY's portion of Network Earnings, except that the cost for replacement shall not exceed the CITY's portion of Network Earnings.

11.9.5 Any other expenses mandated by the CITY.

11.10 SJCC Network Earnings.

SJCC Network Earnings shall mean all the Gross Revenue from OPERATOR's operations under this Agreement, less the Management Fee, Service Fee and all of the Reimbursable Expenses paid from the Operating Account.

11.10.1 All negative SJCC Network Earnings will be carried over from month to month until SJCC Network Earnings become positive.

11.10.2 Positive SJCC Network Earnings shall be distributed from the Operating Account in the amount of fifty (50) percent to OPERATOR and fifty (50) percent to CITY. Subject to CITY'S applicable procurement procedures, CITY may reinvest all or part of its portion of the SJCC Network Earnings to enhance, update, or accelerate deployment of the SJCC Network.

Section 12. FINANCIAL REVIEW AND ACCOUNTING MATTERS

12.1 Financial Review.

The last Day of every month shall be the close of a payment period. CITY and OPERATOR shall meet no later than the twentieth (20th) of the month following the close of a payment period for a Financial Review of the OPERATOR's monthly Financial Statement and Operations Report. The Financial Statement, Operations Report, and any other reports requested by Director shall be aligned to the CITY's fiscal calendar.

12.2 Financial Statements and Reports

12.2.1 Financial Statement. The Financial Statement shall include, but is not limited to, a Revenue Report detailing Gross Revenues, an Expense Report detailing Reimbursable Expenses, a SJCC Network Earnings Report, a six (6) month Financial Forecast, an Operating Account Report, and such other information as requested by the Director. OPERATOR agrees to prepare and submit monthly Financial Statements in duplicate to the Director no later than the fifteenth (15th) of each month following the close of the payment period for each month or part thereof in which the Communication Services are performed. The Financial Statements shall be in a form to be approved by the Director.

12.2.2 Revenue Report. By the fifteenth (15th) day of each month, OPERATOR shall provide Director with a written report detailing revenues from the previous month in a format approved by the Director. Each monthly Revenue Report shall detail the monies received per event, per type of service during the previous month, identify any uncollected accounts, and reconcile payment of uncollected accounts.

12.2.3 Expense Report. By the fifteenth (15th) day of each month, OPERATOR shall provide Director with a written Expense Report in a format approved by the Director. Each monthly Expense Report shall detail the Reimbursable Expenses incurred during the previous month. The monthly Management Fee and the Service Fees shall be included in this Expense Report.

12.2.3.1 With each Financial Statement, OPERATOR shall provide documentation satisfactory to the Director that the Reimbursable Expenses, Management Fee and Service Fees contained in the Expense Report were actually incurred by OPERATOR and are reasonable. Such documentation shall include, but not be limited to, copies of all vendor invoices. OPERATOR shall not be entitled to reimbursement for any expenses for which proper documentation is not submitted.

12.2.3.2 Payment to service providers and other vendors for

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Reimbursable Expenses approved by CITY shall be made by OPERATOR from the Operating Account, and OPERATOR shall document all such payments in the Expense Report.

12.2.4 SJCC Network Earnings Report. By the fifteenth (15th) day of each month, OPERATOR shall provide Director with a written SJCC Network Earnings Report in a format approved by the Director. Each monthly SJCC Network Earnings Report shall include, but not be limited to, a summary of that month's Gross Revenue, Management Fee, Service Fees and Reimbursable Expenses, with the resulting net earnings or loss, and a year-to-date summary that balances to the Operating Account.

12.2.4.1 At the Financial Review meeting, CITY shall authorize payment of positive SJCC Network Earnings from the Operating Account to OPERATOR, and determine disposition of CITY portion of SJCC Network Earnings per Section 11.10 of this Agreement.

12.2.4.2 If the CITY authorizes OPERATOR at the Financial Review meeting to issue payment of CITY's portion, per Section 11.10 of this Agreement, from the Operating Account, payment to CITY shall be due on the last Day of the month following the close of the payment period. Payment shall be payable in lawful money of the United States to:

CITY of San Jose
Convention & Cultural Facilities
408 S. Almaden Blvd.
San Jose, CA 95110
Attn: Accounts Receivable

12.2.4.3 In the event that CITY does not receive the payment for SJCC Network Earnings within fifteen (15) Days of the date payment is due, OPERATOR shall pay interest thereon from the day that payment is due until the date that full payment is received by CITY at the maximum interest rate then allowed by law.

12.2.4.4 A failure to issue payment for SJCC Network Earnings to CITY within the stated fifteen (15) days after the date payment is due shall constitute grounds for termination of this Agreement by CITY for cause. Notwithstanding any right or remedy to CITY on account of such nonpayment, the obligation to pay the outstanding SJCC Network Earnings shall survive the termination of this Agreement.

12.2.5 Financial Forecast. By the fifteenth (15th) day of each month, OPERATOR shall provide Director with a written detailed proposed Financial Forecast in a format approved by the Director. The Financial Forecast shall include all costs and expenses reasonably expected to be incurred by OPERATOR in providing Communication Services during the upcoming six (6) months.

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12.2.5.1 Approval of Financial Forecast. In each monthly Financial Review meeting, Director shall review the proposed Financial Forecast submitted by OPERATOR and approve it without modification if it is acceptable. If the proposed Financial Forecast is unacceptable to the Director, Director shall meet with OPERATOR to determine what modifications are necessary to make the proposed Financial Forecast acceptable to both parties.

12.2.5.2 Director, in Director's sole discretion, may require OPERATOR to provide additional Communication Services and/or staffing, including, but not limited to, additional employee supervision at the Facilities, not previously included in Financial Forecast; provided that Director approves the additional services or staffing as Reimbursable Expense, or the additional services or staffing are paid by CITY.

12.2.5.3 Except with regard to the payment of any taxes or of any expenses incurred in responding to an emergency at the Facilities, OPERATOR shall not incur any cost that exceeds the applicable costs set forth in the monthly Financial Forecast without the prior written approval of the Director.

12.2.6 Operating Account Report. By the fifteenth (15th) day of each month, OPERATOR shall provide Director with a written report that reconciles the Operating Account balance to the Revenue, Expense, and SJCC Network Earning Reports in a format approved by the Director. Each monthly SJCC Network Earnings Operating Account Report shall include, but not be limited to, a copy of the Operating Account bank statement.

12.2.7 Operations Report. OPERATOR agrees to prepare and submit monthly Operations Reports in duplicate to the Director for each month or part thereof in which the Communication Services are performed in a form to be approved by the Director no later than the fifteenth (15th) of each month for the prior month. The Operations Report shall include, but not be limited, to the following documents:

12.2.7.1 A written report of the physical status of the SJCC Network, including summaries of any damage to the Facilities and any unusual or significant maintenance activities that occurred during the month or that are anticipated to occur within the upcoming six (6) months; and

12.2.7.2 A detailed report of accounts receivable or due to OPERATOR; and

12.2.7.3 A current inventory of all CITY property and equipment used in connection with the SJCC Network and purchased under this Agreement. A final inventory shall be submitted to CITY no later than thirty (30) days prior to the expiration or earlier

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termination of this Agreement; and

12.2.7.4 Any other financial or operating information that may be reasonably required from time to time by Director.

12.2.8 Disputes. Any charge contained in a Financial Statement that is disputed by the Director shall be deducted by Director from Reimbursable Expenses; provided that Director shall provide OPERATOR with a written explanation of the reason(s) that such charge is not being paid.

12.2.8.1 OPERATOR shall have the right to file with the Director, within thirty (30) days of the date of the Director's written explanation, a written response and/or additional documentation justifying the charge that is being disputed.

12.2.8.2 Upon receiving from OPERATOR a written response to a disputed charge and/or additional documentation justifying the disputed charge, Director shall reconsider whether the disputed charge is appropriate under this Agreement. If the Director concludes that the disputed charge is appropriate in light of the written response and/or additional documentation provided by OPERATOR, the disputed charge shall be included as a Reimbursable Expense at the next Financial Review meeting. Director's determination to deny the disputed charge shall be final.

12.2.9 Other Reports and Statements. OPERATOR shall furnish to Director as promptly as practicable, additional reports, statements or information with respect to the management, operation and maintenance of the SJCC Network as Director may reasonably request from time to time.

12.2.10 Ownership of Materials. All reports, documents or other materials developed by OPERATOR or any other person engaged directly or indirectly by OPERATOR to perform the Communication Services required under this Agreement shall be and remain the property of CITY without restriction or limitation upon their use.

12.3 Books, Records and Documents.

OPERATOR shall keep and maintain books, records and other documents, including, but not limited to, books of account, ledgers, vouchers, invoices, canceled checks, journals and records of accounts, (collectively, "Records") evidencing and documenting all charges, expenditures, disbursements and money transactions relating to OPERATOR's operation, management and supervision of the Facilities.

12.3.1 All Records required to be maintained pursuant to this Agreement shall be kept in accordance with generally accepted accounting principles and shall utilize cash method of accounting.

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12.3.2 Records required to be maintained pursuant to this Agreement shall be kept for a minimum of three (3) years, or for any longer period required by law, from the date of final payment of SJCC Network Earnings disbursement from the Operating Account pursuant to this Agreement.

12.3.3 Records required to be maintained pursuant to this Agreement must be made available for inspection, copying or audit at any time during regular business hours, upon request by the CITY Attorney, CITY Auditor, CITY Manager, Director or a designated representative of any of these officers. OPERATOR shall provide copies of the Records to CITY for inspection at CITY Hall when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the books and records shall be available at the Records Office.

12.3.4 Where CITY has reason to believe the OPERATOR's Records may be lost or discarded due to dissolution, disbandment or termination of OPERATOR's business, CITY may, by written request by any of the above-named officers, require that custody of the books, records and documents be given to CITY and that they be maintained in City Hall. Any party authorized by OPERATOR, OPERATOR's representatives, or OPERATOR's successor-in-interest may have access to OPERATOR's Records maintained at City Hall.

12.4 Audit.

CITY shall have the right to conduct audits of all or any portion of the OPERATOR's operations at the times and as frequently as the CITY may deem necessary or appropriate. OPERATOR shall fully cooperate with CITY in any such audit. OPERATOR shall promptly correct all accounting method deficiencies and errors disclosed by CITY's audits, and shall timely inform CITY, in writing, of all corrective actions taken. Any adjustments in amounts due and owing from CITY or OPERATOR shall be paid within fifteen (15) Days following CITY's completion of the audit and written notification of any such adjustments.

12.5 Final Accounting.

OPERATOR shall deliver a final Financial Statement and Operations Report of its Communication Services operations to CITY within thirty (30) days after the expiration or earlier termination of this Agreement, together with such other information as may be reasonably requested by Director. The final Financial Statement shall include all Reimbursable Expenses, Management Fees, Service Fees, and Network Earnings, less outstanding receivables declared as bad debt. All positive network earnings will be distributed to OPERATOR and CITY per Section 26.2.2.

12.6 Certification.

OPERATOR shall certify that each Financial Statement and Operations Report submitted to CITY is true, correct and complete in all material respects.

Section 13. Theft or Damage.

13.1 Reports

OPERATOR shall make reports of theft or damage as follows:

13.1.1 OPERATOR shall inform Director, in writing, by the Day following OPERATOR's receipt of any report or OPERATOR's discovery of any theft or damage to a Client's property, the SJCC Network, or the Facilities.

13.1.2 In the case of theft or deliberate damage to CITY or Client property by an employee of OPERATOR, OPERATOR shall submit to Director a report which identifies the name and job title of the employee who committed the theft or damage, the amount of the theft or damage as can best be determined, and the action which OPERATOR either has taken or proposes to take. Theft for the purpose of this Agreement shall include, but not be limited to, intentionally failing to turn in all service orders, taking of cash receipts, intentionally mischarging Clients, taking a Client's property, or taking any article left in or on a Client's Event space. OPERATOR shall inform all supervisory personnel of this requirement and require that they fully abide by it.

13.2 Damage by OPERATOR

If OPERATOR causes any injury, damage or loss at the Facilities, OPERATOR shall repair, at its sole cost and expense, such injury, damage or loss at CITY's direction and upon CITY's prior approval. CITY reserves the right to perform such repairs, and bill OPERATOR for such costs and deduct such costs from any compensation then due and owing to the OPERATOR. The rights of CITY set forth in this Section are in addition to, and do not in any manner limit, any right of CITY to be indemnified by OPERATOR for any such injury, damage or loss.

Section 14. Indemnity

14.1 Indemnification.

OPERATOR shall defend, indemnify and hold harmless CITY, its officers, employees and agents against any claim, loss or liability arising out of or resulting in any way from work performed under this Agreement due to the willful or negligent acts (active or passive) or omissions by OPERATOR or its officers, employees or agents. The acceptance of said services and duties by CITY shall not operate as a waiver of such right of indemnification.

14.2 Assumption of Risk.

OPERATOR agrees to and covenants that it shall voluntarily assume any and all risk of loss, damage or injury to the person or property of OPERATOR, its

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directors, officers, employees, agents, and contractors which may occur in, on, or about the Facilities at any time and in any manner, except such loss, injury, or damage as may be caused by the sole active negligence or the sole willful misconduct of CITY, its officers, employees or agents.

Section 15. Limitation on CITY's Liability

The CITY shall not be liable to OPERATOR for, and the OPERATOR agrees to waive and hold CITY harmless from all claims and causes for, any liability, loss or damage to the OPERATOR resulting, in whole or in part, directly or indirectly, from any maintenance or repair work conducted by the CITY at the Facilities, the installation of any improvement or equipment at the Facilities, or any other type of construction work by the CITY at the Facilities.

Section 16. Waiver of Claim

OPERATOR, as a material part of the consideration to CITY under this Agreement, hereby specifically waives any and all claims or causes of action which it may now or hereafter have against CITY, its officers, employees, contractors or agents for any loss, injury or damage for any loss or injury or damage to the goods, wares, equipment or other property of or business operations (including without limitation any interruption thereof), and for injuries to or death of any persons in or about the Facilities, from any cause or condition (including from any act or omission of any Subcontractor or other occupant or user of the Facilities) arising at any time, except as shall arise from the sole active negligence or the sole willful misconduct of CITY, its officers, employees or agents, and notwithstanding that joint, several or concurrent liability or comparative negligence might otherwise impose liability on CITY or its officers, agents or employees.

Section 17. Hazardous Materials

17.1 Definition of "Hazardous Materials"

For purposes of this provision, "Hazardous Materials" shall mean any and all (a) substances, products, by-products, waste, or other materials of any nature or kind whatsoever which is or becomes listed, regulated or addressed under any Environmental Laws, and (b) any materials, substances, products, by-products, waste, or other materials of any nature or kind whatsoever whose presence in and of itself or in combination with other materials, substances, products, by-products, or waste may give rise to liability under any Environmental Law or any statutory or common law theory based on negligence, trespass, intentional tort, nuisance, strict or absolute liability or under any reported decisions of any state or federal court; and (c) any substance, product, by-product, waste or any other material which may be hazardous or harmful to the air, water, soil, environment or affect industrial hygiene, occupational, health, safety and/or general welfare conditions, including without limitation, petroleum and/or asbestos materials,

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products, by-products, or waste.

17.2 Definition of “Environmental Laws”

For purposes of this provision, “Environmental Laws” means and includes all federal, state, and local laws, statutes, ordinances, regulations, resolutions, decrees, and/or rules now or hereinafter in effect, as may be amended from time to time, and all implementing regulations, directives, orders, guidelines, and federal or state court decisions, interpreting, relating to, regulating or imposing liability (including, but not limited to, response, removal, remediation and damage costs) or standards of conduct or performance relating to industrial hygiene, occupational, health, and/or safety conditions, environmental conditions, or exposure to, contamination by, or clean-up of, any and all Hazardous Materials, including without limitation, all federal or state superlien or environmental clean-up statutes.

17.3 Use and Storage of Hazardous Materials Prohibited

The use and storage of Hazardous Materials by the OPERATOR in the Facilities is prohibited except as necessary to perform the services required under this Agreement. To the extent the OPERATOR must use Hazardous Materials to perform the services required under this Agreement, the OPERATOR shall comply with the following conditions:

17.3.1 The OPERATOR shall comply with all Federal, State and local laws and regulations regarding the use, storage and disposal of such Hazardous Materials.

17.3.2 The OPERATOR shall be solely responsible for obtaining all permits necessary to use, store, or dispose of the Hazardous Materials it uses.

17.3.3 The OPERATOR shall take all necessary precautions to prevent any Hazardous Materials it uses from entering into any storm or sewage drain system, or into the air or groundwater or from being released on the Facilities.

17.3.4 The OPERATOR shall be solely and fully responsible for the release of any Hazardous Material that it uses. The OPERATOR shall timely comply with all requirements of all appropriate governmental agencies and authorities in its investigation, remediation and clean-up of any release of a such Hazardous Material. If the OPERATOR does not promptly commence and diligently pursue to remediate and clean-up any release of such a Hazardous Material, the CITY, in its discretion, may pay, to have the release remediated and cleaned up, and the OPERATOR shall reimburse the CITY within fifteen (15) business days of CITY’s demand for payment. The failure to commence remediation and clean-up and to provide CITY with a schedule for diligent completion of the

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remediation within sixty (60) days after discovery of such release, or danger of release, of such Hazardous Material shall constitute *prima facie* evidence of failure to promptly commence remediation. The demand for payment by CITY shall be *prima facie* evidence that the expense incurred was necessary and reasonable and that such expense was incurred by CITY on behalf of OPERATOR.

17.3.5 The OPERATOR agrees to defend, indemnify and hold harmless the CITY, its trustees, officers, officials and employees from any and all losses, claims, actions costs, expenses, judgments, subrogation or other damages resulting from injury to any person or damage to property, including, without limitation, the cost of any cleanup and remediation of Hazardous Materials, which the CITY may sustain as a result of the presence, use, storage or cleanup of Hazardous Materials in the Facilities that are attributable in any manner to the OPERATOR.

17.3.6 The obligations set forth in this Section 17.3 shall survive the expiration or earlier termination of this Agreement.

17.4 Reporting Obligation

Upon becoming aware of any release of a Hazardous Material in a Facility, the OPERATOR shall immediately report such release to Director and to any other appropriate public agency. The OPERATOR shall immediately report the release of any Hazardous Material to the Director even where the quantities released would not be otherwise reportable to another public entity. This reporting obligations exists with regard to any release of Hazardous Material within a Facility and is not limited to releases of those Hazardous Materials used by the OPERATOR.

Section 18. Insurance

18.1 Required Insurance Coverage.

Prior to commencing any work or Operations under this Agreement, OPERATOR at its sole cost and expense and for the full Term of this Agreement and all extensions thereof, shall obtain and maintain or shall cause to be obtained and maintained insurance against claims for injuries to persons or damages to property which may arise from or in connection with the activities of OPERATOR and its agents, employees and contractors, meeting at least the minimum insurance requirements set forth in **EXHIBIT D** on terms and conditions and in amounts as required by CITY from time to time and with insurers acceptable to CITY. CITY shall not be obligated to take out insurance on OPERATOR's property. OPERATOR shall provide CITY with certificates of insurance or copies of all policies and such endorsements as may be required by CITY. From time to time at the request of the Risk Manager of the CITY of San Jose ("Risk Manager"), OPERATOR shall provide a written statement of the

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replacement cost of the OPERATOR's property at the Facilities, with a copy to the Director.

18.2 Waiver of Subrogation.

CITY and OPERATOR hereby mutually agree that so long as their respective insurance carriers concur, any fire and extended coverage insurance policies carried on properties which are the subject of this Agreement shall include a waiver of subrogation against the other party hereto, provided that such agreement applies only to subsequent loss.

Section 19. Americans with Disabilities Act (ADA)

OPERATOR shall be solely and fully responsible for complying with the Americans with Disabilities Act of 1990 ("ADA") in connection with: (a) the Communication Services provided by OPERATOR to Clients; and (b) modifying its policies, practices, and procedures to comply with the ADA. OPERATOR shall develop a workplan to correct or avoid any violations or non-compliance with the ADA. OPERATOR shall deliver to the CITY, upon CITY's request, a copy of each report and workplan. CITY's approval of or acceptance of any aspect of OPERATOR's activities under this Agreement shall not be deemed or construed in any way as a representation that such item, activity or practice complies with the ADA. OPERATOR agrees to indemnify, defend, and hold the CITY harmless from any and all costs incurred by CITY with respect to OPERATOR's failure to comply with the ADA. CITY shall be responsible for complying with the provisions and obligations of the ADA applicable to CITY in all common areas of the Facilities.

Section 20. Taxes And Assessments

20.1 Generally

OPERATOR shall be responsible for payment of all taxes, fees contributions or charges applicable to the conduct of OPERATOR's business, except as noted in Reimbursable Expenses, Section 11.7.7.

20.2 Possessory Interest Tax

It is the understanding of the CITY and OPERATOR that no interest in the Facilities property or structures is created by this Agreement because it is only an agreement to design, install, operate and manage the Communication Services. Nevertheless, OPERATOR recognizes and agrees that the assessor for the County of Santa Clara County may determine that the OPERATOR's right to operate and manage the Communication Services as set forth in this Agreement creates a possessory interest subject to a possessory interest tax. OPERATOR shall be solely responsible for paying any possessory interest tax or taxes imposed upon OPERATOR as a result of its operation and management of the Communication Services at the Facilities. OPERATOR further agrees that any

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such tax shall not be considered a Reimbursable Expense pursuant to Section 11.7 of this Agreement.

20.3 Tax - Hold Harmless

OPERATOR shall protect, defend, indemnify and hold CITY, including the Facility, and any improvements now or hereafter in the Facilities, free and harmless from any liability, loss, or damage resulting from any taxes, assessments, or other charges required by this Agreement to be paid by OPERATOR and from all interests, penalties, and other sums imposed thereon and from any proceedings to enforce collection of any such taxes, assessments, or other charges.

Section 21. Independent Contractor

OPERATOR, in the performance of this Agreement, is an independent contractor. OPERATOR shall maintain complete control over all of OPERATOR's employees, any subcontractors, any consultants, and OPERATOR's operations. Neither OPERATOR nor any person retained by OPERATOR may represent, act, or purport to act as the agent, representative or employee of CITY. Neither OPERATOR nor CITY is granted any right or authority to assume or create any obligation on behalf of the other except as otherwise expressly provided in this Agreement.

Section 22. Assignability

The parties agree that the expertise and experience of OPERATOR are material considerations for this Agreement. Unless specifically authorized by this Agreement, OPERATOR may not assign the performance of any obligation or interest under this Agreement without the prior written consent of CITY. Any attempt by OPERATOR to assign this Agreement, in violation of this Section, will be voidable at CITY's sole option.

Section 23. Subcontractors and Consultants

23.1 Authorized Subcontractors

Notwithstanding Section 22 above, OPERATOR may use designated subcontractors approved in advance by Director in performing OPERATOR's services. At the Effective Date of this Agreement, Telecommunication Management Solutions, Incorporated is OPERATOR's sole authorized subcontractor for this Agreement. OPERATOR must obtain Director's prior written consent in order to change or add subcontractors.

23.2 Authorized Consultants

OPERATOR shall be responsible for directing the work of the consultants and for any compensation due to such consultants. Compensation to

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OPERATOR'S consultants shall not be a Reimbursable Expense pursuant to this Agreement, and CITY assumes no responsibility whatsoever concerning such compensation.

23.3 Compliance with this Agreement

OPERATOR's subcontracting of any portion of its obligations under this Agreement shall not relieve it from liability and responsibility for the performance of such obligations required to be performed by OPERATOR under this Agreement. OPERATOR shall ensure that OPERATOR's subcontractors and consultants comply with this Agreement. At CITY's request, OPERATOR shall require any or all of OPERATOR's subcontractors and consultants to sign an Agreement with OPERATOR requiring compliance with this Agreement.

Section 24. Notice

All notices and other communications required or permitted to be given under this Agreement must be in writing and must be personally served, or mailed, postage prepaid via U. S. mail, or sent via courier service, addressed to the respective parties as follows:

A. San Jose Convention & Cultural Facilities

Address:
San Jose Convention & Cultural Facilities
408 South Almaden Blvd.
San Jose, CA 95110
Attn: Event & Technical Services Manager

B. StreamLine Communication Corporation

Address:
StreamLine Communications Corporation
50 Airport Parkway
San Jose, CA 95110-1011
Attn: Michael Sodergren (President)

Notice will be effective on the date personally delivered or if sent by courier service, on the date of receipt. If mailed, notice will be effective three (3) days after deposit in the mail.

The parties may change their respective addresses in accordance with the provisions of this Section.

Section 25. Confidential Information

All data, documents, discussions or other information developed or received by or for OPERATOR in performance of this Agreement are confidential and must not be disclosed to any person except as authorized by CITY, or as required by law.

Section 26. Termination

26.1 Termination for Default

In the event that OPERATOR shall have failed to perform any material term, covenant, or condition of this Agreement to be performed by OPERATOR, and OPERATOR shall have failed to cure same within thirty (30) days after OPERATOR'S receipt of written notice from the Director (the "Cure Notice") ,this Agreement shall terminate upon the thirty-first (31st) day after OPERATOR'S receipt of the Cure Notice.

26.2 Consequences of Termination

26.2.1 OPERATOR shall not contract with any Client to provide Communication Services to the Client at the Facilities beyond the Expiration Date, unless CITY exercises its option to extend the Term pursuant to Section 3.2. During the Extended Term, OPERATOR shall not contract with any Client to provide Communication Services to the Client at the Facilities beyond the Expiration Date of the Extended Term. OPERATOR shall be free to offer its services like any other outside communications provider as described in Section 4.1.3.

26.2.2 Upon the Expiration Date of the Term or the Extended Term, or in the event of an earlier termination of this Agreement for cause pursuant to this Section 26, OPERATOR shall deliver to Director copies of all reports, documents, and other work performed by OPERATOR under this Agreement, and upon receipt thereof, CITY shall pay OPERATOR the Management Fee and Service Fees due for Communication Services performed and Reimbursable Expenses incurred to the date of termination. Any uncollected accounts shall be declared bad debt. Balance of account, if any, shall be split equally between CITY and OPERATOR. Upon request from the Director, OPERATOR shall consent to the assignment to CITY of any SJCC Network Services agreements with third party providers for the remainder of their respective terms, subject to the third party's agreement.

26.2.3 From the date that OPERATOR receives notice from CITY of early termination of this Agreement for cause pursuant to this Section 26, OPERATOR shall not enter into any new contract with any Client to

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provide Communication Services at the Facilities. OPERATOR shall be free to offer its services like any other outside communications provider as described in Section 4.1.3. No later than the termination date, OPERATOR shall provide CITY with a list of any pending contracts that OPERATOR has with Clients for Communication Services to be provided at the Facilities after the termination date. The Term or Extended Term of this Agreement shall be extended through the last day that OPERATOR provides Communication Services at the Facilities to the listed Clients.

Section 27. Appropriation of Funds

CITY's funding of this Agreement shall be on a fiscal year basis (July 1 to June 30) and is subject to annual appropriations. OPERATOR acknowledges that CITY, a municipal corporation, is precluded by the California State Constitution and other laws from entering into obligations that financially bind future governing bodies, and that, therefore, nothing in this Agreement shall constitute an obligation of future legislative bodies of the CITY to appropriate funds for purposes of this Agreement. Accordingly, the parties agree that the Term of this Agreement and the exercise of any option years thereto is contingent upon the appropriation of funds by the CITY. This Agreement will terminate immediately if the funds necessary to continue the Agreement are not appropriated. This Agreement is a zero dollar appropriation contract. If this should change, the Agreement will terminate immediately.

Section 28. Gifts

28.1 Prohibition of Gifts

OPERATOR acknowledges that Chapter 12.08 of the San Jose Municipal Code prohibits CITY's officers and designated employees from accepting gifts as defined in Chapter 12.08.

28.2 No Offer

OPERATOR agrees not to offer any CITY officer or designated employee any gift prohibited by Chapter 12.08.

28.3 Breach of Operating Agreement

OPERATOR's offer or giving of any gift prohibited by Chapter 12.08 will constitute a material breach of this Agreement. In addition to any other remedies CITY may have in law or equity, CITY may terminate this Agreement for such breach as provided in Section 26 of this Agreement.

Section 29. Disqualification of Former Employees

OPERATOR is familiar with Chapter 12.10 of the San Jose Municipal Code ("Revolving Door Ordinance") relating to the disqualification of CITY's

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former officers and employees in matters which are connected with their former duties or official responsibilities. OPERATOR shall not utilize either directly or indirectly any officer, employee, or agent of OPERATOR to perform services under this Agreement, if in the performance of such services, the officer, employee, or agent would be in violation of the Revolving Door Ordinance.

Section 30. Miscellaneous

30.1 Licenses and Permits

OPERATOR shall obtain all licenses, permits, certificates, consents, approvals or other entitlements (collectively, "Licenses") required for OPERATOR's operation of the Communication Services at the Facilities. OPERATOR shall provide CITY with copies of all completed initial or renewal License applications not less than ten (10) days prior to the date such applications are due.

30.2 Conflict of Interest

OPERATOR shall avoid all conflict of interest or the appearance of conflict of interest in performance of this Agreement.

30.3 Nondiscrimination

OPERATOR agrees that there shall be no discrimination against, or segregation of, any person, on account of race, sex, color, age, religion, sexual orientation, disability, ethnicity, national origin, marital status, or family status, in connection with or related to the performance of this Agreement.

30.4 Modification of Agreement

Except as otherwise expressly provided herein, this Agreement shall not be modified unless the parties first agree to and approve of such modification in writing.

30.5 Survival of Provisions

If any part of this Agreement is for any reason found to be unenforceable, all other parts nevertheless remain enforceable.

30.6 Responsibility for Property

Except as otherwise provided in this Agreement, OPERATOR assumes the risk of and shall be responsible for any loss or damage to any equipment or other property delivered to it by the CITY for use providing the Communication Services at the Facilities. Upon the expiration or earlier termination of the Agreement, OPERATOR shall return any such equipment or property to the CITY in the condition in which OPERATOR received it, except for reasonable wear and tear.

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30.7 Successors and Assigns

Subject to the provisions of Section 22, this Agreement binds and inures to the benefit of the parties and their respective successors and assigns.

30.8 Headings

The headings of the sections and exhibits of this Agreement are inserted for convenience only. They do not constitute part of this Agreement and are not to be used in its construction.

30.9 Force Majeure

Neither the CITY nor the OPERATOR shall be in breach of any obligation under this Agreement, other than any obligation requiring the payment of money, to the extent any failure to perform such obligation is caused by any act completely beyond the control of the party breaching the obligation, including, but not limited to, Acts of God such as earthquakes, high winds, and weather disturbances, or widespread loss of internet access. Breach of an obligation due to labor strikes or other labor strife shall not be considered a matter completely beyond the control of the OPERATOR.

30.10 Business License

During the term of this Agreement and any extensions thereof, the OPERATOR shall obtain and maintain a current CITY of San Jose business license.

30.11 Transition of Operation and Management

Upon the expiration of this Agreement or its earlier termination, the OPERATOR agrees to cooperate fully with CITY to remove OPERATOR's assets from the Facilities and to fully and completely document CITY's property pursuant to this Agreement.

30.12 Authority of CITY Manager

Where this Agreement requires or permits CITY to act and no officer of the CITY is specified, CITY's Manager or the designated representative of CITY's Manager has the authority to act on CITY's behalf.

WITNESS THE EXECUTION HEREOF on the day and year first hereinabove written.

APPROVED AS TO FORM:

"CITY"
CITY OF SAN JOSE, a
municipal corporation

By:

By:

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KEVIN FISHER
Deputy CITY Attorney

PATRICIA L. O'HEARN
CITY Clerk

CITY of San Jose
801 N. First Street
San Jose, CA 95110

"OPERATOR"
STREAMLINE
COMMUNICATIONS CORPORATION,
a California corporation

By:

Name:

Title: _____

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**EXHIBIT A
PROVIDER TERMS AND CONDITIONS**

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**EXHIBIT B
SJCC NETWORK PLAN**

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EXHIBIT C
COMMUNICATION SERVICES FEES AND CHARGES

**EXHIBIT D
INSURANCE REQUIREMENTS**

- A. OPERATOR's Insurance Responsibility. OPERATOR shall obtain and maintain for the full term of this Agreement at least all of the following minimum insurance requirements prior to Commencement Date under this Agreement:
1. Policies to be Maintained.
 - a. Comprehensive Crime Policy. A comprehensive crime policy, with a minimum limit of not less than \$250,000 and a deductible not exceeding \$50,000, providing at least the following minimum coverage:
 - (1) Employee Dishonesty Coverage – Form A;
 - (2) Depositors Forgery Coverage.

The policy shall contain a provision either:

 - (1) Naming the CITY as additional insured, or
 - (2) Providing that by reason of any loss resulting from OPERATOR's operation or maintenance of the Facilities, CITY shall have a direct right against the insurer for such loss, and such loss shall be payable directly to CITY upon request. Prior to commencing performance of this Agreement, OPERATOR shall deliver a copy of the policy to the CITY Risk Manager for approval.
 - b. Comprehensive General Liability. Policy with a minimum limit of not less than \$3,000,000 combined single limit for bodily injury and property damage, providing at least all of the following minimum coverage, with any self-insured retention not exceeding \$100,000 per occurrence:
 - (1) Premises Operations;
 - (2) Owners' and CITY's Protective;
 - (3) Blanket Contractual;
 - (4) Broad Form Property Damage;
 - (5) Completed Operations;
 - (6) Products (on an "if any" basis);
 - (7) Personal Injury (Coverage for A, B and C);
 - (8) Fire Legal Liability (with a minimum limit of \$100,000 per structure).
 - c. Comprehensive Business Auto. Policy with a minimum limit of not less than \$3,000,000 combined single limit for bodily injury and property damage, providing at least all of the following coverage, with any self-insured retention not exceeding \$100,000 per occurrence. Coverage shall be applicable to any and all leased, owned, hired or non-owned vehicles used

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in any of the activities associated with this Agreement.

- d. Workers' Compensation and Employers' Liability. Policy written in accordance with the laws of the state of California and providing coverage for any and all employees of OPERATOR. This policy shall:
 - (1) Provide coverage for Workers' Compensation (Coverage A), and
 - (2) Provide coverage for \$100,000 Employers' Liability (Coverage B).
 - e. Third Party Crime. Policy with a minimum limit of not less than \$2,000 each occurrence, and \$100,000 aggregate limit of liability. This policy shall include the "Employee Option" on a blanket basis.
2. Endorsements. The following endorsements are required to be made a part of each of the above-required policies excepting the Comprehensive Crime Policy. (For the Excess Liability policy only, identify on the Certificate of Insurance as "following form".)
- a. CITY, its employees, officers, agents and contractors are hereby added as additional insureds as applies to any and all operations performed by or on behalf of OPERATOR and/or CITY.
 - b. Thirty (30) days prior written notice of cancellation shall be given to the CITY in the event of any cancellation and/or reduction in coverage. Such notice shall be sent to:

"CITY"

Risk Manager
CITY of San Jose
152 N. Third Street, Suite 904
San Jose, CA 95112-5509
 - c. Such insurance as is afforded by the additional insured endorsement shall apply as primary insurance, and other insurance maintained by CITY, its officers, agents, and employees shall be excess only and not contributing with insurance provided under this policy. Endorsements No. 2 and No. 3 are the only endorsements required to be made a part of the Workers' Compensation and Employers' Liability policy.
3. Proof of Coverage. Copies of all the required endorsements shall be attached to a Certificate of Insurance which shall be provided by OPERATOR's insurance company as evidence of the required coverage. The Certificate shall be mailed to:

Appendix III(g)

“CITY”

Risk Manager
CITY of San Jose
140 Asbury Street
San Jose, CA 95110

4. Self-Insurance. OPERATOR may be self-insured for the above-required insurance policies where permitted by law. The CITY Risk Manager shall approve in advance of all self-insurance.
 5. Approval of Contents and Form; Amendment; Waiver; Loss within the Deductible. All policies, endorsements, certificates and/or binders shall be subject to approval by CITY Risk Manager as to form and content. These requirements are subject to amendment or waiver if so approved in writing by CITY Risk Manager. CITY Risk Manager may consent to the increase or decrease of any deductible of self-insured retention. OPERATOR shall remain liable to CITY for the amount of loss with a deductible or self-retention. OPERATOR shall provide CITY Risk Manager with a copy of said policies, certificates and/or endorsements before Commencement Date under this Agreement.
 6. Qualifying Insurers. All coverage except surety, shall be insured by companies which hold a current policyholder's alphabetic and financial size category rating of not less than A VIII, according to the current Best's Key Rating Guide or a company of equal financial stability that is approved by the CITY Risk Manager.
- B. OPERATOR's Duties in Case of Loss. OPERATOR shall notify Director immediately of any fire or other damage to any part of the Facilities. OPERATOR shall notify the Director immediately if any hazardous substances or other contaminants are released on, about, under or in the vicinity of the Facilities. OPERATOR shall not settle any losses, complete loss reports or adjust losses on behalf of CITY nor meet with any federal, state or local regulatory agency without a CITY representative being present. OPERATOR shall notify Director promptly of any personal injury, property damage or theft occurring to or claimed by any user or third party on or with respect to any part of the Facilities.

JRG:KF
12/08/99

FULLY-EXECUTED

DEPT. FILE COPY *CAE*

**SAN JOSE DEPARTMENT OF
CONVENTIONS, ARTS AND ENTERTAINMENT**

CATERING AGREEMENT

BY AND BETWEEN

THE CITY OF SAN JOSE

AND

**SERVICE AMERICA CORPORATION d/b/a
VOLUME SERVICES AMERICA**

EFFECTIVE JANUARY 2, 2000

**CATERING AGREEMENT
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EXHIBITS

- Exhibit A CATERER'S EQUIPMENT**
- Exhibit B CATERER'S IMPROVEMENTS**
- Exhibit C OPERATING AREAS**
- Exhibit D MENU AND PRICE LIST**
- Exhibit F LIVING WAGE AND PREVAILING WAGE COMPLIANCE FORM
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- Exhibit G SECURITY DEPOSIT**
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- Exhibit I CATERER'S REQUIRED INSURANCE COVERAGE**
- Exhibit J HAZARDOUS MATERIALS**
- Exhibit K CITY'S UTILITIES CONNECTIONS IN FOOD SERVICE
OPERATING AREAS**

NOW, THEREFORE, in consideration of the covenants, terms and conditions of this Agreement, the City of San Jose and Caterer hereby agree as follows:

SECTION 1 - SUMMARY OF TERMS AND DEFINITIONS

Each reference in the body of this Agreement to specific terms or phrases set forth in this Section 1 shall have the specific meanings and/or contain the respective express information set forth below. To the extent there is a conflict between the information in this Section 1 and any more specific provision of this Agreement, such more specific provision shall control.

“Alcoholic Beverage” Includes alcohol, spirits, liquor, wine, beer, and every liquid or solid containing alcohol, spirits, wine, or beer, and which contains one-half of 1 percent (0.5%) or more of alcohol by volume and which is fit for beverage purposes either alone or when diluted, mixed, or combined with other substances.

“Anniversary Year” shall mean a period of twelve consecutive calendar months, whether or not all twelve calendar months fall within the same calendar year and whether or not a calendar month commences or ends on the first day of such month.

“Award Date” shall mean the date of approval of award of this Catering Agreement by the San Jose City Council.

“Business Day” shall mean any calendar day except Saturday, Sunday and any other day observed as a full holiday by the City of San Jose. For purposes of this Agreement, if the time in which any act is to be performed falls on a Saturday, Sunday, or full holiday, the time for performance shall be extended to the following business day.

“Beverage” shall mean any alcoholic or non-alcoholic liquid refreshment offered for sale at the SJCCF by Caterer.

"CAE" shall mean the City of San Jose Department of Conventions, Arts and Entertainment.

"Catered Services" Pre-arranged food and beverage related banquet services at an established price per person or per meal. Catered Services are provided to SJCCF Clients pursuant to the terms and conditions of agreement(s) between each Client and the Caterer.

"Caterer's Equipment" or "Equipment" means all proprietary items of Caterer displaying distinctive features associated with Caterer's Operations and all personal property (exclusive of "Caterer's Improvements") identified on **EXHIBIT A**, which Caterer is permitted to install or locate within the Operating Areas, subject to the requirements of this Agreement, and such other personal property or equipment authorized by Director in writing.

"Caterer's Improvements" shall mean those fixtures and other permanent improvements as defined in **EXHIBIT B**, which Caterer is permitted to construct in, on, or about the Operating Areas, subject to the requirements of this Agreement and such other fixtures and other improvements authorized by Director in writing.

"Caterer's Operations" or "Operations" shall mean the Catered Services and Concession Services provided by Caterer at the SJCCF.

"Caterer's Proposal" means Caterer's Proposal as submitted to the City on July 23, 1999.

"Catering Fee" shall mean the fee payable by Caterer in accordance with Section 10 of this Agreement.

"Commencement Date" shall mean January 2, 2000.

“Concession Services” shall mean over-the-counter cash, credit card sales and vending machine sales to SJCCF clients, invitees, and the general public conducted at fixed and mobile Food and Beverage areas at the SJCCF.

“Day” shall mean any calendar day, unless a business day is specified. For purposes of this Agreement, the time in which any act is to be performed shall be computed by excluding the first day and including the last.

“Director” shall mean the Director of CAE or such other person, division, department, bureau or agency as may from time to time exercise functions equivalent or similar to those now exercised by the Director of CAE. The term also includes any person, including but not limited to the General Manager, expressly designated to exercise functions with respect to the rights and obligations of the Director of CAE under this Agreement.

“Effective Date” shall mean the date of this Agreement as set out in Paragraph 1 on Page 1 of this Agreement.

“Engineering and Inspection (“E&I”) Fees” are defined in Section 22.6 of this Agreement.

“Environmental Laws” shall mean and include all federal, state, and local laws, statutes, ordinances, regulations, resolutions, decrees, and/or rules now or hereinafter in effect, as may be amended from time to time, and all implementing regulations, directives, orders, guidelines, and federal or state court decisions, interpreting, relating to, regulating or imposing liability (including, but not limited to, response, removal, remediation and damage costs) or standards of conduct or performance relating to industrial hygiene, occupational, health, and/or safety conditions, environmental conditions, or exposure to, contamination by, or clean-up of, any and all Hazardous Materials, including without limitation, all federal or state superlien or environmental clean-up statutes.

“Event” shall mean any activity conducted at any SJCCF by any third party pursuant to the terms of an agreement between City and that third party. “Events” shall include but not be limited to conventions, meetings, commercial trade shows, musical or dramatic performances, hobby or crafts fairs, and exhibits.

“Expiration Date” shall mean five (5) years from the Commencement Date, subject to extension or earlier termination as provided in this Agreement.

“Food” shall mean all food, confections, and snacks offered for sale by Caterer at the SJCCF.

“Gross Revenues” shall mean any revenues paid or payable in cash in United States or foreign currency, by personal check or bank cashier's check or other form of negotiable instrument, or on credit to Caterer for any sale of Product made or for any service rendered either at or from the SJCCF, or from any source related directly or indirectly to Caterer's Operations at the SJCCF, whether collected or uncollected, regardless of when or where the order therefor is received, or outside the SJCCF, if the order therefor is received at the SJCCF, and any other revenue of any type arising out of or in connection with Caterer's Operations at the SJCCF, including, but not limited to:

- A. The full amount of any and all deposits that are forfeited by patrons in connection with the conduct of business of Caterer at or from the SJCCF; and
- B. The full amount of any and all insurance proceeds that are paid on any gross earnings or gross revenues business interruption insurance policy to Caterer.

However, there shall be excluded from Gross Revenues the following items:

- A. Any and all federal, state, county, municipal, or other sales or use tax now or hereafter imposed on any patron as part of the price of any sale of Product made

or service rendered, and collected by Caterer on behalf of any such patron and required to be paid by Caterer to any governmental agency; and

- B. Any and all gratuities, service charges, or tips paid or given by any patron to or for any employee of Caterer for any services rendered at or from the SJCCF; and
- C. Any and all revenues of Caterer that arise solely from its operations under any other agreement with City at any other City facility and that is subject to a percentage fee or flat fee arrangement under that agreement; and
- D. Any legitimate refund made to a patron on an authorized sale of Product by Caterer.

“Hazardous Materials” shall mean any and all: (a) substances, products, by-products, waste, or other materials of any nature or kind whatsoever which is or becomes listed, regulated or addressed under any Environmental Laws; and (b) any materials, substances, products, by-products, waste, or other materials of any nature or kind whatsoever whose presence in and of itself or in combination with other materials, substances, products, by-products, or waste may give rise to liability under any Environmental Law or any statutory or common law theory based on negligence, trespass, intentional tort, nuisance, strict or absolute liability or under any reported decisions of any state or federal court; and (c) any substance, product, by-product, waste or any other material which may be hazardous or harmful to the air, water, soil, environment or affect industrial hygiene, occupational, health, safety and/or general welfare conditions, including without limitation, petroleum and/or asbestos materials, products, by-products, or waste.

“Laws” shall refer to any judicial decision, statute, ordinance, resolution, regulation, rule, administrative order, constitution, or other requirement of any municipal, county, state, federal or other governmental agency or authority having jurisdiction over the

parties or the SJCCF, or both, in effect either at the time of execution of this Agreement or at any time during the term, including, without limitation, any regulation or order of a quasi-official entity or body.

"Merchandise" shall mean and include any and all concession items other than Food or Beverages, which are made available for sale by Caterer at or from the SJCCF.

"Municipal Code" shall mean the San Jose Municipal Code, as amended from time to time.

"Operating Areas" shall mean those areas in the SJCCF designated as Caterer's Operating Areas on **EXHIBIT C**, which is attached hereto and incorporated herein.

"Person" shall include an individual, a corporation, a partnership, a joint venture, and any other form of business association.

"Product" shall collectively refer to all Food, Beverages, and Merchandise made available for sale or sold by Caterer at or from the SJCCF.

"Security Deposit" shall mean the amount of Five Hundred Thousand Dollars (\$500,000), payable to City as provided in Section 10.5 of this Agreement.

"San Jose Convention and Cultural Facilities (SJCCF or the Facilities)" shall mean and include:

San Jose McEnery Convention Center

150 West San Carlos

Opened in 1989, the San Jose McEnery Convention Center hosts a variety of events including national convention and trade shows, consumer events, and other significant local activities such as the Silicon Valley Charity Ball. The Convention Center features 143,000 square-feet of contiguous column-free exhibit space with three concession stands, a 22,000 square-foot ballroom, up to

30 meeting rooms with capacities from 50-2,400, theater-style seating, and banquet seating and kitchen facilities for 5,000.

Civic Auditorium

145 West San Carlos Street

Opened in 1936, this historical landmark Auditorium hosts a wide variety of general assembly, community, and sporting events. The Auditorium seats 3,060, and has four meeting rooms, a concession stand, and banquet space for 500.

Parkside Hall

180 Park Avenue

Opened in 1977, Parkside Hall hosts a variety of consumer events and convention and trade shows. The Hall features 30,000 square-feet of contiguous column-free exhibit space (frequently used as additional exhibit space by the larger shows at the Convention Center). There are two concession stands and banquet space for 1,840.

The Center for the Performing Arts

255 Almaden Boulevard

Opened in 1972, the CPA is home to the San Jose Symphony, San Jose Cleveland Ballet and American Musical Theatre of San Jose. The CPA holds 2,665 fixed seats and features full production capabilities. There are six bars in the theater Facility.

Montgomery Theater

Opened in 1936, the Montgomery Theater is home to Opera San Jose, San Jose Children's Musical Theater, Lyric Theatre, and the Performing Arts Series (featuring a variety of multi-cultural arts groups). The theater holds 523 fixed seats and features full production capabilities. There is a bar in the main lobby.

"Smallwares" shall mean glassware, china, flatware, decorations, bar service ware, pots, pans, kitchen utensils, storage containers, and buffet ware.

"Summary" shall mean Section 1 of this Agreement.

“**Tax**” shall mean and include any assessment, license, charge, fee, imposition, or levy imposed by any governmental body.

“**Unavoidable Delay**” shall include any strike, boycott, labor dispute, riot, or embargo (any of which is directly related to Caterer’s Operations), act of God (such as an earthquake and to the extent not insured against as required under this Agreement), act of a public enemy, act of superior governmental authority, major weather disturbance, rebellion, sabotage and any other circumstance of a magnitude which a reasonable person would believe is beyond the reasonable control of either party to this Agreement.

SECTION 2 - TERM

2.1 Term. This Agreement shall be binding on both parties from the Effective Date set forth in the Summary. The Term of this Agreement shall commence on the Effective Date and shall continue for the Term of five (5) years from the Commencement Date, unless and until sooner terminated by no less than ninety (90) days written notice from either the Director or Caterer, or unless sooner terminated in accordance with the terms of this Agreement.

2.2 Option to Extend Term. City shall have an option, at its sole discretion, to extend the Term of this Agreement for one additional term of five (5) years from the Expiration Date (the “Extended Term”). In the event that City decides to extend the term of this Agreement, City shall deliver written notice to Caterer no later than ninety (90) days prior to the Expiration Date. All terms and conditions of this Agreement, including but not limited to the Catering Fees, shall remain in full force and effect during the Extended Term.

2.3 Holdover. It is not the intent of this Agreement to create any rights of Caterer beyond the Expiration Date or earlier termination of this Agreement. Subject

only to City's Option under Section 2.2 above, any holding over after the Expiration Date or earlier termination of this Agreement shall be subject to and conditioned on the approval of the City Council and on terms and conditions approved by the City Council.

2.4 Employee List. Not later than sixty (60) days prior to the Termination Date, Caterer shall provide City with a list of names, addresses, dates of hire and employment classifications for all persons employed by Caterer or Caterer's subcontractors who:

2.4.1 will have been employed by Caterer or any subcontractor of Caterer at the SJCCF for at least the six (6) month period prior to the Termination Date; and

2.4.2 are interested in continued employment in the food and beverage operations at the SJCCF.

SECTION 3 - AUTHORIZED ACTIVITIES

3.1 General Approvals. In consideration of Caterer's payment of the Catering Fees and all other fees and charges and the performance of all provisions of this Agreement and any amendments thereto by Caterer, City grants to Caterer the right to use the SJCCF for the purposes of conducting the Catering Operations at the SJCCF. Except as otherwise provided in this Agreement, the right of Caterer to use the SJCCF shall be exclusive as to the Operating Areas of the SJCCF.

3.1.1 Subcontractors Caterer will not contract with a subcontractor to provide all or any portion of the Catering or Concession Services required under this Agreement without the prior written consent of the Director, which shall not be unreasonably withheld. In the event that Caterer wishes to contract with a subcontractor, Caterer will provide the Director with information regarding the proposed subcontractor's management and experience.

SAN JOSE CONVENTION AND CULTURAL FACILITIES
CITY OF SAN JOSE
CATERING AGREEMENT

THIS CATERING AGREEMENT ("Agreement") is dated for convenience this ____ day of November, 1999, by and between the City of San Jose, a municipal corporation of the State of California ("City") and Service America Corporation d/b/a Volume Services America ("Caterer"). All capitalized terms in this Agreement shall have the meanings set forth in Section 1 unless otherwise specifically defined in this Agreement.

RECITALS

- A. City is empowered to grant the right and privilege to operate a Food and Beverage concession at the various San Jose Convention and Cultural Facilities (collectively "SJCCF"); and
- B. Caterer represents and warrants that it possesses the necessary experience and qualifications to provide Food and Beverage services as required pursuant to this Agreement at the SJCCF; and
- C. Caterer desires to secure the privilege of providing Food and Beverage services at the SJCCF, and the City of San Jose has determined that the award of such catering privileges to, and the execution of an agreement with Service America Corporation d/b/a Volume Services America, will maintain and enhance the quality of Food and Beverage services at the SJCCF; and
- D. The San Jose City Council has determined that the award of catering privileges to, and the execution of a Catering Agreement with Caterer will enhance the quality of Food and Beverage services at the SJCCF:

3.2 Permitted Merchandise Sales. The rights granted to Caterer shall include the right to sell at or from the SJCCF Merchandise such as programs, souvenir books, other printed matter of a like nature, and certain novelties such as, but not limited to, T-shirts, records, tapes, and posters, where such Merchandise has been approved by the Director and is offered in connection with Events at the SJCCF. Caterer understands and agrees that the sale of any Merchandise and the rendering of any service not specifically included in this Agreement shall be prohibited, unless Caterer has first obtained the prior written consent of the Director. All Merchandise kept for sale by Caterer at the SJCCF shall be subject to the inspection and prior written approval by the Director at all times during the Term of this Agreement. Any payment which is earned by Caterer on the sale of such Merchandise shall be included in Gross Revenues.

3.3 Permitted Sales and Services in Each Facility. Caterer is granted the right to use the Operating Areas of each Facility for Catered and Beverage Services and Concession Services as follows:

3.3.1 Auditorium and CPA: Caterer shall provide Concession Services at the Auditorium and the CPA. Concession Services shall include the sale of Food, Beverages and Merchandise of the kinds and types normally sold to the public at theatrical, sporting or other performances, trade shows, conventions, political gathering and rallies, or other Events. Sales shall be made from refreshment stands at designated locations in the Auditorium and the CPA and by walking vendors carrying refreshments and Merchandise into and about the seating area of the Auditorium and the CPA. Sales from vending machines may be permitted at selected locations upon the prior written approval of the Director as provided in Section 5.3.7 of this Agreement.

3.3.2 Convention Center: Caterer will provide Catered Services at the Convention Center. Caterer will have the ability to prepare and serve meals to 5,000 persons or more per day at banquets in the Convention Center. Caterer shall also provide Concession Services at the Convention Center. Concession Services shall

include the sale of Food, Beverages and Merchandise of the kinds and types normally sold to the public at theatrical, sporting or other performances, trade shows, conventions, political gathering and rallies, or other Events. Sales shall be made from refreshment stands at designated locations in the Convention Center and by walking vendors carrying refreshments and Merchandise into and about the seating area of the Convention Center. Sales from vending machines may be permitted at selected locations upon the prior written approval of the Director as provided Section 5.3.7 of this Agreement.

3.4 Relocation, Expansion or Contraction of Operating Areas. In the Event that implementation of the City's requirements for the SJCCF necessitates the relocation of Caterer's Operations within the SJCCF, Caterer shall relocate all or part of its Operations or expand or contract the size of its Operations in an expeditious manner only as may be permitted, directed or required by the Director. Caterer shall bear the costs of relocation of any portion of Caterer's Operating Areas. Such relocation, expansion or contraction shall not affect Caterer's obligation to pay the Catering Fees and other fees and charges pursuant to the terms of this Agreement. If Caterer does not agree to increase the Operating Areas at City's request, City shall have the right to sell or cause the sale of such Merchandise and provide or cause the provision of such Catering and Banquet Services and Concession Services as the Director deems appropriate, and City shall not be deemed to have violated any exclusive right of Caterer hereunder or to have defaulted hereunder.

SECTION 4 - RESTRICTIONS ON ACTIVITIES

The commercial activities authorized in Section 3 shall be subject to the following conditions and restrictions:

4.1 Use. Caterer shall not be permitted any use of the Operating Areas, or the SJCCF, except for the Catered Services and Concession Services as provided in this Agreement.

4.2 Compliance With Laws. Caterer shall comply with and conform to all Laws applicable to or affecting, directly or indirectly, the Caterer, the Operating Areas, and Caterer's Operations and activities under this Agreement. Caterer shall not use or allow the Operating Areas to be used for any improper or unlawful purpose. Further, Caterer shall not do or permit anything to be done in, on, or about the Operating Areas or the SJCCF, nor bring or keep or permit to be brought or kept therein, anything which is prohibited by a standard form of fire insurance policy or which will in any way increase or affect the then existing rate of fire or other insurance required to be carried upon the Operating Areas, the SJCCF, or any part thereof, or any of their contents, or which will cause a cancellation of any insurance policy covering the Operating Areas, the SJCCF, or any part thereof or any of their contents.

4.3 No Waste or Nuisance. Caterer shall not commit, cause, maintain, permit or suffer, or allow to be committed, caused, maintained, or permitted, any legal waste upon the Operating Areas or the SJCCF, nor any public or private nuisance, or injury nor any improper or unlawful use on the SJCCF or surrounding areas of the SJCCF, nor any other act or thing, or omission to act, which may in any way disturb the quiet enjoyment of or obstruct or interfere with the rights of, any other Caterer, tenant, licensee, invitee, or Subcontractor of any portion of the SJCCF. Caterer shall maintain in safe, good and clean condition all areas of the SJCCF where Caterer conducts its operations.

4.4 Disposal, Use and Storage of Hazardous Materials. Disposal of Hazardous Materials on the SJCCF is strictly prohibited. Storage and use of Hazardous Materials on the SJCCF is prohibited, except:

4.4.1 Caterer may store and use Hazardous Materials in the Operating Areas in a safe and prudent manner and in accordance with the requirements of all applicable Environmental Laws, those kinds and quantities of Hazardous Materials that are normally used in conducting the activities permitted under this Agreement. Caterer shall provide Director with a copy of any application for a permit for use or storage of

Hazardous Materials in the Operating Areas from any regulatory agency responsible for enforcement of Environmental Laws, and shall also provide a copy of any permit received from such agency.

4.5 Facility Common Areas. Caterer shall not use the common areas of the SJCCF reserved for the use of the general public to move any Product for sale to or from the SJCCF, except upon Director's prior written approval.

4.6 Sale of Food and Beverages Limited to SJCCF. Caterer covenants that the Food and Beverages prepared in the SJCCF shall not be sold from locations other than the SJCCF. Caterer may sell Food and Beverages prepared in the SJCCF from other City owned facilities or City sponsored events with the advance written consent of the Director.

4.7 Signs and Advertising. Caterer shall not install, erect, affix, paint, or place or permit the installation, erection, affixation, painting, or placement of any sign, lettering, or other advertising device or media in, on, or about the Operating Areas, the SJCCF, or any portion thereof, without the prior written consent of the Director.

SECTION 5 - STANDARDS OF OPERATION

5.1 Quality of Service. During the Term of this Agreement, Caterer covenants and agrees to maintain, operate and keep or cause the maintenance and operation of its Operations in accordance with the provisions of this Agreement in a first-class manner and in a safe, clean, and orderly condition at all times to the reasonable satisfaction of the Director. Catered Services and Concession Services shall be provided by Caterer in accordance with the following Standards of Operation:

5.1.1 In Concession Service refreshment stand and vendor operations, all bottled and canned drinks shall be served in individual glass, paper or plastic cups, and all glasses, bottles and cans shall be retained for proper disposal by Caterer's employees.

5.1.2 All Food and Beverages, sold or kept for sale, shall be first quality, wholesome and pure and shall conform in all respects to all Laws. No imitation, adulterated or misbranded article shall be sold or kept for sale, and all Food and Beverages kept on hand shall be stored and handled with due regard for sanitation. Perishable Food and Beverages shall not be sold past their expiration date.

5.1.3 Vendors, whether stationary or moving throughout the SJCCF, shall have leakproof baskets and containers for carrying Food, Beverages and Merchandise. Caterer shall prevent the littering and scattering of cups, wrappers, napkins and other items by Caterer's employees.

5.1.4 The Director reserves the right at all times to object to the quality of food, beverage, merchandise, or services offered by Caterer, the method by which Caterer's Operations are conducted by Caterer, the prices, charges, and the appearance and condition of the SJCCF in which Caterer operates. Caterer, upon receipt of notice, covenants and agrees to: (a) immediately discontinue any Food, Beverage, or Merchandise; or (b) remedy any such Catered Services or Concession Services reasonably determined by the Director to be of substandard quality. Caterer shall periodically meet with the Director at the Director's request to discuss any and all aspects of Caterer's Operations. The failure of Caterer to cease marketing any substandard Food, Beverages, or Merchandise or service shall constitute an Event of Default under this Agreement.

5.1.5 Caterer shall be held strictly accountable for furnishing complete and adequate service for the full period of time required for each Event of which Caterer has been given notice.

5.2 Pricing. As a material inducement to City to enter into this Agreement, Caterer covenants that its Catering and Concession menu prices shall be reasonable, fair and non-discriminatory and that its menu prices shall not vary by more than ten percent (10%) from similar operations as described in Section 5.2.3. Prices shall be posted or displayed prominently at all Concession Service locations where Product is sold. Caterer covenants and agrees to offer for sale items at prices in accordance with the attached menu and price list as set forth in **EXHIBIT D**, as such list may be amended from time to time, with prior written approval of Director.

5.2.1 Caterer shall be required to give the Director at minimum thirty (30) days' written notice of proposed price or menu adjustments, including documentation substantiating and explaining the proposed price and menu adjustment. The Director shall have the reasonable discretion and authority to disapprove the selection and pricing of Food and Beverages. Upon notice from the Director, Caterer shall promptly adjust the price and/or menu to the Director's reasonable satisfaction.

5.2.2 Caterer may be permitted to sell Product not included in the approved price schedule or menu, provided the product, menu, and maximum price at which such Product may be offered receive the prior written approval of the Director. Caterer may be permitted to substitute other Product for Product listed in the schedules, menus or lists, provided that the Director first approves such substitution and the quality, amount, and maximum price of the substitute Product.

5.2.3 Caterer agrees to perform price surveys at least twice each year, at the reasonable request of the Director. The Director may select no more than ten (10) comparable operations at convention and cultural facilities for price comparison of Product. Caterer shall survey a sample of Product, excluding promotional items, specified by the Director at the selected comparable facilities and shall provide a written report of the results of its pricing survey to the Director. Caterer shall submit results to the Director for review within thirty (30) days of Director's request that Caterer conduct a price survey.

5.3 Operating Conditions. At all times during the Term of this Agreement, Caterer shall provide the necessary Product and personnel and shall conduct operations necessary to serve the public for reasonable periods of time before, during, and after all Events scheduled in the SJCCF, unless otherwise approved by the Director.

5.3.1 The Director shall furnish Caterer with advance notice of the nature of each scheduled Event and any available information pertaining to the anticipated attendance at each Event in the SJCCF. The Director shall use reasonable efforts to notify Caterer of the cancellation of any scheduled Event, provided that the Director has received notice of such cancellation, but City shall not be liable for any failure of the Director to notify Caterer of any cancellation.

5.3.2 The locations of all concession stands and the locations of storage space furnished for use by Caterer are shown in **EXHIBIT C** to this Agreement. Caterer shall acquire no possessory rights to such locations, and the Director may require Caterer to move the stands and Caterer's Equipment as the Director determines in his or her reasonable discretion.

5.3.3 Caterer shall be responsible for the setup of portable equipment relating to the operation of Concession Service and bar service such as bars, snack stands and equipment at the locations as determined by the Director. Caterer shall be responsible for the removal of litter and cleaning of portable areas during and immediately after an Event in a manner suitable to the Director.

5.3.4 Caterer, at its sole cost and expense, shall furnish common and skilled labor for the moving and setting up and dismantling of temporary refreshment stands in such locations as may be designated by the Director.

5.3.5 Caterer shall be entitled to remain at the Facilities during the Events staged at the SJCCF for such reasonable times prior to and subsequent to such Events

or for such time as is reasonably necessary to provide the Catered Services and Concession Services as provided in this Agreement. Caterer shall not operate at times when no Events are staged at any of the Facilities, except as may be approved by the Director.

5.3.6 Caterer shall use due care in hiring and selecting Caterer's personnel working in the SJCCF. Caterer shall furnish to the Director the names of all Caterer personnel working in the SJCCF, in order to secure the issuance of passes and work identifications.

5.3.7 Vending machines shall be maintained in the SJCCF only with the prior written approval of the Director. If Caterer desires to maintain such machines at the SJCCF, Caterer shall submit its proposals concerning the Product to be sold from the machines, their suggested prices and recommended locations within the SJCCF to the Director.

5.3.8 Notwithstanding Section 5.4.4 of this Agreement. Caterer acknowledges that nothing in this Agreement shall be construed to prohibit any person authorized by City to exhibit any Product in connection with any exhibit or other type of Event staged by that person in the SJCCF. Caterer further acknowledges that nothing in this Agreement shall be construed to prohibit such person from dispensing free samples of any Product or from selling Product that is not sold by Caterer. Any Product which is dispensed as a free sample in competition with Product that is sold by Caterer may be dispensed only upon the mutual agreement of the Director and Caterer's General Manager. Notwithstanding the provisions of this paragraph, the Director may direct Caterer to suspend sales of any Product prior to or during those Events at which persons authorized to use the SJCCF have requested that only certain sales or no sales of any such Product by Caterer be permitted.

5.3.9 All Foods, excepting baked goods specialty buffet products and standard canned and packaged items, shall be cooked and prepared at the SJCCF. Any deviation from this provision must be first approved in writing by the Director.

5.4 City's Responsibilities.

5.4.1 City shall provide Caterer with storage space, commissary space and office space, as part of the Operating Areas identified in **EXHIBIT C** to this Agreement. The use of any portion of the Operating Areas for non-SJCCF concession Operations by Caterer without the prior written approval of the Director shall constitute an Event of Default, and City shall be entitled to terminate Caterer's right to use such space, in addition to exercising all other available rights and remedies.

5.4.2 City shall be responsible for setting up tables, chairs and staging necessary for all Events or functions at which Caterer is to provide Catered Services. Caterer shall be responsible for the removal of litter and cleaning of tables during and immediately after an Event in a manner suitable to the Director.

5.4.3 City shall be responsible for the removal of all tables and chairs after the staging of all Events or functions at the SJCCF.

5.4.4 During the Term of this Agreement, City will prohibit competing vendors or salespersons from selling or offering for sale Product of the same type as is then being sold or offered for sale by Caterer at the Event. Except as otherwise provided in Section 5.3.8 of this Agreement, the sale by any third party of any Foods or Beverages not sold or offered for sale by Caterer at any Event shall be permitted by City only upon the mutual agreement of the Director and Caterer.

5.4.5 City reserves the right to its officers, employees and agents to enter into and upon the spaces occupied by Caterer at all reasonable times with reasonable notice to make inspections that the Director deems expedient and desirable for the

proper enforcement of the provisions of this Agreement, to maintain the spaces or repair, alter or improve such spaces, to post notices of non-responsibility, and to engage in any other action which the Director deems reasonably necessary to administer the obligations of City under this Agreement.

SECTION 6 - CATERING AND CONCESSION EMPLOYEES

6.1 Caterer General Manager. As a material consideration of this Agreement, Caterer shall appoint a general manager (the "Caterer General Manager") to supervise and manage Caterer's Catering and Concession Services at the SJCCF. The Caterer General Manager shall have at least one year of substantial and continuous management experience at a major facility comparable to the SJCCF. Caterer covenants to minimize the frequency of replacement or substitution of the Caterer General Manager during the Term of this Agreement. If Caterer designates a Caterer General Manager without securing the prior written consent of the Director, which consent shall not be unreasonably withheld, Caterer shall be in Default under this Agreement. At all times during Caterer's provision of Catering or Concession Services at the SJCCF, the Caterer General Manager, who shall be subject at all times to the direction and control of Caterer, shall be assigned to a location of general availability in the Operating Area, and, during the Caterer General Manager's unavailability, a qualified subordinate shall be appointed to act in his or her absence.

6.2 Caterer Management Staff and Employees. In addition to the Caterer General Manager, Caterer's full-time, permanent operating staff shall include a Unit Controller, a Director of Food and Beverage, an Assistant Director of Food and Beverage, a Banquet Manager, Catering Sales Managers, an Executive Chef, a Sous Chef, and a Chief Steward with adequate support staff to monitor all Food and Beverage related Events and to keep all Operating Areas clean and orderly on a daily basis. Caterer shall be entitled to appoint a reasonable number of employees who shall be permitted entry to the SJCCF, provided that the number of such employees shall be approved by the Director. Caterer's employees shall be admitted to the SJCCF in

accordance with regulations established by the Director. The Director, for good cause, may deny entry to the SJCCF to any person employed by Caterer in the exercise of its rights and obligations under this Agreement.

6.3 Employee Uniforms and Appearance. Employees of Caterer shall at all times be neat, clean and in uniform. The styles and colors of uniforms for employees must be approved by the Director. Caterer's employees shall meet all sanitary standards prescribed for restaurant employees. Employees' uniforms shall bear no advertising (unless advertising is approved in writing by the Director) and shall be worn with numbered badges in a visible location on the uniform as approved by the Director. Accurate records of the names and addresses of those to whom such badges are issued shall be kept by Caterer to assure proper identification of employees at any time required by City, the Director, or any other government agency.

6.4 Employee Conduct, Training and Supervision. Caterer's employees shall at all times be polite and courteous in their dealings with the SJCCF patrons and management. Such employees shall not, either by act or language, offend or disturb patrons and spectators or interfere with a program or Event in progress. The Director shall be the sole judge in the determination of such matters. The Director may consult with Caterer regarding the performance of Caterer's employees, and may request steps reasonably necessary to ensure that Caterer's employees meet the highest standards of performance. Caterer shall train and closely supervise all employees so that they are aware of and habitually practice the high standards of cleanliness, courtesy and service required.

SECTION 7 - LIVING WAGE POLICY

7.1 Wage Requirements.

7.1.1. Covered Employees Defined For purposes of this provision, Covered Employees means any person employed by the Caterer or Subcontractor who meets

the following conditions:

- a. The person does not provide volunteer services that are uncompensated except for reimbursement of expenses such as meals, parking or transportation;
- b. The person expends at least half of his/her time on work for the City;
- c. The person is at least eighteen (18) years of age; and
- d. The person is not in training for the period of training specified under training standards approved by the City of San Jose.

7.1.2. Prevailing Wage Throughout the term of this Agreement and any option years, the Caterer and any Subcontractors will be required to pay, at least, Prevailing Wages to certain of its Covered Employees. Covered Employees who must be paid, at least, Prevailing Wages include all of the following full-time and part-time Food and Beverage Service employee classifications: Banquet Manager, Sous Chef, Supervisor (kitchen, food and beverage, catering, steward), pastry chef, first cook, administrative assistant/catering secretary, and cook. For purposes of this Agreement, Prevailing Wages mean:

- (a) The wages paid under a collective bargaining agreement between the Operator and a recognized union representing Food and Beverage Service employees who will perform services pursuant to this Agreement.

However, if the wage rates set forth in the collective bargaining agreement fall below the then current Living Wage rates set by the

City of San José, then the required rate of pay shall be the Living Wage Rate, unless the collective bargaining agreement provides that the agreement shall supercede the requirements of the Living Wage Policy; or

- (b) If there is no collective bargaining agreement as described above, not less than the prevailing rate of per diem wages for employee classification, as determined by the City of San Jose's Office of Equality Assurance.

SEE EXHIBIT E FOR THE APPLICABLE PREVAILING WAGE CLASSIFICATION/ DETERMINATION.

The Prevailing Wage will be subject to adjustment on February 1, 2000 and subsequent years, based upon a review of the Consumer Price Index for all Urban Consumers in the San Francisco-Oakland-San Jose area (United States Department of Labor, Bureau of Labor Statistics).

7.1.3 Living Wage Throughout the term of this Agreement and any option years, the Caterer and any Subcontractors will be required to pay, at least, Living Wages to certain of its Covered Employees. Covered Employees who must be paid, at least, Living Wages include all of the following full-time and part-time Food and Beverage Service employee classifications: Bartender, Banquet Bartender, Pantry Person, Deli Worker, Café Attendant, Bar Back/Bar Attendant, Store Room Clerk, Shipping/Receiving, Host/Hostess/ Cashier/Stand Worker, Steward, Porter, Dishwasher, Cocktail Server, Busperson, Food Server. For purposes of this Agreement, Living Wages mean:

- (b) The wages paid under a collective bargaining agreement between the Operator and a recognized union representing

Food and Beverage Service employees who will perform services pursuant to this Agreement.

However, if the wage rates set forth in the collective bargaining agreement fall below the then current Living Wage rates set by the City of San José, then the required rate of pay shall be the Living Wage Rate, unless the collective bargaining agreement provides that the agreement shall supercede the requirements of the Living Wage Policy; or

- (b) If there is no collective bargaining agreement as described above, not less than the Living Wage rate, as determined by the City of San Jose's Office of Equality Assurance.

SEE EXHIBIT E FOR THE APPLICABLE LIVING WAGE CLASSIFICATION/ DETERMINATION.

The Living Wage will be subject to adjustment on February 1, 2000 and subsequent years, based upon a review of the Consumer Price Index for all Urban Consumers in the San Francisco-Oakland-San Jose area (United States Department of Labor, Bureau of Labor Statistics).

7.1.4. Reports The Office of Equality Assurance will monitor the payment of Prevailing Wages and Living Wages by requiring the Caterer and all Subcontractors to file a Combined LV/PW Compliance Form and a Prevailing Wage Fringe Benefit Statement.

SEE EXHIBIT F FOR THE COMBINED LV/PW COMPLIANCE FORM AND PREVAILING WAGE FRINGE BENEFIT STATEMENT.

Caterer and Subcontractors shall also report such other additional information as requested by the Director of Equality Assurance to ensure adherence to this Policy.

7.2 Enforcement. If a violation of any provision of the Policy occurs and is not corrected after written notice, the City may, at its option, do any or all of the following in addition to any other remedies available to City:

- a. Suspend and/or terminate the contract for cause;
- b. Require the Operator and Subcontractors to pay any amount underpaid in violation of the required payments and City's administrative costs and liquidated damages, as provided in Sections 24.3.1.9 and 24.3.1.10;
- c. Debar the Operator or Subcontractors from future City contracts.

7.2.1 Coexistence With Any Other Employee Rights These provisions shall not be construed to limit an employee's ability to bring any legal action for violation of any rights of the employee.

7.3 Labor Peace. As provided in the Request for Proposals, City has determined that the level of vulnerability of this Agreement to service or labor disputes is sufficient to warrant that labor peace is essential to the proprietary interest of the City. In order to assure labor peace during the Term and any Extended Term of this Agreement, Caterer hereby affirms all labor peace assurances in Caterer's Proposal, including but not limited to assurances regarding training, work environment and employee relations.

SECTION 8 - ALCOHOLIC BEVERAGES AND CORKAGE

8.1 Sale Permitted. Alcoholic Beverages are to be offered for sale to the extent permitted by the applicable laws and subject to regulations established by City relating to Caterer's operations at the SJCCF.

8.2 Licenses and Permits. Caterer, at its own expense, shall provide all licenses and permits required for the legal sale of Alcoholic Beverages.

8.3 Serving Size, Pricing and Quality. The proposed size or portion of all drinks and liquor and the proposed price schedule thereof shall be submitted to the Director by Caterer within thirty (30) days of the execution of this Agreement. Requests for bar and concession pricing guarantees shall be submitted in writing by Caterer to the Director for approval in advance of each Event. Mixers such as fruit juices and carbonated water shall be of the highest quality.

8.4 Corkage Fees. Any fee which is charged by Caterer to any person who caters a function at the SJCCF for the privilege of serving Alcoholic Beverages not supplied by Caterer (commonly known as a "corkage fee") shall be deemed to be a fee for services rendered by Caterer and shall be includable in Gross Revenues. Requests for corkage services shall be submitted in writing by Caterer to the Director for approval in advance of each Event.

SECTION 9 - MARKETING AND SALES

9.1 Advertising. Caterer may advertise the existence of its Catering and Concession Services at the SJCCF, provided that the Director has approved any and all forms of advertising. A listing of the operations in Caterer's brochures, however, need not be approved by the Director.

9.2 Marketing Reserve. Each month during the term of this Agreement, the Caterer will deposit a sum equal to two percent (2%) of the previous month's Gross Revenues (the "Marketing Reserve") in a Marketing Reserve Account maintained by Caterer. The Marketing Reserve shall not be considered to be part of the Catering Fee payable under Section 10.1 of this Agreement, and Marketing Reserve funds deposited by Caterer in the Marketing Reserve Account shall not be credited or offset against the Catering Fee payable under Section 10.1 of this Agreement. Funds from the Marketing Reserve Account shall be administered by the Caterer's General Manager with the Director's approval. The Marketing Reserve Account shall be used for the promotion and marketing of the SJCCF and the Food and Beverage services at the SJCCF, including but not limited to, sales materials, travel and entertainment costs related to Client marketing, costs of advertising, and sales training programs. The Caterer's sales personnel salaries, commissions, and benefit costs are not payable from the Marketing Reserve Fund. The reserves will be maintained throughout the term of the Agreement in interest-bearing accounts at a local banking organization, selected by City, and approved by the Caterer, in the name of the Caterer and City. Any disbursement of these funds will require the written approval of Director, and City reserves the right to withdraw from any account within the reserve accounts at its discretion, as required to discharge the obligations for which the reserves are maintained, and to cross-over accounts if appropriate. Upon expiration of this Agreement, City shall be entitled to all funds, including any accrued interest, remaining in the Marketing Reserve Account.

9.2.1 Caterer shall prepare and furnish to the Director such records pertaining to the management and maintenance of the Marketing Reserve Account in accordance with the general accounting and auditing provisions of this Agreement.

9.3 Marketing Fee. Caterer shall pay the City a monthly Marketing Fee in an amount equal to Fifty Percent (50%) of the monthly cost of the sales person hired by the City to develop corporate and community markets. Caterer shall pay the monthly Marketing Fee at the time of payment of the Catering Fee. In the event that City's costs for the above-referenced sales person increase during the Term of this Agreement, City

may increase the monthly Marketing Fee upon thirty (30) days written notice to Caterer. While City shall have sole final control over the selection, hiring, supervision and termination of the above-referenced sales person, Caterer shall have the opportunity for input and feedback on the position.

SECTION 10 - FEES AND DEPOSITS

10.1 Catering Fee. As consideration for the right and privilege to use and occupy the SJCCF during the Term of this Agreement, Caterer guarantees and agrees to pay to City, without deduction, abatement, or setoff and without demand or notice, a Catering Fee as set forth in this Section. The Catering Fee shall be payable, notwithstanding the temporary damage or destruction of any of the five (5) buildings that constitute the SJCCF in which Caterer shall conduct its Operations.

Caterer agrees to pay to City a Catering Fee calculated pursuant to the categories set out as follows:

	From:	To:	Percentage of Gross Revenues
Concession Gross Revenues	\$1	\$1,000,000	30%
	\$1,000,001	\$2,000,000	35%
	\$2,000,001	Greater than \$2,000,001	40%
Catering Gross Revenues	\$1	\$2,500,000	22%
	\$2,500,001	4,500,000	26%
	\$4,500,001	Greater than \$4,500,001	30%
Beverage Gross Revenues	\$1	\$1,000,000	30%

	\$1,000,001	\$2,000,000	35%
	\$2,000,001	Greater than \$2,000,001	40%
Gross Revenues from Other Products	\$1	\$Greater than \$1	15%

For any Anniversary Year in which Caterer's Net Sales at the Convention Center are greater than \$7,500,000, Caterer shall pay to City the following percentages of monthly Catering Gross Revenues instead of the percentages of monthly Catering Gross Revenues listed above:

Catering	\$1	\$2,500,000	23%
	\$2,500,001	4,500,000	27%
	\$4,500,001	Greater than \$4,500,001	31%

10.2 Payment. Within twenty (20) days after the end of each month, that month's Catering Fee payment shall be payable in lawful money of the United States to the City of San Jose, San Jose McEnery Convention Center, 408 S. Almaden Boulevard, San Jose, California 95110-2715, to the Attention of the Director or to such other person or at such other place as City may designate from time to time in writing. Caterer shall be required to pay a late payment fee equal to the lesser of one percent (1%) per month or the maximum rate then allowed by law, of the amount that is late, calculated monthly, for each month that payment is not timely received by City. City assessment of the late payment shall be in addition to any other remedies City may have in law or in equity, including termination and revocation of the Concession Agreement. Notwithstanding any right or remedy in City on account of such nonpayment, the obligation to pay the outstanding amounts of the Catering Fee shall survive the termination of this Agreement.

10.3 Monthly Report. No later than twenty (20) days after the end of each month, Caterer agrees to prepare and submit with the monthly Catering Fee, a monthly written report (the "Monthly Report") in triplicate to the Director for each month or part thereof in which the Catered Services and Concession Services are performed. Each Monthly Report shall contain the previous month's total Gross Revenues and such other information as requested by the Director. The Monthly Report shall be submitted on a form to be approved by the Director and shall, at a minimum, include a revenue breakdown for each Event.

10.4 Security Deposit. Caterer shall deposit and maintain with City upon execution of this Agreement a Security Deposit in the sum of Five Hundred Thousand Dollars (\$500,000). The Security Deposit shall be payable to the "City of San Jose" in the form of: (a) a cashier's check or certified bank check; (b) a surety bond in a form acceptable to the Director; or (c) an irrevocable standby letter of credit in substantially the same form as the sample attached to this Agreement as **EXHIBIT G**. The Security Deposit shall be held by City and may be applied against any unpaid fees, rates or charges due and owing to City under this Agreement.

If City makes such deduction, Caterer shall replace the Security Deposit to the original amount of the security deposit within thirty (30) days of a written demand by Director. A failure to do so shall entitle City to terminate this Agreement on thirty (30) days notice. City shall not be required to keep the Security Deposit separate from its funds, and Caterer shall not be entitled to interest on the Security Deposit. Any or all of this Security Deposit that is not needed to satisfy fees, rates or charges resulting from Caterer's Operations or activities under the terms of this Agreement will be refunded without interest to Caterer after the expiration or termination of this Agreement.

SECTION 11 - AUDIT OF BOOKS AND RECORDS

11.1 Caterer shall maintain and make available for City's inspection and/or audit at Caterer's address specified in the Summary, for a period of not less than four

(4) years, separate and accurate daily, monthly and annual records of Gross Revenues using a form and method approved by Director, and in accordance with generally accepted accounting principles, showing in detail all business done or transacted. Caterer shall furnish City with such other financial or statistical reports as Director, from time to time may reasonably require.

11.2 Any records or documents required to be maintained pursuant to this Agreement shall be made available for inspection or audit, at any time during regular business hours, upon written request by the Director, City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Copies of such documents shall be provided for inspection at a location designated by City when it is practical to do so. Unless an alternative location is mutually agreed upon, the records shall be available at Caterer's address indicated for receipt of notices in this Agreement.

11.3 Caterer agrees to maintain a commercial bank account, separate from any other accounts maintained by Caterer, into which all cash receipts from the Catered Services and Concession Services shall be deposited within one business day after receipt. Upon deposit, the cash receipts may thereafter be transferred to Caterer's other corporate bank accounts for disbursements.

11.4 Caterer shall use cash registers of a type approved by the Director for the recordation of all sales made at each refreshment stand permitted to operate and at such other Concession Services or locations as determined by the Director, provided, however, that sales by walking vendors and sales at such Events which are determined by the Director to not be conducive to recordation on cash registers shall be recorded in a manner approved in advance by the City's Director of Finance. Caterer shall not permit any employees (with the exception of walking vendors or the employees assigned to provide service to patrons at such other places where, as determined by the Director, cash registers are not used) to make change from open cash registers, boxes or containers, or from pockets of clothing.

11.5 An inventory of all supplies and materials shall be taken by Caterer no later than July 31 of each calendar year and a copy of such inventory shall be given to the Director not later than thirty days after the preparation of such inventory.

11.6 If City has reason to believe that any records or documents required to be maintained by Caterer under this Agreement may be lost or discarded due to dissolution, disbandment or termination of Caterer's business, City may, by written request by any of the above-named officers, require that custody of records be given to City and that the records and documents be maintained at a location designated by the Director, City Attorney, City Auditor, or City Manager. Access to such records and documents shall be granted to any party authorized by Caterer, its representatives, or its successor-in-interest.

11.7 If any examination, inspection, and/or audit of Caterer's books and records by City discloses an underpayment by Caterer, Caterer promptly shall pay City the amount of such underpayment and, if such underpayment is in excess of one percent (1%) of the fees and charges due, the Caterer promptly shall reimburse City for all costs incurred in the conduct of such examination, inspection, or audit, including interest from the time such underpayment was due, at the lesser of the rate of one percent (1%) per month or the maximum rate then allowed by law. Caterer shall furnish City with such other financial or statistical reports as Director, from time to time, may reasonably require.

SECTION 12 - CATERER'S EQUIPMENT

12.1 **Equipment of City.** City will provide the kitchen food service equipment and furnishings as described in the attached **EXHIBIT H**. The equipment and furnishings listed in **EXHIBIT H** shall be and remain the property of City.

12.2 **Caterer's Equipment.** Within thirty (30) days after the execution of this Agreement, Caterer shall provide to the Director a list containing a complete description

of each item of Caterer's Equipment to be supplied by Caterer prior to their delivery to the SJCCF. The list shall also contain such other information that may be requested by the Director, including, without limitation, the costs of Caterer's Equipment and the anticipated delivery schedule of any and all items of Caterer's Equipment to the SJCCF. Caterer covenants and agrees to provide Caterer's Equipment with a minimum value of \$450,000, of which \$450,000 shall be allocable to Smallwares and Office Equipment. Any installation, connection, or disconnection of such Equipment to utility stubs or drains shall be at the sole cost of Caterer and subject to approval of the Director. Ownership of such Equipment shall remain with Caterer, and only such Equipment so listed may be removed from the SJCCF. Caterer's Equipment will include, without limitation, such operating equipment as smallwares, linens, walking vendor equipment, and office equipment.

12.3 Availability of Certain Equipment. At all times during the Term of this Agreement, Caterer shall be prepared to provide table service items (for example, china, glassware, silverware and other items) of a design and quality as approved by the Director to accommodate a catered function for at least 5,000 persons in the Convention Center and 1,500 persons in the Community Facilities. At all times during the Term of this Agreement, Caterer shall keep on hand at the Convention Center and Auditorium, as the case may be, a minimum supply of these table service items to accommodate a catered function for at least 2,000 persons in the Convention Center and 500 persons in the Community Facilities. Caterer covenants and agrees not to assess any additional charge for any person that requests Caterer's Catered Services for the cost of table service items to be provided for any catered function in excess of 2,000 persons in the Convention Center and 500 persons in the Community Facilities.

12.4 Maintenance and Repair of Equipment. Caterer shall be responsible at Caterer's sole cost to perform day to day maintenance, clean up, periodic sterilization and other routine operating procedures with respect to kitchen equipment, food service equipment, food preparation equipment, floor drains, sink drains, equipment drains, and furnishings provided to Caterer by City. City shall perform, or cause to be performed,

non-routine maintenance, repair, or replacement of all such City provided equipment and furnishings. City shall perform, or cause to be performed, maintenance, repair, or replacement of water, gas, or sewer lines and electrical lines to the hook-up stubbing in the SJCCF. City shall pay for the maintenance, repair or replacement of such of water, gas, or sewer lines and electrical lines, provided however, if the negligence of Caterer's agents or employees is determined to be the primary cause for the maintenance, repair or replacement, Caterer shall reimburse City for the cost of such maintenance, repair or replacement.

12.5 Modification, Cleaning and Servicing of Equipment. Caterer shall make no modification to or replacements of any kitchen, food service or food preparation equipment or furnishings without the written consent of the Director. Caterer shall cause the periodic cleaning and servicing of all kitchen, food service and food preparation equipment and furnishings as necessary to keep the equipment in good operating condition and appearance, normal wear and tear excepted.

12.6 Fire Protection Systems. Caterer, at its sole cost and expense, shall be responsible for periodic servicing of fire extinguishers and fire protection systems in the kitchen and food preparation areas and shall ensure that same are kept in a useable, serviceable condition at no cost to City.

12.7 Concession Stands. Any and all temporary concession stands which may be required in addition to those provided by City shall be of first-class quality. Final approval of design and decor rests with the Director.

12.8 Equipment Reserve Account. Each month during the term of this Agreement the Caterer deposit a sum equal to two percent (2%) of the previous month's Gross Revenues (the "Equipment Reserve") in an Equipment Reserve Account maintained by Caterer. The Equipment Reserve shall not be considered to be part of the Catering Fee payable under Section 10.1 of this Agreement, and Equipment Reserve funds deposited by Caterer in the Equipment Reserve Account shall not be

credited or offset against the Catering Fee payable under Section 10.1 of this Agreement. Caterer shall use funds from the Equipment Reserve Account for repair, maintenance, replacement, and addition to Equipment used by Caterer in its Operations at the SJCCF. City shall perform, or cause to be performed, such non-routine repair, maintenance, or replacement as provided in Section 12.4, or as mutually agreed upon by the City and Caterer and approved in writing by the Director. The reserves will be maintained throughout the term of the Agreement in interest-bearing accounts at a local banking organization, selected by City, and approved by the Caterer, in the name of the Caterer and City. Any disbursement of these funds will require the written approval of Director, and City reserves the right to withdraw from any account within the reserve accounts at its discretion, as required to discharge the obligations for which the reserves are maintained, and to cross-over accounts if appropriate.

The Equipment Reserve Account shall not serve to relieve the Caterer of its responsibility for routine maintenance of equipment and facilities as necessary to provide a continuous, high-quality operation as provided in Section 12.4.

Upon the expiration of this Agreement, City shall be entitled to all funds, including any accrued interest, remaining in the Equipment Reserve Account.

12.8.1 Caterer shall prepare and furnish to the Director such records pertaining to the management and maintenance of the Equipment Reserve Account in accordance with the general accounting and auditing provisions of this Agreement.

12.9 Repurchase of Non-Smallwares Equipment and Capital Expenditures. City agrees to repurchase up to \$1,190,674 worth of non-Smallwares Equipment and Capital Expenditures as defined in Section 22.4 upon the Expiration Date or earlier termination date of this Agreement for any cause, to the extent of Caterer's undepreciated value of such Equipment and Capital Expenditures. For purposes of this Section, the Caterer's Equipment and Capital Expenditures shall be

depreciated on a straight line basis over five (5) years, such depreciation to commence at the time of expenditure. Any Equipment and Capital Expenditures which are subject to repurchase and which are acquired subsequent to the execution of this Agreement shall be depreciated as of the date on which such Equipment and Capital Expenditures were acquired for Caterer's use or made by Caterer pursuant to this Agreement. All Equipment and Capital Expenditures shall be approved by the Director before any such items can qualify for repurchase.

SECTION 13 - CLEANING AND MAINTENANCE

13.1 Operating Area and Facility Janitorial. Caterer shall provide janitorial service and shall provide for the removal and disposal of all litter generated at all Operating Areas or any other part of the SJCCF as a result of Caterer's operations under this Agreement. All trash left on banquet tables must be placed in containers by Caterer and disposed of in the Facility trash compactor. All refuse and waste materials created by the Caterer's Operations, excluding those left in seating areas, shall be promptly disposed of during and after each Event by Caterer. Waste Foods will be kept in closed containers until they are removed from the SJCCF. Such removal shall be made promptly during and after each Event. Refuse and waste materials shall be deposited by Caterer in outdoor litter bins provided by City and designated by the Director for use by Caterer.

13.1.1 In addition to the Operating Areas, Caterer shall provide janitorial service for those areas of the SJCCF within a radius of twelve (12) feet of any Operating Area. Caterer shall reimburse City for damage done to floors, walls, windows or other property within this radius by reason of Caterer's operations under this Agreement. Caterer shall employ the necessary personnel before, during, and after the hours of any Event to perform its duties pursuant to this Section 13.1. Caterer shall - ensure that sufficient waste receptacles are provided at each Operating Area and make certain that they are kept clean and promptly serviced during and after each Event.

Caterer shall comply with the City Recycling Program in disposition of its waste and refuse.

13.2 Maintenance of Operating Area/Equipment Removal. Caterer shall not permit its agents, officers, or employees to commit any waste, injury or damage upon any part of the SJCCF or its equipment and appurtenances. At the expiration of this Agreement, Caterer shall leave the Operating Areas and all equipment and appurtenances in the clean condition existing at the commencement of this Agreement, normal wear and tear excepted. Caterer shall not remove any Equipment or improvement, whether or not installed by Caterer, unless requested by City to do so. If City requests the removal of any item installed by Caterer, Caterer shall remove such item at its own expense.

13.3 Pest Control. Caterer shall be solely responsible for a pest free environment within the Operating Areas by maintaining its own pest control services, in accordance with the most modern and effective control procedures. All materials used in pest control shall conform to Federal, State and Local laws and ordinances. All pest control substances utilized shall be used with precautions to obviate the possibility of accidents to humans, domestic animals and pets. Pests referenced above include, but are not limited to, cockroaches, ants, rodents, silverfish, earwigs, spiders, weevils and crickets. Whenever the Director deems that pest control services must be provided to a building or area that include the Operating Areas under this Agreement, Caterer shall pay for the costs of such services provided for the Operating Areas under this Agreement. All food preparation and service areas shall be treated for pests at least once a month, or more, as may be determined by the Director.

13.4 Grease Traps. Caterer, at its sole cost and expense, shall be responsible for the cleaning and servicing of grease traps and drains associated with the kitchen and Caterer's Operations.

SECTION 14 - INSURANCE

14.1 Required Insurance. Prior to commencing any work or Operations under this Agreement, Caterer at its sole cost and expense and for the full Term of this Agreement and all extensions thereof, shall obtain and maintain or shall cause to be obtained and maintained insurance against claims for injuries to persons or damages to property which may arise from or in connection with the activities of Caterer and its agents, employees and contractors, meeting at least the minimum insurance requirements set forth in **EXHIBIT I** on terms and conditions and in amounts as required by City from time to time and with insurers acceptable to City. City shall not be obligated to take out insurance on Caterer's property. Caterer shall provide City with certificates of insurance or copies of all policies and such endorsements as may be required by City.

From time to time at the request of the Risk Manager of the City of San Jose ("Risk Manager"), Caterer shall provide a written statement of the replacement cost of the Caterer's Improvements, with a copy to the Director.

14.2 Waiver of Subrogation. City and Caterer hereby mutually agree that so long as their respective insurance carriers concur, any fire and extended coverage insurance policies carried on properties which are the subject of this Agreement shall include a waiver of subrogation against the other party hereto, provided that such agreement applies only to subsequent loss.

SECTION 15 - BAILEE DISCLAIMER

The parties understand and agree that City in no way purports to be a bailee, and is therefore not responsible in any way for any damage to Caterer's property or the property of Caterer's contractors, agents, employees and invitees.

SECTION 16 - INDEMNITY

16.1 Indemnification. Caterer, for and on behalf of its directors, officers, employees and agents, covenants and hereby agrees to indemnify, defend, protect and hold harmless City, its officers, employees, contractors and agents, from and against any and all claims, demands, damages, obligations, liabilities, losses, costs, expenses, penalties, suits or judgments, at any time received, incurred or accrued by City, its officers, agents, employees, contractors or members of the public using the SJCCF, arising out of or resulting in whole or in part from any act (or failure to act) of Caterer, its officers, employees, contractors, agents, permittees or invitees, or which results from their noncompliance with any Laws respecting the condition, use, occupation or safety of the SJCCF, or any part thereof, or which arises from Caterer's Operations or which arises from Caterer's failure to do anything required under this Agreement, except as may arise from the sole active negligence or the sole willful misconduct of City, its officers, employees or agents. City's right to full indemnity hereunder shall arise notwithstanding that principles of joint, several or concurrent liability or comparative negligence, might otherwise impose liability on City pursuant to statutes, ordinances, regulations or other Laws. This Section shall survive termination of this Agreement.

16.2 Assumption of Risk. Caterer agrees to and covenants that it shall voluntarily assume any and all risk of loss, damage or injury to the person or property of Caterer, its directors, officers, employees, agents, and contractors which may occur in, on, or about the SJCCF at any time and in any manner, except such loss, injury, or damage as may be caused by the sole active negligence or the sole willful misconduct of City, its officers, employees or agents. The indemnification obligations of Caterer shall include the obligation of Caterer to defend, indemnify, protect and hold harmless City, its officers, agents or employees, from and against fines, costs, claims, expenses, damages, obligations, suits, judgments, penalties, proceedings, causes of action, losses, liabilities, costs, or expenses arising under the Americans With Disabilities Act of 1990, which arise from Caterer's activities under this Agreement.

SECTION 17 - WAIVER OF CLAIM

Caterer, as a material part of the consideration to City under this Agreement, hereby specifically waives any and all claims or causes of action which it may now or hereafter have against City, its officers, employees, contractors or agents for any loss, injury or damage for any loss or injury or damage to the goods, wares, Product, equipment or other property of or business operations (including without limitation any interruption thereof), and for injuries to or death of any persons in or about the SJCCF, from any cause or condition (including from any act or omission of any Subcontractor or other occupant or user of the SJCCF) arising at any time, except as shall arise from the sole active negligence or the sole willful misconduct of City, its officers, employees or agents, and notwithstanding that joint, several or concurrent liability or comparative negligence might otherwise impose liability on City or its officers, agents or employees.

SECTION 18 - AMERICANS WITH DISABILITIES ACT

Caterer shall be solely and fully responsible for complying with the Americans with Disabilities Act of 1990 ("ADA") in connection with: (a) the Operating Areas or any portion thereof and its Operations thereon, the Equipment and Caterer's Improvements; (b) removing physical barriers from the Operating Areas; (c) providing auxiliary aids and services for use of Caterer's Improvements and Equipment, where necessary or required; and (d) modifying its policies, practices, and procedures to comply with the ADA. Caterer shall develop a workplan to correct or avoid any violations or non-compliance with the ADA. Caterer shall deliver to the City, upon City's request, a copy of each report and workplan. City's approval of or acceptance of any aspect of Caterer's activities under this Agreement shall not be deemed or construed in any way as a representation that such item, activity or practice complies with the ADA. Caterer agrees to indemnify, defend, and hold the City harmless from any and all costs incurred by City with respect to Caterer's failure to comply with the ADA.

City shall be responsible for complying with the provisions and obligations of the ADA applicable to City in all common areas of the SJCCF. Nothing herein shall relieve Caterer from the obligation to seek and obtain City's consent prior to commencing any construction, alteration or renovation pursuant to Section 22 below.

SECTION 19 - TAXES AND ASSESSMENTS

19.1 Payment by Caterer. Caterer shall pay before delinquency and without notice or demand, any and all taxes (including without limitation any gross receipts income tax or excise tax), charges or penalties which shall be levied, imposed or assessed against the Caterer's Operations, Caterer's property, Caterer's interest in or operation of the Operation or Caterer's Gross Revenues. Any such payment made under this Section shall not reduce the amount of the Catering Fee or any other fee that is required to be paid by Caterer to City under the provisions of this Agreement.

19.2 Possessory Interest Subject to Taxation. Caterer acknowledges that this Agreement is not intended to, but may create a possessory interest in the Operating Areas, and that such interest may give rise to a real estate or possessory interest tax. In that event, Caterer agrees to pay such tax if and when it is due without any credit or offset to the Catering Fee or such other fees, rentals, or charges, that are due and payable to City hereunder.

19.3 Tax - Hold Harmless. Caterer shall protect, defend, indemnify and hold City, including the SJCCF, and any improvements now or hereafter in the Operating Areas, free and harmless from any liability, loss, or damage resulting from any taxes, assessments, or other charges required by this Agreement to be paid by Caterer and from all interests, penalties, and other sums imposed thereon and from any proceedings to enforce collection of any such taxes, assessments, or other charges.

SECTION 20 - NONDISCRIMINATION

Caterer certifies that it shall fully comply with all Federal and State of California laws pertaining to nondiscrimination, and Chapter 4.08 of the San Jose Municipal Code, and shall not discriminate or grant preferential treatment on the basis of age, sex, race, religion, color, creed, disability, ethnicity, sexual orientation, or national origin in connection with or related to the performance of this Agreement. Caterer understands that any such discrimination or preference is in violation of Chapter 4.08 of the San Jose Municipal Code. Caterer shall make efforts to include participation from all segments of the community in connection with or related to the performance of this Agreement.

SECTION 21 - REPRESENTATIONS AND WARRANTIES

Caterer represents, warrants and covenants with respect to this Agreement and any amendment hereto as follows:

21.1 That Caterer has the power and authority to enter into this Agreement with City, that the Board of Directors of Caterer has by corporate resolution approved such power and authority to enter into this Agreement and bind Caterer, or, if not a corporation, by its governing body as demonstrated to Director's satisfaction, that this is properly Agreement shall be executed, delivered and performed by Caterer and shall be binding upon Caterer, and that the individual executing this Agreement is duly authorized to do so.

21.2 That there are no unresolved claims or disputes between Caterer and City.

21.3 That Caterer shall furnish true and accurate financial statements, records, reports, resolutions, certifications, and other information as may be requested of Caterer by City from time to time during the Term of this Agreement.

21.4 That Caterer is in compliance with all local, state, and federal Laws related to Caterer's Operations.

21.5 That Caterer possesses the necessary experience and qualifications to conduct Caterer's Operations at the SJCCF.

21.6 That all information provided to City in connection with City of award of this Agreement, including but not limited to Caterer's Proposal, is true and correct in all material respects.

SECTION 22 - ALTERATIONS AND IMPROVEMENTS

22.1 Caterer's Improvements.

22.1.1 Caterer agrees to install Caterer's Improvements and Equipment in the Operating Areas at its sole cost and expense without any reimbursement from City in accordance with the provisions of the Agreement. In the event that the installation of the Caterer's Improvements will require the removal of any asbestos and asbestos-containing materials, such removal shall be at Caterer's sole cost and expense.

22.1.2 Caterer shall be solely responsible for the proper installation of Caterer's Improvements and Equipment, and shall be liable for any damage or loss to any portion of the SJCCF, which results from the installation or use of Caterer's Improvements or any work related thereto. Caterer shall be solely responsible for the costs of remedying the disturbance or damage including, without limitation, the removal of any asbestos and asbestos-containing materials.

22.1.3 The number and locations of all existing electrical, gas, water, sewer and telephone connections (collectively referred to as "Utility Connections") for the Operating areas are indicated on **EXHIBIT K**, which is attached hereto and incorporated herein. Caterer may install additional Utility Connections to the Concession Areas utilized by the Caterer as it may require at Caterer's sole cost and expense, upon prior approval of Director in accordance with the procedures for installation of Caterer's Improvements in Section 22 of this Agreement. Caterer shall be solely responsible for all costs and expenses for Caterer's installation of additional Utility Connections, including but not limited to all costs and expenses required to bring additional service distribution lines or other connections from any part of the SJCCF to the Concession Areas. The location, relocation and coordination of all utilities and telephone facilities to service the Concession Areas shall be subject to the prior written approval of the Director, in accordance with Section 22 of this Agreement. Caterer shall, upon request by the Director, remove any and all utility connections installed by Caterer and restore the affected areas to their original condition upon expiration or earlier termination of this Agreement. Caterer shall comply with all City, county, state or federal government-mandated energy conservation programs in fulfilling its obligations hereunder. Caterer shall be solely responsible for all utility and telephone charges incurred by Caterer at SJCCF. Any utilities provided by City which are not separately metered and paid for by Caterer directly to the utility provider shall be paid by Caterer to City on a pro-rated basis as established by City.

22.2 Schedule. No later than thirty (30) days after the Award Date, Caterer shall deliver to City an overall construction program for Caterer's Improvements, including a time schedule for the same, which shall be subject to approval by the Director. Such schedule shall, at a minimum, include the following milestones for each Operating Area: (1) phased construction time plan, which provides for continuous food and beverage service at the SJCCF; (2) submission of plans and specifications to City; (3) approval of plans by all required authorities; (4) contractors' bids; (5) construction; and (6) completion date.

22.3 Approval of Plans and Specifications. Caterer shall not construct any of Caterer's Improvements, remove any asbestos or asbestos-containing materials from the Operating Areas, or make any subsequent alterations or additions to Caterer's Improvements, without the prior written approval of the Director. Full and complete plans and specifications for all work, and the time required to complete same, shall be submitted to and receive the written approval of Director before work or construction is commenced. First-class standards of design and construction will be required in connection with all such work, facilities, and improvements. All construction must conform with the plans and specifications as approved by Director and the established architectural design scheme for the SJCCF, and must be subject to City's Department of Public Works "Planning Guide".

22.3.1 Eight (8) copies of plans for all improvements or subsequent changes or alterations shall be given to Director for review prior to commencement of construction. Director after giving his or her final approval, shall return to Caterer one (1) approved copy for its records.

22.3.2 Upon completion of all work, Caterer shall provide to Director two (2) completed sets of as-built drawings and provide a CAD disk if Caterer produces drawings on disk, and a breakdown which shows all costs incurred for such work. Caterer agrees that, upon the request of Director, Caterer will inspect the Operating Areas jointly with Director to verify the "as-built" drawings.

22.4 Capital Investment. Caterer shall make Capital Investments in the Operating Areas in an amount not less than - One Million Dollars \$1,000,000 (the "Capital Investment").

22.4.1 The Capital Investment shall be amortized on a straight line basis over five (5) years, such depreciation to commence at the time of expenditure, as set forth in Section 12.9.

22.4.2 The following Capital Expenditures may be counted toward the Capital Investment:

22.4.2.1 Costs incurred by Caterer for: improvements; furnishings; fixtures (both removable and non-removable); interior walls and doors; plumbing, electrical and mechanical improvements; lighting; wall finishes; ceiling finishes; flooring; removable and non-removable counters; and removable and non-removable equipment that is necessary to the operation of the Operating Areas.

22.4.2.2 Fees and costs payable to Caterer's architects and contractors.

22.4.2.3 City's E&I Fees (as provided in Section 22.6.2).

22.4.2.4 Asbestos abatement costs.

22.4.3 The following capital improvement costs shall not be counted as part of Caterer's Minimum Capital Investment:

22.4.3.1 Caterer's costs for internal design, review, management and oversight of Operating Area construction.

22.4.3.2 Caterer's licensing or franchising costs.

22.4.3.3 Any costs incurred by Caterer for improvements to the office spaces in the Operating Areas.

22.4.4 Any other future renovation and remodeling of Caterer's Improvements which Caterer, at its option, elects to make during the Term shall not be subject to the minimum dollar expenditure requirements as required herein.

22.5 City's Rights. City shall have the right to renovate or remodel any portion of the SJCCF, including any portion of the SJCCF which is contiguous with the

perimeter of the Operating Areas. The provisions of Section 3.4 shall govern any relocation of Caterer's operation due to City's renovation or remodeling of the SJCCF. If possible, City shall exercise such right with a minimum amount of inconvenience to Caterer, and Caterer shall not be entitled to any payment or credit from City if City exercised such right in accordance with this Section.

22.6 General Approvals.

22.6.1 All of Caterer's Improvements, Equipment, and fixtures, including the plans and specifications therefor, constructed or installed by Caterer, its agents, or contractors, shall conform in all respects to applicable statutes, ordinances, building codes, and rules and regulations.

22.6.2 Caterer shall obtain at its sole cost and expense all governmental reviews and approvals (including any approvals of the Director or any other City official), licenses, and permits which are, or may be, required and are necessary to install Caterer's Improvements and/or Equipment and to operate its Operations, including, but not limited to, all plans and specifications, approvals, site development reviews, development permits, and building permits. The costs and expenses which are payable by Caterer to secure these reviews and approvals may include City engineering and inspection fees ("E&I Fees"), and a check in the amount of ten percent (10%) of total estimated cost must be deposited with City with submission of construction plans, as a deposit amount toward payment of such E&I Fees. Caterer shall comply with all conditions, restrictions or contingencies imposed upon, or attached to, the governmental approvals, licenses, and permits described herein.

22.6.3 All work shall be performed only by competent contractors duly licensed under the laws of the State of California and shall be performed pursuant to written contracts with such contractors.

22.6.4 The Director's approval shall not be deemed to include the approval of any other City department or governmental or public entity which Caterer may be required to obtain.

22.7 Removal. During the Term, Caterer shall not remove Caterer's Improvements and/or Equipment, in whole or in part, without the Director's prior written consent. The Director may exercise his or her absolute discretion and condition such consent upon the obligation of Caterer to replace the same by other Improvements or Equipment specified in such consent.

22.7.1 Upon installation, the City shall have title to Caterer's Improvements. However, City shall have the right in the Director's sole discretion to require Caterer to remove any or all Caterer's Improvements upon termination or expiration of this Agreement. Except for Caterer's Equipment purchased by City upon the expiration or termination of this Agreement pursuant to Section 12.9 of this Agreement, Caterer's Equipment shall remain the property of Caterer and shall be removed from the SJCCF upon termination or expiration of this Agreement, unless Caterer obtains Director's written consent to leave Equipment at the SJCCF. Caterer shall ascertain from the Director, at least sixty (60) days prior to the Expiration Date or as soon as possible if this Agreement is terminated: (a) whether City will require Caterer to remove any of Caterer's Improvements and, (b) whether the City will accept Caterer's Equipment, if Caterer desires to leave Caterer's Equipment at the SJCCF.

22.7.2 Any Caterer's Improvements or Equipment left by Caterer at the SJCCF shall be free and clear of any liens and Caterer shall execute any documents conveying title to City, at City's request. Any removal shall be at Caterer's sole cost and expense. In the event of an early termination of this Agreement by City for cause, the Director shall give notice of removal of Caterer's Improvements, if removal is required by City. Removal shall occur within thirty (30) days following Caterer's receipt of such notice, but in no event later than the Expiration Date or earlier termination date.

22.7.3 In the event Caterer fails to remove or expresses an intention not to remove any of Caterer's Improvements and/or Equipment required to be removed by the Director pursuant to this Section 22, City may enter upon the Operating Areas and remove such Caterer's Improvements or Equipment at the sole cost and expense of Caterer. Caterer agrees to promptly reimburse City for all costs and expenses of removal, plus ten percent (10%) thereof for administrative overhead as such percentage is approved and established from time to time by the City Council. The obligation to reimburse City for such expenditures shall survive the termination of this Agreement. Any receipt showing payment by City of expenditures associated with the removal of Caterer's Improvements and/or Equipment shall be prima facie evidence that the amount of such payment was necessary and reasonable and made by City on Caterer's behalf.

22.7.4 Caterer shall repair at its sole cost and expense any and all damage to the Operating Areas, the SJCCF or any part of the SJCCF occasioned by the removal of Caterer's Improvements and/or Equipment from the Operating Areas or any other area of the SJCCF, and shall leave all of the remaining Improvements in good and clean condition and repair, ordinary wear and tear excepted, and shall appropriately "cap off" all utility connections. City may also require Caterer to remove any and all special Equipment and any installations which are unique to Caterer, and Caterer shall comply with such requirement.

22.8 Liens. Caterer shall keep the Operating Areas and the SJCCF free of any liens arising out of the work performed, materials furnished or obligations incurred by Caterer in the performance of any construction or installation of Caterer's Improvements or Equipment. Caterer shall notify City at least ten (10) days prior to the commencement of any work to be performed or materials to be furnished on the Operating Areas which could give rise to any such lien, and City shall have the right to post and keep on the Operating Areas any notices that may be required by law or which City may deem proper for the protection of City, the SJCCF, or the Operating Areas from such liens.

22.9 Payment Bond. Prior to the commencement of any construction, betterment, improvement, alteration, addition, repair, demolition or reconstruction of Caterer's Improvements or the Operating Areas by Caterer or its contractor, Caterer or its contractor shall furnish to City, and without expense to City, a payment bond pursuant to California Civil Code Sections 3247, 3248 et. seq. Such bond shall name Caterer or Caterer's contractor or contractors as principals, and the City as obligee. Caterer shall provide a payment bond equal to one hundred percent (100%) of the total amount of the contract or contracts for the construction, alteration, demolition or repair of the improvements and facilities. The bond shall guarantee the prompt payment to all persons named in California Civil Code Section 3181, amounts due under the Unemployment Insurance Code and amounts required to be deducted, withheld or paid over to the Employment Development Department from the wage of employees of the contractor and subcontractors pursuant to Section 13020 of the Unemployment Insurance Code and reasonable attorneys' fees. Prior to commencement of any work requiring a bond, the bond shall be approved by the City Attorney and filed with the City Clerk. Immediately upon completion of any work or improvements, Caterer shall record in the office of the Santa Clara County Recorder a notice of completion complying with the requirement of California Civil Code Section 3093.

SECTION 23 - DEFAULT BY CATERER

In addition to the other defaults specified in this Agreement, the Director may determine in the Director's sole discretion that Caterer is in default under this Agreement if:

23.1 Caterer fails duly and punctually to pay the Catering Fee, or to make any other payment required hereunder, when due to City; or

23.2 Caterer becomes insolvent, or takes the benefit of any present or future insolvency statute, or shall make a general assignment for the benefit of creditors, or file a voluntary petition in bankruptcy, or a petition or answer seeking an arrangement for its reorganization, or the readjustment of its indebtedness under the Federal

bankruptcy laws, or under any other law or statute of the United States or of any State thereof, or consent to the appointment of a receiver, trustee, or liquidator of any or substantially all of its property; or

23.3 A petition under any part of the Federal bankruptcy Laws, or an action under any present or future insolvency Law or statute, is filed against Caterer and shall not be dismissed within thirty (30) days after the filing thereof; or

23.4 The interest of Caterer under this Agreement shall be transferred, by reason of death, operation of law, assignment, sublease or otherwise, to any other person, firm or corporation; or

23.5 Caterer shall fail to install the Equipment and Caterer's Improvements in compliance with the Schedule as provided in Section 22 above; or

23.6 Caterer's Operations shall be repeatedly unavailable at the SJCCF; or

23.7 Caterer fails to keep, perform and observe each and every other promise, covenant and agreement set forth in this Agreement, and such failure shall continue for a period of more than ten (10) days after delivery by Director of a written notice of such breach or default, except where fulfillment of its obligation requires activity over a period of time, in excess of ten (10) days and Caterer shall have commenced in good faith to perform whatever may be required for fulfillment within ten (10) days after receipt of notice and continues such performance without interruption except for causes beyond its control.

SECTION 24 - CITY'S REMEDIES

24.1 Termination. In the event that Caterer fails to cure any default within ten (10) days after Caterer's receipt of notice from City, City shall have the right, at City's election, to terminate this Agreement. City may terminate this Agreement on account of

Caterer's default by giving Caterer written notice of termination, in which event this Agreement shall terminate on the date set forth for termination in such notice. Any termination under this paragraph shall not relieve Caterer from the payment of any sums then due to City or from any claim for damages or fees previously accrued or then accruing against Caterer. In no event shall City have any obligation to Caterer, financial or otherwise, as a result of the termination of this Agreement following a default.

24.2 Damages. In the event City elects to terminate this Agreement, Caterer shall pay to City all amounts owing at the time of termination on account of Caterer's breach of any term, covenant or condition of this Agreement including but not limited to unpaid fees plus interest thereon on all such amounts from the date due until paid at the rate of the lesser of one percent (1%) per month or the maximum rate then allowed by law; and any other amount to compensate City fully for all detriment proximately caused by Caterer's failure to perform its obligations hereunder or which in the ordinary course would likely result therefrom.

24.3 Liquidated Damages. Caterer understands and agrees that one of City's primary goals in granting the Catering and Concession rights at the SJCCF is to ensure that customer service provided at the SJCCF is of the highest caliber and is consistent with the image that the City wants to project to its users and visitors. Caterer further agrees that City will suffer damage if Caterer fails to meet these standards and that, due to the nature of certain breaches, the actual damage to the City would be impractical or very difficult to remedy.

Caterer and City agree that the amounts set forth in subsection 24.3.1 below, shall be paid to City as liquidated damages if Caterer breaches the performance standards specified in such subsection 24.3.1. Caterer and City acknowledge that City's actual damages in the event of a breach of such performance standards would be impractical or very difficult to determine. City and Caterer expressly acknowledge and affirm that the amounts set forth in subsection 24.3.1 below have been agreed upon as the parties' reasonable estimate of City's damages in the event of such breach. City's acceptance

of any liquidated damages as a result of a performance standard breach shall not prevent City from exercising any other right or remedy for default available to City under this agreement.

24.3.1 Performance Standard Breaches The following specified breaches shall be referred to as "Performance Standard Breaches". Caterer agrees to pay to City the amount specified below as liquidated damages for the applicable breach.

24.3.1.1 Concession site(s) not open during scheduled hours: \$25.00 per occurrence.

24.3.1.2 The number of verbal and written customer complaints exceeds five (5) in any one calendar month period: \$100.00 per occurrence; \$25.00 per each complaint exceeding four (4) complaints in any one calendar month period.

24.3.1.3 Operating Areas not clean, improperly or poorly stocked: \$25.00 per occurrence.

24.3.1.4 Health code citations: \$100 for each citation issued by the Health Department; \$25.00 per day each citation is not corrected.

24.3.1.5 Any reports required under this Agreement not received by the required date: \$25.00 per occurrence and \$25.00 for each twenty-four (24) hour period thereafter until any such reports are received by City.

24.3.1.6 Caterer personnel are not in 'designated' uniform/attire when working at Catering or Operating Areas: \$25.00 per occurrence after one (1) warning in any one calendar month period.

24.3.1.7 Failure to post visible (from exterior of Operating Areas) hours of operations: \$25.00 per occurrence after one (1) warning in any one calendar month period.

24.3.1.8 Menu/Product price adjustments or Menu/Product removals not accomplished within the time frame prescribed by the Director or his or her designee: \$100.00 per occurrence.

24.3.1.9 Failure to comply with the Wage Requirements of the Living Wage Policy set out in Section 7 of this Agreement: \$25 per Covered Employee for each week that the Prevailing Wage or Living Wage, as applicable, is not paid.

24.3.2 Procedure for Declaring Performance Standard Breaches Except as otherwise provided for Prevailing Wage and Service Worker Retention, the determination as to whether Performance Standards have been met is at the reasonable discretion of the Director or his or her designee.

24.3.2.1 Upon determining the existence of a Performance Standard Breach, the Director shall issue a written notice to Caterer of the occurrence of such breach and the City's claim for liquidated damages.

24.3.2.2 The notice of Performance Standard Breach shall become final unless the Director receives from Caterer no later than ten (10) calendar days after the date of the notice of Performance Standard Breach is received by Caterer, a written statement from Caterer, with Caterer's evidence that the breach did not occur. Director shall review such evidence and determine, in his reasonable discretion, whether Caterer has demonstrated that the breach did not occur.

24.3.2.3 The Director shall review the Caterer's evidence as soon as reasonably possible after timely receipt of such evidence.

24.3.2.4 The Director shall render a decision sustaining or reversing the determination that a breach occurred and the claim for liquidated damages. A written notice of decision shall be delivered to the Caterer.

24.3.2.5 If such written evidence is not received by the Director within ten (10) calendar days of the date of the notice of Performance Standard Breach, the Director's determination shall be final and the applicable liquidated damages shall be immediately due and payable.

24.3.2.6 Upon expiration of the period for Caterer to deliver its written evidence or upon Director's determination that a breach occurred after reviewing Caterer's written evidence as provided above, Caterer agrees to immediately pay City the liquidated damages amount. Caterer further agrees that the Director may, at his or her option, deduct the amount of such liquidated damages from any deposit or performance guarantee provided by Caterer, without further notice to Caterer.

24.4 No Waiver by City. The acceptance of any fee or charge hereunder by City shall not be deemed to be a waiver of any preceding violation by Caterer of any provision of this Agreement, other than the failure of Caterer to pay the fee or charge so accepted, regardless of City's knowledge of such preceding or subsequent violation at the time of acceptance of such fee or the waiver of any other right or remedy allowed in law or in equity. The consent or approval by City to any act of Caterer requiring City's approval shall not be deemed to waive or render unnecessary the need for City's consent to or approval of any subsequent similar act of Caterer.

24.5 City's Right to Cure. In the event that Caterer fails to cure any default within the period provided in Section 24.1 of this Agreement, City may, at City's election, after first giving Caterer written notice, cure any default in the payment of money or performance of any act required under this Agreement, but without any obligation of City to make such payment or perform such act and without waiving any rights of City or relieving Caterer from any obligation under this Agreement. All

amounts incurred by City, plus ten percent (10%) thereof for administrative overhead as such percentage is approved, established or modified from time to time by the City Council, and all penalties, interest, and costs in connection therewith shall be due and payable by Caterer to City on demand together with interest thereon at the rate of one percent (1%) per month or the maximum rate then allowed by law from the date paid by City, plus any collection costs. The receipt for any payment by City on behalf of Caterer shall be prima facie evidence that the expense incurred was necessary and reasonable and that such expense was incurred by City on behalf of Caterer.

SECTION 25 - ACCEPTANCE OF OPERATING AREAS

25.1 Caterer has carefully examined the Operating Areas and is satisfied with their current condition. Caterer acknowledges that no representation or warranty has been made by City concerning the nature, quality or suitability for Caterer's business of the Operating Areas or the SJCCF, or the existence of any Hazardous Materials in, on, upon, under or about the Operating Areas or the SJCCF, and Caterer acknowledges that it shall have no rights against City by reason of such matters or any claimed deficiencies therein. Caterer accepts the Operating Areas "as is", and as being in good, safe and sanitary condition satisfactory for Caterer's use.

25.2 Caterer acknowledges that City has made no representations or warranties with respect to the Operating Areas, the SJCCF or this Agreement except as expressly set forth in this Agreement, and no rights, easements or licenses, implied or otherwise, are or shall be acquired by Caterer unless expressly set forth in this Agreement.

SECTION 26 - RIGHT TO ENTER

City reserves the right to enter the Operating Areas at any and all times for any purpose and the right to inspect Caterer's Improvements and Equipment.

SECTION 27 - ASSIGNMENT

27.1 No Encumbrance. Caterer shall not mortgage, pledge, encumber, or otherwise hypothecate this Agreement, its Operations or any interest of Caterer therein, voluntarily or involuntarily, or by operation of law.

27.2 Prohibition on Assignments, Transfers or Sublease. Caterer shall not assign, sublease, transfer or convey the rights of Caterer under this Agreement, Caterer's Improvements, the Equipment or its Operations without the prior written consent of City, which City may withhold in its sole and absolute discretion. Any attempted transfer shall be void.

SECTION 28 - PROHIBITION ON GIFTS

28.1 Caterer is familiar with City's prohibition against the acceptance of any gift by a City officer or designated employee, which prohibition is found in Chapter 12.08 of the San Jose Municipal Code.

28.2 Caterer agrees not to offer any City officer or designated employee any gift prohibited by said Chapter.

28.3 The offer or giving of any gift prohibited by San Jose Municipal Code Chapter 12.08 shall constitute a material breach of this Agreement by Caterer. In addition to any other remedies City may have in law or equity, City may terminate this Agreement for breach as provided in Section 24.1 of this Agreement.

SECTION 29 - HAZARDOUS MATERIALS - PROHIBITIONS AND RESTRICTIONS

Caterer shall at all times comply with the provisions of this Agreement, including those provisions of **EXHIBIT J**, regarding Hazardous Materials.

SECTION 30 - MISCELLANEOUS

30.1 Consent. Whenever in this Agreement the approval or consent of a party is required, such approval or consent shall be in writing and shall be executed by a person having the express authority to grant such approval or consent.

30.2 Director's Consent. The Director shall act reasonably and in good faith in exercising any power to approve, disapprove or consent to any action of Caterer pursuant to this Agreement, and the Director shall not arbitrarily or capriciously exercise any such power granted to the Director under this Agreement.

30.3 Controlling Law. Except as federal law may apply, the parties agree that this Agreement shall be governed and construed by and according to the laws of the State of California.

30.4 Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be an original, but all of which together shall constitute one and the same instrument.

30.5 Entire Agreement. This instrument contains all of the agreements and conditions entered into and made by and between the parties and may not be modified orally, or in any manner, other than by an agreement in writing signed by all the parties hereto or their respective successors-in-interest.

30.6 Force Majeure. Neither party shall be deemed to be in default on account of any Unavoidable Delay or failure to perform its obligations under this Agreement which results from an act of God, acts of superior governmental authority, a strike, a boycott, a shortage of items, or any other cause beyond the reasonable control of such party.

30.7 Gender. Any reference to the masculine gender shall be deemed to include references to the feminine or neuter gender.

30.8 Headings. The paragraph headings are not a part of this Agreement and shall have no effect upon the construction or interpretation of any part of the Agreement.

30.9 Resolutions. Caterer shall submit a copy of any corporate resolution, if requested by City, which authorizes any director or officer to act on behalf of Caterer or which authorizes Caterer to enter into this Agreement.

30.10 Severability. If a court of competent jurisdiction finds or rules that any Provision of this Agreement is void or unenforceable, the remaining Provisions of this Agreement shall remain in effect.

30.11 Successors and Assigns. The provisions of this Agreement shall, subject to the provisions of this Agreement concerning transfer, apply to and bind the successors and assigns of the parties hereto.

30.12 Time of Essence. Time is of the essence of this Agreement and each of its Provisions.

30.13 Venue. In the event that suit shall be brought by either party hereunder, the parties agree that trial of such action shall be vested in the state courts of California in the County of Santa Clara or in the United States District Court in the Northern District of California.

30.14 Caterer not an Agent of City. Caterer is not an agent, contractor or employee of City and nothing in this Agreement nor any action of Caterer shall be construed in any way to constitute Caterer as an agent, contractor or employee of City for any purpose.

30.15 Joint and Several. If there be more than one Caterer designated in or signatory to this Agreement, the obligations hereunder imposed upon Caterer shall be joint and several; and the term Caterer as used herein shall refer to each and every of said signatory parties, severally as well as jointly.

30.16 Material Considerations. Each and every term, condition, covenant and provision of this Agreement is and shall be deemed to be a material part of the consideration for City's entry into this Agreement, and any breach hereof by Caterer shall be deemed to be a material breach. Each term and provision of this Agreement performable by Caterer shall be construed to be both a covenant and a condition.

30.17 Exhibits and Addenda. All exhibits and addenda referred to herein, and any exhibits or schedules which may from time to time be referred to in any duly executed amendment thereto, are by such reference incorporated herein and shall be deemed a part of this Agreement as if set forth fully herein.

30.18 No Assumption. The review, approval, inspection, examination or consent of City of or to any item to be reviewed, approved, inspected, examined or consented to by City shall not constitute the assumption of any responsibility by City for either accuracy or sufficiency of any item or the quality or suitability of such item for its intended use, but rather for the sole purpose of protecting City's interests. No third parties, including Caterer or persons claiming under Caterer, shall have any rights hereunder resulting therefrom or otherwise.

30.19 Hold Harmless. Caterer shall defend, indemnify and hold City harmless from and against claims for any broker's commissions, finder's fee or other commission or fee relating to the execution of this Agreement by anyone claiming by or through Caterer.

SECTION 31 - NOTICES

All notices which are required to be given by either party shall be in writing and shall be deemed to have been fully given when either delivered personally or deposited in the United States mail, postage prepaid, or otherwise to the following addresses or to any other address as subsequently noticed in writing by either party as follows:

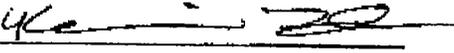
To City: City of San Jose
San Jose McEnery Convention Center
408 South Almaden Boulevard
San Jose, CA 95110-2715
Attention: General Manager

To Caterer: Service America Corporation d/b/a Volume Services America
201 East Broad Street
Spartanburg, South Carolina, 29306

Copy to: Volume Services America
408 South Almaden Boulevard
San Jose, CA 95110-2715
Attention: General Manager

IN WITNESS WHEREOF, the parties hereto have executed this Agreement by their authorized officers on the dates set forth below.

APPROVED AS TO FORM:

By: 
Kevin Fisher
Deputy City Attorney

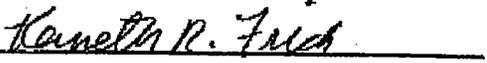
"CITY"

CITY OF SAN JOSE, a municipal corporation

By: 
Name: Jennifer A. Maguire
Title: Assistant to the City Manager

"CATERER"

Service America Corporation
d/b/a Volume Services America

By: 
Name: Kenneth R. Frid
Title: V.P.

Appendix III(i)

UTILITY SERVICES AGREEMENT

THIS AGREEMENT, dated this _____ day of _____, 2003, is made and entered into by and between the

CITY OF SAN JOSE ("City")

A
N
D

[ADD CONTRACTOR'S FULL LEGAL NAME] ("Contractor")

WHEREAS, City owns and operates the San José McEnery Convention Center, Parkside Hall, and Civic Auditorium (the "Convention Facilities") located at Almaden Boulevard and West San Carlos Street, San José, California;

WHEREAS, Contractor desires to provide Utility Services, as defined below, to the event promoter ("Client") who has entered into a Facility Use Agreement with the City, and to Client's exhibitors, vendors, contractors, subcontractors and other persons (collectively, the "Event Participants") authorized to use the Convention Facilities during Client's Event; and

WHEREAS, Contractor must use the Convention Facilities in order to provide such Utility Services.

NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. DEFINITIONS

1.1 "Agreement Documents" shall consist of this Agreement and the documents forming the Agreement between City and Contractor including:

- Exhibit A – Summary Page form
- Exhibit B – Insurance Requirements

In the event any discrepancies or inconsistencies between the provisions of this Agreement and any of the above-referenced documents arise, the provisions of this Agreement will prevail. This Agreement and the Exhibits set forth above, contain all of the agreements, representations and understandings of the parties hereto, and supersede and replace any previous understandings, commitments, or agreements, whether oral or written.

1.2 "Director" shall mean the person designated Director of Conventions, Arts & Entertainment by City or such person, division, department, bureau or agency as may be

designated by the City Council or City Manager from time to time to exercise functions equivalent or similar to those now exercised by the Director of Conventions, Arts & Entertainment; the term also includes any person expressly designed by the Director of Conventions, Arts & Entertainment to exercise rights and/or obligations empowered in the "Director" under this Agreement.

1.3 "Environmental Laws" shall mean all federal, state, and local laws, statutes, ordinances, regulations, resolutions, decrees, and/or rules now or hereinafter in effect, as may be amended from time to time, and all implementing regulations, directives, orders, guidelines, and federal or state court decisions, interpreting, relating to, regulating or imposing liability (including, but not limited to, response, removal, remediation and damage costs) or standards of conduct or performance relating to industrial hygiene, occupational, health, and/or safety conditions, environmental conditions, or exposure to, contamination by, or clean-up of, any and all Hazardous Materials, including without limitation, all federal or state superlien or environmental clean-up statutes.

1.4 "Event" shall mean the convention, trade show, conference or other function as described in a Summary of Terms of Facility Use Agreement (a "Summary Page"), the form of which is attached hereto as Exhibit A. "Show Days" shall mean the days on which a particular Event takes place. "Move-in Days" shall mean the move-in and set up days prior to an Event. "Move-out Days" shall mean the disassembly and move-out days after an Event. The Show Days, Move-In Days and Move-Out Days identified in a Summary Page shall be collectively referred to as "Event Days."

1.5 "Gross Revenue" shall mean any revenues payable to Contractor in cash in United States or foreign currency, by electronic transfer, by personal check or bank cashier's check or other form of negotiable instrument, or on credit, whether or not collected by Contractor either directly or indirectly (subject to Section 4.8), less any and all federal, state, county, municipal or other sales or use tax now or hereinafter imposed and less any legitimate refund made to Client and/or Event Participants by Contractor for Utility Services, for any Utility Services rendered directly or indirectly by Contractor to a Client or Event Participant in connection with an Event either at or from the Convention Facilities. Contractor shall be solely responsible for the collection of all Gross Revenue.

1.6 "Hazardous Materials" shall mean any and all (a) substances, products, by-products, waste, or other materials of any nature or kind whatsoever which is or becomes listed, regulated or addressed as pollution or contamination under any Environmental Laws, and (b) any materials, substances, products, by-products, waste, or other materials of any nature or kind whatsoever whose presence in and of itself or in combination with other materials, substances, products, by-products, or waste may give rise to liability under any Environmental Law or any statutory or common law theory based on negligence, trespass, intentional tort, nuisance, strict or absolute liability or under any reported decisions of any state or federal court; and (c) any substance, product, by-product, waste or any other material which may be hazardous or harmful to the air, water, soil, environment or affect industrial hygiene, occupational, health, safety and/or general welfare conditions including, without limitation, petroleum and/or asbestos materials, products, by-products, or waste.

1.7 "Utility Services" shall mean labor, equipment and materials in connection with electrical, air, water, and drain services whether by lease, rental or sale provided to Event Participants, including but not limited to labor, materials, equipment for temporarily distributed utility connections to production power, production support, show graphics and rigging for (i) show management areas, (ii) kiosks, (iii) exhibit booths, (iv) meeting rooms, (v) exhibit halls, (vi) show offices, (vii) registration areas, and (viii) any other Event Areas. Utility services does not include rental or labor of theatrical and overhead lighting, which includes but is not limited to rentals of electric hoists, truss, truss lighting, lighting controls, lifts, cable and the labor to install those items, but does include connections to production power.

1.8 "Manager" shall mean the person designated City Manager by the City Council, or any person expressly designated by the City Manager to exercise rights and/or obligations empowered in the "Manager" under this Agreement.

2. CONTRACTOR PERMITTED TO PROVIDE UTILITY SERVICES

2.1 City hereby agrees to permit Contractor on a non-exclusive basis upon the terms and conditions of this Agreement, to enter upon the premises and utilize the Convention Facilities for the Event as described on a Summary Page (Exhibit A) solely for the purposes of providing Utility Services to Client and Event Participants during Client's Event.

2.2 The Contractor hereby represents and covenants that, with respect to any show or Event at the convention center to which this contract applies:

- (a.) The Contractor will only be compensated for contracted Utility Services pursuant to a previously agreed upon schedule of fees which will not be increased or decreased based upon the financial success or failure of any show or Event and will not be based upon revenues or profits received by the manager or organizer of the show or Event, of exhibitors, concessionaires, or of any other trade or business associated with the show or Event.
- (b.) The Contractor will not share, directly or indirectly, in any profits of any person or entity connected to the show or Event.

3. TERM OF AGREEMENT

The term of this Agreement shall be for one year commencing on July 1, 2003 and ending on June 30, 2004 (the "Initial Term"), unless and until sooner terminated in accordance with Section 17 of this Agreement. The City Manager shall have the option to extend the Initial Term of this Agreement for an additional year ("Extension Term"), upon the same terms and conditions set forth in this Agreement. The City Manager shall exercise the option by providing Contractor with written notice at least sixty (60) days prior to the expiration of the Initial Term of the Agreement. The Initial Term and any Extension Term are collectively referred to herein as the "Term."

4. COMMISSION

4.1 Subject to Section 4.3, in consideration of being permitted to enter the premises of the Convention Facilities to provide Contractor's Utility Services, Contractor agrees to pay City a commission equal to twenty-five percent (25%) of the Gross Revenue for outlets and twenty five percent (25%) for materials and fifteen percent (15%) for labor billed by Contractor to Client and Event Participants for Utility Services provided at an Event.

4.2 Subject to Section 4.3, Contractor may offer Event Participants several types of services, labor, material and equipment bundled together at an all inclusive rate (commonly referred to as a "Booth Package"). If Utility Services are provided as part of a Booth Package, the Contractor agrees to pay City twenty-five percent (25%) of the Gross Revenue for outlets and twenty five percent (25%) for materials and fifteen percent (15%) for labor billed for the Utility Services portion of each Booth Package calculated as follows:

- (i) If the Contractor's rate sheet for the Event does not identify a price for the type of Utility Service provided, then Contractor's standard rate or most recently published rate for the same or similar Utility Service shall be the applicable rate.

4.3 In lieu of paying the Commission pursuant to Sections 4.1 and 4.2, Contractor agrees to pay the City a commission equal to twenty percent (20%) of the Gross Revenue for outlets and materials billed by Contractor to exhibitors for Utility Services (as defined above) used at an Event held in years 2003 through 2005 where Contractor had quoted to the show manager of such Event in writing prior to May 31, 2003 exhibitor rates for Utility Services, excluding specifically labor from this definition for the purposes of this section, whether or not as part of a show management-provided package, based on this twenty percent (20%) commission structure, which was the applicable commission structure prior to the effective date of this Agreement. Contractor will submit to the Manager a list of Events, in writing, that are subject to this Section 4.3 by July 1, 2003.

4.4 Contractor shall pay City the commission owed for an Event not later than sixty (60) days after the final Move-Out Day of the Event as set forth in the Summary Page whether or not Contractor has received payment for its Utility Services. Payment shall be mailed or delivered to:

San José McEnery Convention Center
408 S. Almaden Boulevard
San José, CA 95110
Attention: Accounting Office

Checks are to be made to the "City of San José". If payment is not remitted to City within this period, Contractor agrees to pay City a late payment fee equal to one percent (1%) of the amount that is late calculated monthly for each month or part of thereof that payment is not timely received by City. City assessment of the late payment shall be in addition to any other remedies City may have in law or in equity.

4.5 Contractor agrees to provide City with the following information for each Event where Contractor owes a commission pursuant to Section 4.1:

- (i) A summary report of all Utility Services ordered and the expected revenue for such orders ("Summary Report"), mailed or delivered no later than the first Move-in Day of such Event to:

San José McEnergy Convention Center
408 S. Almaden Boulevard
San José, CA 95110
Attention: Accounting Office

- (ii) A detailed floor plan and list of all Utility Services to be provided by location, party billed, and booth number for that Event, mailed or delivered, no later than the first day of the Event, to the address below. City acknowledges that the detailed floor plan does not accurately reflect the revenue billed for Utility Services and that the reports submitted by Contractor pursuant to clauses (iii), (iv) and (v) of this Section would provide more accurate details regarding the Utility Services than a detailed floor plan.

San José McEnergy Convention Center
408 Alandén Boulevard
San José, CA 95110
Attention: Electrical Services

- (iii) An updated to date Summary Report, mailed or delivered no later than the last Move-Out Day to:

San José McEnergy Convention Center
408 S. Almaden Boulevard
San José, CA 95110
Attention: Electrical Services Manager

- (iv) An updated to date Summary Report, mailed or delivered no later than 30 days after the last Move-Out Day to City's Electrical Services Manager at the same address as provided upon in clause (ii).

- (v) An updated to date Summary Report containing a complete and accurate accounting of the Gross Revenue billed for Utility Services by type of service, mailed or delivered no later than sixty (60) days after the final Move-Out Day to:

San José McEnergy Convention Center
408 S. Almaden Boulevard
San José, CA 95110

Attention: General Manager

4.6 By the tenth of each month, Contractor shall furnish to City a projection of commission revenues to be paid to City for the next sixty (60) days including information on Events already contracted, and projections of future sales to be used by City for revenue projection and budgetary purposes. City understands that Contractor makes no warranty as to the accuracy of such forward-looking projections. This report should contain a brief summary of the assumptions used to develop the commission projection, and be mailed or delivered to:

San José McEnery Convention Center
Attention: Finance Department
408 Almaden Blvd
San José, CA 95110

4.7 Notwithstanding any right or remedy available to City, Contractor's obligation to pay Gross Revenue to City, shall survive the expiration or earlier termination of this Agreement.

4.8 Contractor may credit the dollar amount of the commissions attributable to uncollected debts against the total amount of the commissions, but not more than a maximum of one and one-half percent (1.5%), during each full year of this Agreement. Such credit adjustment shall be made as soon as possible after the end of each contract year. If any credited debt is later collected in whole or in part, then the Contractor will pay the appropriate commission pursuant to the provisions of Section 4, net of collection expenses, to City promptly after collection. If this Agreement is not renewed at the end of the contract year, and a full credit adjustment cannot be made on the outstanding commissions owing to City at the end of the contract year, then City agrees to remit to Contractor an amount equal to the portion of the credit not taken on the outstanding commissions owing.

5. PERFORMANCE OF UTILITY SERVICES

5.1 Disposal of Hazardous Materials at the Convention Facilities is strictly prohibited. Upon becoming aware of any release of a Hazardous Material at the Convention Facilities, the Contractor shall immediately report such release to City. The Contractor shall immediately report the release of any Hazardous Material to the City to which Contractor has knowledge of regardless of whether the quantities released would not be otherwise reportable to another public entity pursuant to Environmental Laws. This reporting obligation exists with regard to any release of Hazardous Material within the Convention Facilities and is not limited to releases of those Hazardous Materials used by the Contractor. The use and storage of Hazardous Materials by the Contractor in the Convention Facilities is prohibited except:

Contractor may store and use Hazardous Materials in the Convention Facilities in a safe and prudent manner and in accordance with the requirements of all applicable Environmental Laws, those kinds and quantities of Hazardous Materials that are normally used in conducting the activities permitted under this Agreement. Contractor shall provide Director with a copy of any application for a permit for use or storage of Hazardous Materials in the Convention Facilities from any regulatory agency responsible

for enforcement of Environmental Laws, and shall also provide a copy of any permit received from such agency.

5.2 Contractor shall maintain in good standing Contractor's state contractor's license and Contractor shall obtain and pay for all licenses and permits necessary or required for providing Utility Services, all of which must be kept current by Contractor for the term of this Agreement. A copy of Contractor's current C-10 license shall be furnished to the City upon execution of this Agreement. Contractor shall immediately inform City in writing of the expiration or suspension of its state contractor's license or any other regulatory license or permit required for Contractor to engage in the activities contemplated by this Agreement. In addition, Contractor shall pay any and all possessory interest, property, and any other applicable licenses and taxes, if any.

5.3 Contractor shall comply with the rules and regulations of the Convention Facilities, including all directives issued by the Director relating to correcting a problem associated with the Utility Services provided to the Client and/or Event Participants at the Convention Facilities. Contractor shall not consider City's failure to provide directions as an excuse from operating in a professional, efficient and effective manner consistent with industry standards.

5.4 Contractor shall, at its sole expense, maintain a complete inventory of equipment and supplies adequate for rendering effective Utility Services to customers at Events. All equipment must meet Occupational Safety and Health Administration and all other applicable City, State and Federal Safety Standards and electrical and plumbing code requirements. Equipment used to provide Utility Services shall be maintained in a safe condition and in a good state of repair.

5.5 Contractor shall furnish and use the following forms:

- (a) Electrical and Plumbing Order Form;
- (b) Work Order Form for use by Contractor's job supervisors;
- (c) Invoices for customer billings; and
- (d) Such other forms as may be deemed necessary by the Director of the Convention Facilities from time to time.

The procedures to be followed when using the above-listed forms shall be as follows:

- (i) Electrical and Plumbing Order Form: Contractor shall require that the Client and Event Participants execute this form when they order services.
- (ii) Work Order Form: A true copy of the Work Order Form shall be completed for each Electrical and Plumbing Order Form.

5.6 Contractor's listed rates shall include the commission payable to City, and Contractor shall not state or refer to the commission on any order form, invoice, or other document provided to the Client or Event Participants.

5.7 Contractor shall employ, properly train, and closely supervise its employees and subcontractors ("personnel") and shall ensure that Contractor has a sufficient number of personnel with the appropriate qualifications to provide all Utility Services appropriate for the Event, including planning and execution of all work orders for Utility Services. Contractor's personnel shall at all times, consistent with industry standards, be neat, clean, and in uniform, and shall be polite, courteous, and professional while at the Convention Facilities. The City reserves the right to remove any of Contractor's personnel if in the opinion of the Director, Contractor's personnel poses a threat to the safety of patrons of the Convention Facilities or employees, or is otherwise not performing in a professional manner. Contractor's personnel shall wear photo identification badges with their names clearly imprinted thereon.

5.8 Contractor shall ensure that all of its personnel have and maintain all of the appropriate licenses and/or certifications required by any local, state and/or federal law or by the trade for which Contractor's personnel are providing Utility Services.

5.9 Contractor shall assign a manager and an alternate to oversee Utility Services provided at the Convention Facilities. Contractor shall assign and maintain a qualified electrician and/or plumber, as applicable, at the Convention Facilities at all times during the Event Days specified in a Summary Page for an Event unless waived in writing in advance by the Director. If the City in its discretion determines it is necessary to correct faulty, or defective, or incomplete work or repair damage caused by Contractor, and Contractor has not promptly remedied the problem after receiving a written report from the City (except in the case of an emergency, as reasonably defined by the City, where no opportunity to cure is required), the City will invoice Contractor within thirty (30) days of incurring such expense. Contractor agrees to pay City's invoice within thirty (30) days of receiving the invoice.

5.10 Contractor shall not engage in any activity, or permit any of its officers, agents, contractors (including independent contractors), subcontractors, exhibitors, registrants and other persons attending the Event, to engage in any activity, which (i) will obstruct or interfere with the rights of any other user of the Convention Facilities or otherwise interfere with free access to and from the Convention Facilities, unless authorized by the Director, (ii) will cause damage to the Convention Facilities, or (iii) is prohibited by a standard form of fire insurance policy, or (iv) will in any way increase or affect the then existing rate of any fire or other insurance at the Convention Facilities.

5.11 The Convention Facilities and any equipment used by Contractor shall each be in at least as good condition and repair as before Contractor's use thereof, except for ordinary wear and tear. Contractor shall be charged a fee for failure to leave the Convention Facilities in such condition as described herein, in addition to any other right and remedy the City may have. Contractor agrees to pay costs of repair or replacement for any and all damages to the Convention Facilities and other property of City, caused by Contractor, its employees,

representatives, agents, contractors (including independent contractors), or subcontractors at the Event. Such responsibility shall not cover damage caused by the active negligence or willful misconduct of City, its officers, agents or employees.

6. AUDIT

Contractor shall maintain any and all records including, but not limited to, those identified in Section 4 of this Agreement, evidencing or relating to Utility Services provided to Client and/or Event Participants under the terms of this Agreement ("Records"), for a minimum period of three (3) years from the date of expiration or earlier termination of this Agreement. City shall have the right to conduct audits of (1) all or any portion of the Contractor's Records during normal office hours and in conformance with generally accepted auditing standards upon reasonable notice as frequently as City deems necessary and (2) operations at the Convention Facilities at the times and as frequently as the City may deem necessary. Such Records shall be maintained within 100 miles of City. If such records are maintained more than 100 miles from City, Contractor shall reimburse City for reasonable travel and related expenses incidental to an audit, not to exceed \$1,000 for travel and related expenses per audit. In the alternative, upon the written request by City, Contractor shall provide copies of Records required to be maintained pursuant to this Agreement to City, at the Contractor's expense, for inspection at City Hall. Contractor shall fully cooperate with City in any such audit. If any examination, inspection or audit of Contractor's records by City discloses an underpayment by Contractor, City shall notify Contractor in writing of the exception taken as a result of an audit and Contractor shall pay City the amount of the underpayment and, if such underpayment is in excess of ten percent (10%) of the Commission owed City, the Contractor promptly shall reimburse City for all costs incurred for conducting such an examination, inspection, or audit, including interest from the time such underpayment was due, at the rate of one percent (1%) per month. Contractor shall correct all accounting method deficiencies and errors disclosed by City's audits, and shall timely inform City, in writing, of all corrective actions taken. Any amounts due and owing from Contractor shall be paid within fifteen (15) days following City's completion of the audit and written notification of the amount owed. Upon receipt by City of all amounts due and owing from Contractor, or if City determines that no amounts are due and owing from Contractor, City shall as soon as reasonably possible return to Contractor copies of Records.

All information received by City under this Agreement shall be regarded as a public record, with the exception of those records which are plainly marked by Contractor as "Confidential," "Trade Secret," or "Proprietary." Although laws related to disclosure of public records ("Public Records Laws") recognize that certain confidential trade secret information may be protected from disclosure, the City may not be in a position to establish that the information is confidential, a trade secret, or proprietary. If a request is made by a third party for information plainly marked by Contractor as "Confidential," "Trade Secret," or "Proprietary," the City will notify Contractor of the public records request and City's deadline for response to allow the Contractor to seek protection from disclosure by a court of competent jurisdiction prior to City's deadline for response.

Notwithstanding the foregoing, City may use and/or disclose such information, whether or not marked "Confidential," "Trade Secret," or "Proprietary," in order to enforce the provisions of this Agreement.

7. INDEMNIFICATION

Contractor agrees to defend, indemnify and hold harmless City, its officers, agents and employees from and against any and all claims, demands, suits, causes of action, or liabilities incurred by City, its officers, agents or employees arising from Contractor's negligent or willful acts or omissions, or any negligent or willful act or omission of Contractor's officers, agents, employees, or subcontractors, except as may arise from the active negligence or willful misconduct of City, its officers, agents, contractors (other than Contractor) or employees. In an action or claim against City in which Contractor is defending City, City shall have the right to approve legal counsel providing City's defense.

8. INSURANCE

Contractor agrees to have and maintain the policies set forth in EXHIBIT B, entitled "INSURANCE," which is attached hereto and incorporated herein. All endorsements and certificates shall be subject to approval by the Director of Finance or the Director's authorized designee ("Risk Manager") of the City of San Jose as to form and content. Contractor agrees to provide City with a copy of said certificates and/or endorsements before work commences under this Agreement.

9. CONTRACTOR'S REPRESENTATIONS

Contractor represents and warrants to City the following: (a) Contractor has full power and authority to execute and deliver this Agreement and to perform its obligations hereunder. This Agreement constitutes the valid and legally binding obligations of Contractor, enforceable in accordance with its terms and conditions; (b) Neither the execution, delivery or the performance of this Agreement as contemplated herein will (i) violate any statute, regulation, rule, injunction, judgment, order, decree, ruling, charge, or other restriction of any governmental agency, government, or court to which Contractor is subject or any provision of its charter or bylaws, or (ii) conflict with, result in a breach of, constitute a default under, or require any notice under any agreement, contract, license, instrument, or other arrangement to which Contractor is a party or by which it is bound; and (c) Contractor will provide Utility Services hereunder in a professional and workmanlike manner, consistent with industry standards.

10. EXCUSABLE DELAY AND NONPERFORMANCE

Neither party hereto shall be liable for any damages sustained from delay or non-performance due to events beyond its reasonable control, including without limitation, strikes or other labor disputes, weather, earthquakes, fires, floods, war, terrorism, riots, civil disorder, curtailment of transportation facilities, failure of power or utilities and government acts. Notwithstanding the foregoing, this Section 10 shall not apply to the financial inability of a party hereto to perform hereunder, or to any changes in the economy or marketplace.

11. ENTIRE AGREEMENT/MODIFICATIONS

This Agreement may be modified ONLY by an express written amendment on a separate document signed by the parties, or by written changes on this document, which are initialed and dated by both parties in the margins. This Agreement contains the entire agreement between the parties regarding the subject matters referred to herein, and shall supersede all prior oral and written agreements between them regarding such matters. If any part of this Agreement is held invalid, the remainder of this Agreement shall not be affected thereby unless such invalidity materially impairs the ability of the parties to consummate the transactions contemplated by this Agreement.

12. NO AGENCY RELATIONSHIP

Under no circumstances shall this Agreement be construed as one of agency, partnership, joint venture, or employment between the parties hereto. Nothing contained in this Agreement shall be deemed to create, in either party hereto, the right or authority to incur any obligation on behalf of the other party, or to bind the other party in any way.

13. ASSIGNMENT

Neither Contractor nor City may assign or transfer this Agreement, or any part thereof, without the written consent of the other party, except that Contractor may assign this Agreement to its parent company and/or any of its parent company's subsidiaries with the prior written consent of Director, which shall not be unreasonably withheld.

14. GOVERNING LAW

This Agreement shall be governed by the laws of the State of California. If any provision of the Agreement shall be held invalid, such invalidity shall not affect the other provisions hereof, and to this extent, the provisions of this Agreement are intended to be and shall be deemed severable. The parties shall agree, if reasonably practicable, upon provisions that are equivalent from an economic point of view to replace any provision, which is determined to be invalid.

15. COMPLIANCE WITH LAWS

15.1 General. In the performance of this Agreement, Contractor shall abide by and conform to any and all applicable laws of the United States, the State of California and the City Charter and Ordinances of San Jose. Contractor shall pay and require any subcontractors to pay City's business tax.

15.2 Americans with Disabilities Act. Contractor shall be responsible for complying with the Americans with Disabilities Act ("ADA") in connection with (i) installing Utility Services in a manner that removes physical barriers prohibited by the ADA, (ii) providing auxiliary aids and services where necessary to ensure effective communication to individuals with disabilities who require Utility Services, (iii) ensuring that Contractor's agents, representatives, employees, contractors and subcontractors at the Event, if any, each comply with

the ADA, and (iv) modifying Contractor's policies, practices and procedures, as necessary, to enable individuals with disabilities to receive Utility Services at the Event. City's approval of any aspect of Contractor's activities under this Agreement shall not be deemed or construed in any way as a representation that such item, activity or event complies with the ADA.

15.3. **Illegal Activity.** Contractor shall not permit its officers, agents, contractors (including independent contractors), subcontractors, employees, and representatives to engage in any illegal activity in connection with performing the Utility Services or with any performance, exhibit or entertainment at an Event.

15.4 **Liens.** Contractor shall keep the Convention Facilities free of any liens arising out of any activity of Contractor at the Convention Facilities or materials furnished or obligations incurred by Contractor in connection with any such activities of it. Contractor shall notify City at least ten (10) business days prior to the commencement of any work to be performed or materials to be furnished by Contractor at the Convention Facilities which could give rise to any such lien, and shall post any bonds as required by City. City shall have the right to post and keep on the Convention Facilities any notices that may be required by law or which City may deem proper for the protection of City and/or the Convention Facilities from such liens.

15.5 **No Smoking.** No smoking is permitted in the Convention Facilities.

15.6 **Possessory Interest Subject to Taxation.** Contractor recognizes and understands that this Agreement may, but is not intended to, create a real property possessory interest that may be, but is not intended to be, subject to real property taxation and that Contractor may be subject to the payment of real property taxes levied on such interest. No such possessory interest tax, or any other tax by any governmental entity, shall in any way reduce or substitute for the charges or fees required to be paid as a condition of this Agreement or as otherwise required by City. Contractor agrees to pay all such taxes, if any, when due. Possessory interest assessments are made by the County of Santa Clara, Office of the County Assessor located at 70 West Hedding Street, San José, CA 95110-1771.

16. NO WAIVER

No waiver or failure to exercise any right, option or privilege under the terms of this Agreement on any occasion shall be construed to be a waiver of any other right, option or privilege on any other occasion.

17. TERMINATION

17.1 An event of default shall occur under this Agreement upon the occurrence of any of the following events (severally "Event of Default" and collectively "Events of Default"):

- A. Contractor shall have failed to pay when due any commission, charge or obligation of Contractor requiring the payment of money under the terms of this Agreement or any other agreement between City, provided that City shall send Contractor a notice of the

overdue amount and Contractor may cure the payment default if Contractor pays the full amount overdue within ten (10) days of the notice of overdue amount; or

- B. Contractor shall have failed more than twice in a calendar year to pay any commission, charge or obligation of Contractor requiring the payment of money under the terms of this Agreement within the payment period specified; or
- C. If any audit performed in accordance with Section 6 of this Agreement shall disclose any willful or material inaccuracy, then City may terminate this Agreement immediately at its option. Material inaccuracy means an inaccuracy in excess of ten percent (10%) of the commission computed and paid by Contractor for the period covered by the audit; or
- D. Contractor becomes insolvent, or takes the benefit of any present or future insolvency statute, or shall make a general assignment for the benefit of creditors, or file a voluntary petition in bankruptcy, or a petition or answer seeking an arrangement for its reorganization, or the readjustment of its indebtedness under the Federal bankruptcy laws, or under any other law or statute of the United States or of any State thereof, or consent to the appointment of a receiver, trustee, or liquidator of any or substantially all of its property; or
- E. A petition under any part of the Federal bankruptcy laws, or an action under any present or future insolvency law or statute, is filed against Contractor and shall not be dismissed within sixty (60) days after the filing thereof.

17.2 Upon an Event of Default, City shall have all remedies available at law or in equity or otherwise under this Agreement including, without limitation, immediate termination of this Agreement, to which City may resort cumulatively, or in the alternative and at its election.

17.3 If Contractor fails to perform any of its material obligations under this Agreement, including but not limited to maintaining all of the licenses and permits required for providing Utility Services, City may terminate this Agreement immediately. The Director is empowered to terminate this Agreement on behalf of City.

17.4 The parties acknowledge and agree that the City, at its sole discretion, may terminate this Agreement during the Extension Term by providing Contractor with written notice of termination at least one hundred and twenty (120) days prior to the effective termination date.

17.5 Upon the termination of this Agreement pursuant to the provisions of this Section 17, Contractor shall deliver to Director copies of all reports, documents, and records demonstrating Contractor's performance under this Agreement, and Contractor shall pay the City not more than thirty (30) days after termination of the Agreement all outstanding Gross Revenue billed for Utility Services under this Agreement. In the event of termination of this Agreement, the indemnification provisions shall survive any such termination.

18. NO THIRD PARTY RIGHTS

The parties intend not to create rights in, or to grant remedies to, any third party as a beneficiary of this Agreement or of any duty, covenant, obligation or undertaking established herein.

19. NOTICES

All notices shall be in writing and shall be deemed duly given upon receipt when hand delivered, sent by certified mail, return receipt requested, or sent by expedited courier service to the parties at their respective addresses set forth below. Either party may, by notice to the other party, change the address specified below.

City:

David Bevans
General Manager
San José Convention & Cultural Facilities
408 S. Almaden Boulevard
San José, CA 95110

Contractor:

Company
Address
City, State, Zip
Attention:

20. HEADINGS

Headings contained in this Agreement are included for convenience only and form no part of the agreement between the parties.

21. VENUE

In the event that suit shall be brought by either party to this Agreement the parties agree that venue shall be exclusively vested in the state courts of the County of Santa Clara, or if federal jurisdiction is appropriate, exclusively in the United States District Court, Northern District of California, San Jose, California.

22. NONDISCRIMINATION

Contractor shall not discriminate, in any way against any person on the basis of race, sex, color, age, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity or national origin, in connection or related to the performance of this Agreement.

23. SUBCONTRACTING

Contractor subcontracting any portion of its obligations under this Agreement shall not relieve it from liability and responsibility of the performance of such obligations required to be performed by Contractor under this Agreement in its entirety.

24. CONSENT

Whenever in this Agreement the approval or consent of a party is required, such approval or consent shall be in writing and shall be executed by a person having the express authority to grant such approval or consent.

25. AUTHORITY

Contractor and Contractor's signators represent that the signators hold the positions set forth below their signatures and that the signators are authorized to execute this Agreement on behalf of Contractor and to bind Contractor hereto.

WITNESS THE EXECUTION HEREOF on the day and year first hereinabove written.

CONTRACTOR, a _____ Corporation
[state of incorporation]

CITY OF SAN JOSE, a municipal corporation

BY: _____

BY: _____

NAME: _____

NAME: _____

TITLE: _____

TITLE: GENERAL MANAGER

DATE: _____

DATE: _____

EXHIBIT A
CITY OF SAN JOSE
CONVENTIONS, ARTS & ENTERTAINMENT DEPARTMENT
 408 ALMADEN BOULEVARD
 SAN JOSE, CA 95110
 (408) 277-5277

SUMMARY OF TERMS OF FACILITY USE AGREEMENT

ISSUE DATE:

**CONTRACT
NUMBER:**

**COMPANY:
ADDRESS:**

**CONTACT:
E-MAIL:**

**PHONE:
FAX:**

EVENT NAME:

**EVENT
DESCRIPTION:**

FACILITY/ ROOM	FUNCTION	FROM DATE/TIME	TO DATE/TIME	FACILITY USE FEE
				0.00
TOTAL				0.00

EXHIBIT B
INSURANCE REQUIREMENTS

INSURANCE REQUIREMENTS. Contractor shall procure and maintain for the duration of the contract insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the work hereunder by the Contractor, his agents, representatives, employees or subcontractors.

D-1 Minimum Scope of Insurance

Coverage shall be at least as broad as:

1. Insurance Services Office form number GL 0002 (Ed. 1/96) covering Commercial General Liability and Insurance Services Office form number GL 0404 covering Broad Form Commercial General Liability; or Insurance Services Office Commercial General Liability coverage (“occurrence” form CG 0001), including X, C, U (explosion, collapse, underground).
2. Insurance Services Office form number CA 0001 (Ed. 12/93) covering Automobile Liability, code 1 “any auto”, or code 2 “owned autos” and endorsement CA 0025. Coverage also to include code 8 “hired autos” and code 9 “non-owned” autos.
3. Workers’ Compensation insurance as required by the Labor Code of the State of California and Employers Liability insurance.

D-2 Minimum Limits of Insurance

Contractor shall maintain limits no less than:

1. Commercial General Liability: \$1,000,000 per occurrence for bodily injury, personal injury and property damage, \$100,000 fire legal liability. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.
2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage.
3. Workers’ Compensation and Employers Liability: Workers’ Compensation limits as required by the Labor Code of the State of California and Employers Liability limits of \$1,000,000 per accident.

D-3 Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared to, and approved by, the City. At the option of the City, either:

- (i) the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officials, employees, agents and contractors; or
- (ii) the Contractor shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by the City.

D-4 Other Insurance Provisions

The policies are to contain, or be endorsed to contain, the following provisions:

1. General Liability and Automobile Liability Coverages
 - a. The City, its officials, employees, agents and contractors are to be covered as additional insureds, as respects to liability arising out of activities performed by, or on behalf of, the Contractor; products and completed operations of the Contractor; or automobiles owned, leased, hired or borrowed by the Contractor, only to the extent provided by the indemnity provision contained in this Agreement entered into between the parties. The additional insured coverage is further limited to claims arising out of the insured's negligence and specifically excludes coverage for the additional insured's sole negligence. The additional insured coverage shall not apply with regard to claims made by an additional insured under this policy against any other additional insured under this policy, unless the claims arise from the Utility Services provided by Contractor. The coverage shall contain no other special limitations on the scope of protection afforded to the City, its officials, employees, agents and contractors.
 - b. The Contractor's insurance coverage shall be primary insurance as respects the City, its officials, employees, agents and contractors. Any insurance or self-insurance maintained by the City, its officials, employees, agents or contractors shall be excess of the contractor's insurance and shall not contribute with it.
 - c. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City, its officials, employees, agents, or contractors.
 - d. Coverage shall state that the Contractor's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

2. All Coverages

Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, or canceled except after thirty (30) days' prior written notice has been given to the City.

D-5 Acceptability of Insurance

Insurance is to be placed with insurers acceptable to the City's Risk Manager.

D-6 Verification of Coverage

Contractor shall furnish the City with certificates of insurance and with original endorsements affecting coverage required by this clause. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Copies of all the required ENDORSEMENTS shall be attached to the CERTIFICATE OF INSURANCE, which shall be provided by the Contractor's insurance company as evidence of the stipulated coverages. This proof of insurance shall then be mailed to: **CITY OF SAN JOSE, Risk Management, 801 N. First Street, Room 110, San Jose, CA 95110-1716.**

D-7 Subcontractors

Contractors shall include all subcontractors as insureds under its policies or shall obtain separate certificates and endorsements for each subcontractor.

Appendix III(j)

D. Any exhibits placed in lobby space, or undefined areas, will be charged at \$. _____ per net square feet, per show day. Any exhibits placed in meeting rooms will be charged the current room rental rate, per show day. The exact amount shall be determined on the first show day, by measuring the space occupied, and will be billed with your closing statement.

<u>PAYMENT SCHEDULE:</u>		
	<u>DUE DATE</u>	<u>AMOUNT</u>
Signed Revised Facility Use Agreement due:		
Final Payment:		
TOTAL MINIMUM FACILITY USE FEE:		

Certificate of Insurance is due by _____. Name and dates of event, including move-in and move-out dates must appear on the certificate.

Any use of the facility after midnight and/or prior to 6:00 A.M. will incur additional overtime charges.

*** NOTE: Client has represented that the Event shall use no less than _____ gross square feet of Exhibit Hall space for a minimum of _____ Show Days for the Event. Client has also represented that Event participants shall use a minimum of _____ peak and/or _____ total traceable, local hotel room nights during the Event. The Minimum Facility Use Fee and complimentary meeting space indicated above, if any, are based upon representations made by Client to the City regarding the size and specific nature of the Event as set forth on these Summary Pages. The Minimum Facility Use Fee and complimentary meeting space are subject to adjustment if the Event does not conform with such representations, as more specifically provided in Section 2B of this Agreement.

City is holding the dates on the Summary Pages based upon Client's representations regarding the Event. Client further understands it is the City's policy that past performance of Client's events in City facilities will be taken into account in determining whether to grant dates for Client's subsequent events, and in determining booking priority and complimentary meeting space for subsequent events. For example, if Client held an event which failed to conform to representations made to the City (including without limitation, the purpose or character of the event, the number of hotel rooms generated by the event, the amount of exhibit space to be used, and the number of Show Days), Client's request for a subsequent event may be denied a date or booked as a lower priority event, or may be denied complimentary meeting space, notwithstanding Client's representations as to the size and nature of the new event.

Equipment and services are subject to extra charges, the rates for which are subject to change by resolution of City Council. Current rates are deliverable upon request. Additional charges are due and payable pursuant to the terms of this Agreement.

This Agreement must be properly executed by Client and returned to Director no later than the date set forth on the Summary Pages dated _____. If Client fails to pay the Initial Payment and return a properly executed Agreement, without modification, to Director on or prior to the Response Date, City may, in its sole discretion, withdraw its offer of dates and may book another event at the Facility on such dates.

The terms of these Summary Pages are incorporated into the attached Facility Use Agreement between Client and City dated _____. These Summary Pages and the attached Agreement are hereby accepted by the parties hereto. All terms used but not defined on these Summary Pages are used as defined in the Agreement.

CLIENT, a _____ [corporation]
[state of incorporation]

CITY OF SAN JOSE, a municipal corporation

BY: _____

BY: _____

NAME: _____

NAME: David Bevans

TITLE: _____

TITLE: GENERAL MANAGER

DATE: _____

DATE: _____

Appendix III(j)

FACILITY USE AGREEMENT SAN JOSE CONVENTION & CULTURAL FACILITIES

THIS FACILITY USE AGREEMENT (this "Agreement"), dated, as of _____, is entered into by and between the City of San José, a municipal corporation of the State of California ("City"), and _____, ("Client").

RECITALS

- A. City is the owner and operator of the San José McEnery Convention Center, Civic Auditorium, Parkside Hall, California Theatre, Center for the Performing Arts, Montgomery Theater, and ancillary plazas and parking facilities (the "Facility").
- B. Client desires to utilize some or all of the Facility for the event ("Event") described on the Summary Pages attached to this Agreement and incorporated herein ("Summary Pages"). "Show Days" shall mean the days on which a particular Event takes place. "Move-in Days" or "Move-out Days" shall mean the move-in and set up days prior to an Event and the disassembly and move-out days after an Event. Such utilization shall occur on the Show Days, Move-In Days and Move-Out Days identified in the Summary Pages (collectively referred to as "Event Days").
- C. The City has determined that the Event will bring many benefits to the City.
- D. City and Client desire to memorialize their agreement regarding Client's use of the Facility for the Event.

AGREEMENT

NOW, THEREFORE, in consideration of the following terms, conditions, and covenants, and for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, City and Client agree as follows:

1. **TERM.** This Agreement shall not be effective until both Client and City have executed this Agreement and the Summary Pages ("Effective Date"), and, subject to the terms and conditions of this Agreement, shall have a term (the "Term") commencing on the Effective Date and continuing until the last Move-out Day set forth on the Summary Pages, unless earlier terminated pursuant to this Agreement. Client's obligation to pay any amounts owed to City hereunder and to abide by the terms of this Agreement, remain in effect until all of such obligations are fulfilled, even if the Event has been completed and Client has moved all of its property out of the Facility.

For purposes of this Agreement, the term "Director" shall mean the Director of the City's Department of Conventions, Arts and Entertainment, or such other person as may be designated by the City Council or the City Manager from time to time to exercise functions equivalent or similar to those now exercised by the Director. The term Director also includes any person designated by the Director of Conventions, Arts and Entertainment to exercise rights and/or obligations of the Director under this Agreement.

2. **FEES AND CHARGES.** For each Event Day identified on the Summary Pages, Client shall pay City in accordance with Section 5 the amount(s) identified on the Summary Pages ("Facility Use Fee"). Client understands that the amount of the Facility Use Fee set forth on the Summary Pages is a minimum amount, based upon representations by the Client as to the amount of exhibit space needed by Client, the number of show days and the number of hotel rooms to be generated by the Event, and may be adjusted as set forth in Section 2B below.

Client shall also pay when due other fees, charges and amounts due under this Agreement as established by resolution of City Council, as such rates may be modified by City Council. For example, Client shall owe additional fees for use of the Facility after midnight and/or prior to 6:00 A.M. unless Client has obtained the Director's prior consent. Client shall also owe additional fees for exclusive services provided by City, as noted in Section 22 of this Agreement. Other nonexclusive charges may include, but are not limited to, the following services and equipment: stage lighting equipment, sound equipment, portable staging, follow spotlights, piano, tables, chairs, movie screens, and trash removal.

Exhibit Space is space designated as Exhibit under the heading Function on the Summary Pages. Exhibit Space may be used for demonstration of products related to the Event, or information regarding products or services related to the Event, via booths or demonstration areas.

Appendix III(j)

3. **PERMISSION TO OCCUPY.** With respect to each Event described on the Summary Pages, City grants Client permission to occupy those portions of the Facility described on the Summary Pages at the times set forth on the Summary Pages. Client shall also be granted non-exclusive access to adjoining corridors and restrooms, as designated by Director. Director may authorize Client to enter the Facility to begin set up of the Event a few hours prior to the times set forth on the Summary Page, if the space is not otherwise utilized and Director determines that such authorization is warranted. Client agrees to be bound by the terms of this Agreement if Client enters the Facility prior to the times set forth on the Summary Pages, or if Client remains in the Facility after such times.

Notwithstanding any term hereof to the contrary, this Agreement is not intended to lease or to grant to Client any interest in the Facility. This Agreement merely evidences Client's authorization to use the specified portions of the Facility on the dates set forth on the Summary Pages, subject to the terms and conditions of this Agreement. This Agreement does not grant Client the right to use or occupy any other portion of the Facility or any other facility comprising the San José Convention and Cultural Facilities. Furthermore, nothing in this Section 3 shall be construed to allow Client to enter or occupy the Facility at any time other than the times set forth on the Summary Page or unless authorized by Director in writing.

4. **EVENT RESERVATIONS AND CONFIRMATION.** Client agrees and understands that by executing this Agreement that it is committed to run the Events on the dates specified on the Summary Pages and otherwise in compliance with this Agreement.
5. **PAYMENT.** The Facility Use Fee shall be paid on the dates set forth on the Summary Pages. If Director determines, after review of actual use of the Facility, that Client owes additional amounts for services, or equipment used by Client in connection with the Event, Client shall promptly pay such additional amounts.

Any invoiced fees and charges are due and payable by Client on or before the thirtieth (30th) day after Client's receipt of City's written invoice and shall be deemed delinquent if not received by City on or before such date. In the event that City does not receive payment of the Facility Use Fee, or any portion thereof, or any other fee or charge within ten (10) calendar days of the due date, Client shall pay interest thereon from the due date until the date that full payment is received ("payment date") at a rate equal to 12% per annum or, if such interest rate shall be deemed illegal, at the maximum interest rate then allowed by law. Failure of Client to pay such overdue amount, plus interest within ten (10) business days of the date of City's notice of such overdue amount, shall be an Event of Default. As specified on the Summary Pages, the Initial Payment must be made on or before the Response Date, without further notice from City, in order for City to execute this Agreement and incur obligation under this Agreement.

Any payments due hereunder shall be payable in lawful money of the United States, to the City of San José, Accounts Receivable, Convention and Cultural Facilities, 408 Almaden Blvd., San José, CA 95110, or to such person or at such place as City may designate from time to time in writing, free from all claims, demands, set-offs, or counter-claims of any kind against City.

6. **INSURANCE.** For each Event Day identified on the Summary Pages, Client shall obtain and maintain all of the minimum insurance requirements set forth in Exhibit A, at its sole cost and expense.
7. **INDEMNITY AND WAIVER OF CLAIMS.** Client agrees to defend, indemnify and hold harmless City, its officers, agents and employees from and against any and all claims, demands, suits, causes of action, or liabilities incurred by City, its officers, agents or employee, arising from the Event (including, without limitation, any claim by any Exhibitor at the Event) or as a result of Client's acts or omissions under this Agreement or any act or omission of Client's officers, agents, employees, contractors (including independent contractors), exhibitors, registrants or other persons attending the Event with the express or implied permission or invitation of Client, except as may arise from the negligence or willful misconduct of City, its officers, agents, contractors or employees. In an action or claim against City in which Client is defending City, City shall have the right to approve legal counsel providing City's defense and such approval shall not be unreasonably withheld.

Client further waives all claims or causes of action against City, its officers, agents, or employees which it may now or hereafter have for loss of or damage to property and for injuries to or death of persons on or about the Facility, from any causes arising at any time except as may arise from the negligence or willful misconduct of City, its officers, agents, contractors or employees. Nothing in this Section 7 limits the waiver of claims by Client for interruption or termination of the Event, as set forth in Section 11. Client's obligations under this section shall survive expiration or earlier termination of this Agreement.

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8. **WORKERS' COMPENSATION INSURANCE.** Client certifies that it is aware of the provisions of the Labor Code of the State of California, which require every employer to be insured against liability of Workers' Compensation or to undertake self-insurance in accordance with the provisions of that code, and certifies that it will comply with such provisions before commencing any activities in connection with this Agreement.
9. **ASSIGNMENT/SUBCONTRACTING.** Client shall not assign, transfer or subcontract its interest in this Agreement, including, without limitation, any of the rights and privileges granted to Client hereunder or its obligations hereunder, to any other person, organization, or corporation. Any attempt to assign, transfer or subcontract such interest may, at City's option, terminate this Agreement.

Notwithstanding the foregoing, Client may assign this Agreement, with the prior written consent of the Director whose consent will not be unreasonably withheld, to a subsidiary or affiliate, to a divisional entity or joint venture entity, to a corporation into which it is merged or if acquired by an entity which acquires all or substantially all of the assets of Client or the Event as a going concern, or to any entity, that directly or indirectly, controls, is controlled by or is under common control with Client.

10. **SCHEDULING.** Unless otherwise specified, in writing, the Director shall have the right to schedule other similar events as may be determined by the Director at any time before or after the dates of this Agreement.
11. **INTERRUPTION OF EVENT/UNAVAILABILITY OF FACILITIES**

A. **Interruption or Termination; Force Majeure.** If (i) the Facility is damaged so that all practical use of the Facility by Client is prevented or (ii) the City Manager or Director determine that closure of the Facility is necessary in the interest of public health, safety or welfare, or (iii) all practical use of the Facility by Client is prevented by strikes against the City (but not strikes against Client or against any person admitted to the Facility by Client) or by fire, casualty, Acts of God, national emergency, by governmental directive to City or by default of a prior occupant, then City or Client may cancel this Agreement upon notice to the other. In that event, neither party shall have any claim against the other by reason of cancellation. However, if cancellation occurs prior to the Event dates, City shall refund any part of the Facility Use Fee paid by the Client. If the cancellation occurs after the Event dates begin, the Facility Use Fee shall be reduced in the same proportion, which the elapsed time period bears, to the total Event Dates.

B. **Limit of City's Liability.** Client agrees and acknowledges that City's liability for any termination, interruption or other impairment of the Event for any reason (including, without limitation, City's negligence), other than City's willful misconduct or unlawful acts shall:

- (1) be limited to the fees and charges paid by Client to the City for use of the Facility for such Event; and
- (2) not include any lost revenue, incidental or consequential damages, or other claims, known or unknown, arising from such termination, interruption, or other claims, known or unknown, arising from such termination, interruption, or other impairment of the Event.

C. **Full Settlement and Release.** Client's acceptance of any refunded or of any adjusted fee or charge, shall be deemed a full waiver, release and settlement of any claims against City, whether known or unknown, resulting from the termination, interruption or impairment of the Event, or with respect to failure to provide such service or equipment (including, without limitation, due to City's negligence). City's refund of any fee or charge or reduction of any fee or charge shall not be deemed an admission of liability on the part of the City, nor shall it modify or increase the limitation of City's liability hereunder.

Client certifies that he or she has read the following statement of California Civil Code Section 1542:

A general release does not extend to claims, which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

Client hereby waives application of California Civil Code Section 1542 and acknowledges that this means that if he or she should suffer any additional injuries, damages, or losses arising out of the events described in this Section 11 but of which Client is not currently aware and which if known would materially affect Client's decision to execute this release, he or she will not be able to make any claim for those injuries, damages or losses.

The terms of this Section 11 shall survive expiration or earlier termination of this Agreement.

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12. **EXPIRATION AND TERMINATION.** Upon the expiration or termination of this Agreement, and upon the termination of any Event authorized by this Agreement, Client shall quit the Facility, and return to the Director all equipment procured from City or Director. Client shall remove from the Facility, or any part thereof, all the property, goods and effects belonging to Client or caused by Client to be brought upon such premises. If any such property is not removed from the Facility by the end of the last Move-out Day, then the Director may make arrangements to store the same and Client shall pay a reasonable fee for such storage including all other expenses incurred therewith, provided, however, that if Client fails to redeem such property after such last Move-out Day, then City may sell such property, in compliance with laws, at auction or otherwise, for said storage fees and expenses.

13. **TERMINATION**

A. **Events of Default.** An event of default shall occur under this Agreement upon the occurrence of any of the following events (severally "Event of Default" and collectively "Events of Default");

- (1) Client shall have failed to pay when due any fee, charge or obligation of Client requiring the payment of money under the terms of this Agreement or any other agreement between City, provided that City shall send Client a notice of the overdue amount and Client may cure the payment default if Client pays the full amount overdue within 10 days of the notice of overdue amount;
- (2) Client shall have violated the provisions of Sections 9, 19, 20 or 21 of this Agreement; or
- (3) Client shall have failed to maintain any insurance required under Section 6 of this Agreement; or
- (4) Any representation or warranty made by Client hereunder shall have been false or misleading in any material respect as of the date on which such representation or warranty was made; or
- (5) Client shall have failed to perform any material term, covenant, or condition of this Agreement to be performed by Client, other than those specifically referred to in this Section 13, and Client shall have failed to cure same diligently after written notice from City; or
- (6) Client shall have failed to perform any material term, covenant or provision required to be performed by Client under any other agreement between City and Client for use of the Facility; or
- (7) Client failed to run an event in any City-owned facility (including the Facility) substantially in conformance with all terms and conditions of the authorization granted by City or such event substantially differed from the representations made to City. Failure of an Event or the Event to substantially conform may include canceling the Event or by materially changing the size, character or subject matter of the Event without the prior approval of City; or
- (8) Client becomes insolvent, or takes the benefit of any present or future insolvency statute, or shall make a general assignment for the benefit of creditors, or file a voluntary petition in bankruptcy, or a petition or answer seeking an arrangement for its reorganization, or the readjustment of its indebtedness under the Federal bankruptcy laws, or under any other law or statute of the United States or of any State thereof, or consent to the appointment of a receiver, trustee, or liquidator of any or substantially all of its property; or
- (9) A petition under any part of the Federal bankruptcy laws, or an action under any present or future insolvency law or statute, is filed against Client and shall not be dismissed within thirty (30) days after the filing thereof; or
- (10) Client shall cancel the Event for reasons other than those granted in Section 11.

B. **CANCELLATION FEE/LIQUIDATED DAMAGES**

- (1) THE PARTIES HERETO AGREE THAT IT WOULD BE IMPRACTICAL AND EXTREMELY DIFFICULT TO DETERMINE THE ACTUAL DAMAGE TO THE CITY IF CLIENT WERE TO TERMINATE THIS AGREEMENT PRIOR TO EXPIRATION OF THE TERM OR WERE OTHERWISE TO BREACH ITS COMMITMENT TO HOLD THE EVENT AT THE FACILITY. IN ADDITION TO THE FACILITY USE FEES FOR THE EVENT, CLIENT ACKNOWLEDGES THAT CITY EXPECTS TO RECEIVE OTHER BENEFIT FROM CLIENTS EVENT, WHICH MAY INCLUDE WITHOUT LIMITATION, POSITIVE EXPOSURE FOR THE CITY AND THE FACILITY, LOCAL BUSINESS REVENUES GENERATED BY EVENT ATTENDEES, AND REVENUES FROM FOOD AND BEVERAGE PROVIDED FOR THE EVENT. ALSO, CITY WOULD INCUR ADDITIONAL STAFF AND ADMINISTRATIVE EXPENSE IN REBOOKING THE FACILITY. THE PARTIES MUTUALLY AGREE THAT LIQUIDATED DAMAGES SET FORTH IN THIS SECTION ARE ACCEPTABLE TO EACH PARTY AND ARE A REASONABLE ESTIMATE OF CITY'S LOSS IF CLIENT FAILS TO HOLD THE EVENT AS PROVIDED HEREIN. THE PARTIES FURTHER ACKNOWLEDGE THAT THEY ARE REPRESENTED BY COUNSEL IN NEGOTIATING THIS AGREEMENT.

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BY PLACING THEIR INITIALS BELOW, CITY AND CLIENT ACKNOWLEDGE THAT THE AMOUNTS SET FORTH BELOW HAVE BEEN AGREED UPON AS THE PARTIES' REASONABLE ESTIMATE OF CITY'S DAMAGES IN THE EVENT OF CLIENTS FAILURE TO HOLD ONE OR MORE CONFERENCES, AS PROVIDED IN THIS AGREEMENT.

"CLIENT"

"CITY"

By: _____ By: _____

(2) Client agrees to pay to City the following cancellation fee as liquidated damages if Client fails to hold the Event at the Facilities as provided in this Agreement:

- (a) If Client delivers to City written notice of termination of the Event more than Eighteen (18) months prior to the first scheduled Move-in Day of such Event, Client shall pay City the 25% of the Facility Use Fee set forth on the Summary Pages; and
- (b) If Client delivers to City written notice of termination of the Event more than Twelve (12) months but less than Eighteen (18) months prior to the first scheduled Move-in Day of such Event, Client shall pay to City the 50% of the Facility Use Fee set forth on the Summary Pages.
- (c) If Client delivers to City written notice of termination of such Event less than Twelve (12) months prior to the first scheduled Move-in Day of such Event, Client shall pay City or 100% of the Facility Use Fee set forth on the Summary Pages.

No cancellation fee shall be due from Client if City terminates this Agreement pursuant to Sections 11A or 11B nor if Client terminates this Agreement for City's material breach.

- (3) **Time for Payment of Liquidated Damages.** Client shall pay the cancellation fee set forth above no later than thirty (30) days after the date of notice of cancellation or the last scheduled Move-out Day of the canceled Event, whichever occurs first. Any payments received by City may be applied by City toward the cancellation fee owed pursuant to this Section. Client shall not receive credit for interest on any such amounts.
- (4) **Remedies for Other Breach of the Agreement.** Upon any Event of Default other than Client's failure to hold the Event, City shall have all remedies available at law or in equity or otherwise under this Agreement including, without limitation, termination of this Agreement, to which City may resort cumulatively, or in the alternative and at its election. Damages for Client's breach shall include, without limitation, the Facility Use Fees set forth on Summary Pages.

14. OPPORTUNITY TO CURE. Prior to taking any action on account of a breach, which in the good faith judgment of City may be cured by Client, City shall provide to Client oral or written notice, as is practical under the circumstances, of the breach and afford to Client such opportunity, as may be practicable under the circumstances, if any, to correct such breach. However, no failure to give such notice or opportunity shall impair the rights of City.

15. NOTICES. All notices and demands which may or are required to be given to either party to the other hereunder shall be in writing and shall be deemed to have been fully given when either delivered personally, faxed, e-mailed or deposited in the U.S. mail, postage prepaid, to Client or City at the addresses set forth in the Summary Pages or any other address subsequently noticed in writing by either party.

16. MUTUAL WAIVER OF BREACH. The waiver by any party to this Agreement of a breach of any provision of this Agreement shall not be deemed a continuing waiver or a waiver of a subsequent breach of that or any other provisions of this Agreement."

17. CONTINUING REPRESENTATION AND COMPLIANCE. Until Client has discharged each of its obligations under this Agreement, (i) each representation of Client shall be deemed to be reasserted as true and correct on a continuous basis by Client; and (ii) Client shall be deemed to represent to City that it is at all times in compliance with all applicable terms and conditions of this Agreement.

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18. **CHANGE IN CIRCUMSTANCES.** Client shall promptly notify City of the occurrence of any Event of Default, including, without limitation, the occurrence of any material event or change in circumstances which renders inaccurate any representation or assertion made to City or which renders Client in violation of any other term or provision of this Agreement. Likewise, City shall promptly notify Client of any material change in the condition or availability of the Facility, equipment or services that City has agreed to provide to Client under this Agreement.

19. **COMPLIANCE WITH LAWS AND REGULATIONS**

A. **Americans with Disabilities Act.** Unless caused by alterations or changes made by Client, including Client's agents, representatives, employees, contractors or subcontractors, or caused by Client's (including Client's agents, representatives, employees, contractors or subcontractors) negligence or willful misconduct, City shall be responsible for compliance with Title II of the Americans with Disabilities Act ("ADA") regarding the following fixtures: (i) structural fixtures, including the Facility's elevators and (ii) any doorway of the Facility or any part of the Facility located outside of the exhibit halls and meeting rooms used by Client. Nothing herein shall create any obligation on Client not required under Title II of the ADA, including without limitation, any retrofit or modification of such fixtures.

For each Event covered by this Agreement, Client shall be responsible for complying with the ADA in connection with (i) setting up and running the Event, including, without limitation, setting up exhibits, seating and access ways in an accessible manner and otherwise removing physical barriers created in connection with the Event, (ii) providing auxiliary aids and services where necessary to ensure effective communication to individuals with disabilities who participate or desire to participate in the Event, (iii) ensuring that exhibitors at the Event, if any, and Client's agents, representatives, employees, contractors and subcontractors each comply with the ADA, and (iv) modifying Client's (and Client's exhibitor's) policies, practices and procedures, as necessary, to enable individuals with disabilities to participate equally in the Event. City's approval of any aspect of Client's activities under this Agreement shall not be deemed or construed in any way as a representation that such item, activity or event complies with the ADA.

B. **Copyright Law.** No copyrighted musical composition shall be played or sung, whether amplified, televised, in the form of a mechanical recording or personal rendition, or otherwise, in connection with any use of the Facility, unless Client shall have first obtained all approvals and paid any license fee or other fee required by the copyright owner. By entering into this Agreement, Client shall indemnify City and its officers and employees and save them free and harmless from and against any and all liability and responsibility whatsoever for any infringement of and/or other violation of the right of any such copyright owner under any copyright law.

C. **Federal, State and Local Laws.** Client shall comply and Client shall ensure that its officers, employees, agents, contractors (including independent contractors), exhibitors, registrants, and Events comply with all federal, state and local laws, ordinances and regulations now or hereinafter in effect, and obtain all permits and licenses, bonds and insurance required for conducting any Event. Client shall take all steps reasonably achievable to ensure that its officers, agents, employees, contractors (including independent contractors), subcontractors, exhibitors, registrants and other persons attending the Events, comply with any rules and regulations regarding use of the Facility established by the Director, as amended from time to time, and with the instructions of Director or authorized City employees.

D. **Illegal Activity.** No performance, exhibition or entertainment, which is illegal, shall be given or held at the Facility. Client covenants that Client, its officers, agents, contractors (including independent contractors), subcontractors, employees, and exhibitors shall not engage in any illegal activity, or permit any of the foregoing persons to engage in any illegal activity, in connection with any performance, exhibit or entertainment at an Event.

E. **Liens.** Client shall keep the Facility free of any liens arising out of any activity at the Facility or materials furnished or obligations incurred by Client in connection with any such activities. Client shall notify City at least ten (10) business days prior to the commencement of any work to be performed or materials to be furnished at the Facility which could give rise to any such lien, and shall post any bonds as required by City. City shall have the right to post and keep on the Facility any notices that may be required by law or which City may deem proper for the protection of City and/or the Facility from such liens.

F. **No Smoking.** No smoking is permitted in the Facility.

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G. Nondiscrimination. Client shall not discriminate in any way, against any person on the basis of race, sex, color, age, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity, or national origin in connection with or related to the Event or with the use of the Facility.

H. Payment of Taxes

- (1) **Payment by Client.** Payment of all Federal, State, County and City taxes in connection with the Event shall always be the liability and responsibility of Client. If Client fails to pay any taxes owed in connection with the Event, Director may deduct such taxes from any amounts to be paid by City to Client, if any, and pay them over to the proper representatives of the Federal, State, City or other units of government.
- (2) **Possessory Interest Subject to Taxation.** Client recognizes and understands that this Agreement may, but is not intended to, create a real property possessory interest that may be, but is not intended to be, subject to real property taxation and that Client may be subject to the payment of real property taxes levied on such interest. No such possessory interest tax, or any other tax by any governmental entity, shall in any way reduce or substitute for the charges or fees required to be paid as a condition of this Agreement or as otherwise required by City. Client agrees to pay all such taxes when due.

Possessory interest assessments are made by the County of Santa Clara, Office of the County Assessor located at 70 West Hedding Street, San José, CA 95110-1771.

- 20. PUBLIC SAFETY.** Client agrees that at all times it shall conduct its activities, and Client shall ensure that its officers, agents, employees, contractors (including independent contractors), subcontractors and exhibitors conduct their activities, with full regard to public safety, and shall observe and abide by all applicable regulations, now in effect or as amended or promulgated from time to time, and requests by City and duly authorized governmental agencies responsible for public safety.
- 21. HAZARDOUS MATERIALS.** Client shall not use or permit flammable materials such as bunting, tissue paper, crepe paper, or other flammable items for decorations; and all other materials used for decorative purposes must be treated with flame-proofing and approved by the City's Fire Department. In addition, Client shall not, without the prior written consent of the Director, put up or operate any engine or motor at the Facility or use oils, burning fluids, camphene, kerosene, naphtha, gasoline, or any other flammable chemical, for mechanical or any other purposes, or any agent other than electricity for illuminating any part of the Facility. Subject to the foregoing, Client shall restrict the use of Hazardous Materials at the Facility to those kinds of materials in small quantities that would be normally expected in conducting the activities permitted under this Agreement. Such Hazardous Materials shall only be used in a safe and prudent manner and Client shall take all necessary precautions to prevent releases of Hazardous Materials. Under no circumstances shall Client store, dispose or permit storage or disposal of any Hazardous Materials at the Facility. Client shall comply with all federal, state, and local laws, ordinances, and regulations concerning environmental laws and Hazardous Materials (including, without limitation, City's Hazardous Materials Management Program), and Client shall be responsible for reporting any Hazardous Material releases to the appropriate public agencies. Client shall immediately notify the Director of any release. At Client's sole cost and expense, any release of a Hazardous Material or danger of release of a Hazardous Material shall be corrected immediately. At the sole discretion of City, City may close the Facility without abatement for fees due to City, until such release or danger of release of a Hazardous Material is removed.

Client shall be solely and fully responsible and shall indemnify and hold City harmless from and against all loss, damage, liability (including all foreseeable and unforeseeable consequential damages) and expense (including, without limitation, the cost of any required clean-up and remediation of the Hazardous Materials) arising as a result of the presence or clean-up of Hazardous Materials at the Facility caused in whole or in part by Client. Client's obligations under this Section shall survive the expiration or earlier termination of this Agreement.

As used herein, the term "Hazardous Material" shall mean any substance or material which has been determined by any state, federal or local government authority to be capable of posing risk of injury to health, safety, or property including all of those materials and substances designated as hazardous or toxic by the U.S. Environmental Protection Agency, the California Water Quality Control Board, the U.S. Department of Labor, the California Department of Industrial Relations, the California Department of Health Services, the California Health and Welfare Agency in connection with the Safe Water and Toxic Enforcement Act of 1986, the U.S. Department of Transportation, the U.S. Department of Agriculture, the U.S. Consumer Product Safety Commission, the U.S. Department of Health, Education and Welfare, the U.S. Food and Drug Administration or any other governmental agency now or hereafter authorized to regulate materials and substances in the environment. Without limiting the generality of the foregoing, the term "Hazardous Material" shall include all of those

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materials and substances defined as "Toxic Materials" in Sections 66680 through 66685 of Title 22 of the California Code of Regulations, Division 4, Chapter 30, as the same shall be amended from time to time.

22. **EXCLUSIVE SERVICES.** City reserves unto itself or its assigned agent the sole right to provide certain services at the Facility on an exclusive basis, including but not limited to the following:
- A. **Advertising Displays.** City or its assigned agent will provide all advertising in permanently mounted display cases and restrooms.
 - B. **Food & Beverage Services.** City or its assigned agent will provide all catering and retail sale of food and/or beverage services.
 - C. **Networking Infrastructure.** City or its assigned agent has the exclusive right to use the Network infrastructure systems, and services necessary to provide high-speed local and wide-area network connectivity services that are made available for a fee to clients at or from the facilities through the SJCC Network. Notwithstanding, Clients may install and manage their own temporary networks.
 - D. **Parking Lots and Check Rooms.** City or its assigned agent will operate the parking lots and any checkrooms provided.
 - E. **Retail Sales & Services.** City or its assigned agent will operate all retail outlets including but not limited to shoeshine services, gift shops and newsstands, and will sell or dispense soft drinks, candies, food items, food novelties and/or any related merchandise commonly sold or dispensed at public facilities.
 - F. **Telecommunication Services.** City or its assigned agent will sell, rent or otherwise make available all wire and wireless communications (voice and data) equipment including wire and wireless telephone, cable TV, and other voice and data communications equipment and related services.

The Director may, in writing, authorize Client to do any of the aforesaid upon such terms as the Director may deem proper under the circumstances, subject to the provisions of any existing concession contracts in effect at the time of the Event.

23. **RULES AND REGULATIONS.** City's General Rules and Regulations, Public Safety Plan, Show Manager's Guide and Service Contractor's Guide are hereby incorporated into this Agreement by reference. City reserves the right to change such rules and regulations in writing from time to time and will provide Client with such changed rules and regulations, which shall be binding on Client.

24. **MISCELLANEOUS**

- A. **Authorization.** If requested by Director, Client shall deliver to City a resolution of its board of directors, or partnership resolution, evidence of officer signatures and incumbency certificate in form and substance satisfactory to City regarding the due authorization, execution and delivery by Client of this Agreement.
- B. **Consent.** Whenever in this Agreement the approval or consent of a party is required, such approval or consent shall be in writing and shall be executed by a person having the express authority to grant such approval or consent. Any consent or approval granted by City of personnel or contractors operating on behalf of Client is for City's benefit only and is not a warranty that such person is qualified to do the work specified.
- C. **Controlling Law.** Except as Federal law may apply, the parties agree that this Agreement shall be governed and construed by and according to the laws of the State of California.
- D. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which counterparts shall be an original, but all of which together shall constitute one and the same instrument.
- E. **Entire Agreement.** The parties acknowledge that there are no agreements or understandings regarding the use of the Facility, written or oral, other than this Agreement, that this Agreement constitutes the full and complete agreement between the parties and shall be controlling in the event of any conflict.

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- F. **Gender.** Any reference to the masculine gender shall be deemed to include references to the feminine gender and vice versa.
- G. **Headings.** The section headings are not a part of this Agreement and shall have no effect upon the construction or interpretation of any part of this Agreement.
- H. **Modification of Agreement.** This Agreement shall not be modified or amended, unless the parties each first agree to and approve of such modification or amendment in writing.
- I. **Severability.** If a court of competent jurisdiction finds or rules that any provision of this Agreement is void or unenforceable, the remaining provisions of this Agreement shall remain in effect.
- J. **Successors and Assigns.** The provisions of this Agreement shall, subject to the provisions of Section 9, apply to and bind the successors and assigns of the parties hereto.
- K. **Time of Essence.** Time is of the essence with respect to this Agreement, and each of the provisions hereof and thereof.
- L. **Venue.** In the event that suit shall be brought by either party hereunder, the parties agree that venue shall be exclusively vested in the state courts of the County of Santa Clara, or if federal jurisdiction is appropriate, exclusively in the United States District Court, Northern District of California, San José, California.

IN WITNESS WHEREOF, City and Client have executed this Agreement on the dates, set forth below.

CLIENT, a _____ [corporation]
[state of incorporation]

CITY OF SAN JOSE, a municipal corporation

BY: _____

BY: _____

NAME: _____

NAME: David Bevans

TITLE: _____

TITLE: GENERAL MANAGER

DATE: _____

DATE: _____

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EXHIBIT A INSURANCE REQUIREMENTS

- INSURANCE.** Client shall furnish the Director by the time specified in this Agreement, a certificate showing there is in force a valid Commercial General Liability Policy of Insurance showing you, the Client, as insured, and showing a minimum limit of liability of \$1,000,000 Combined Single Limit for Bodily Injury and Property Damage. Also, at the City's discretion, Fire Legal Liability in the amount of \$100,000 is required. Additionally, each certificate must be accompanied by the following endorsements: (a) the City of San José, its officers, agents and employees are additional insured; (b) a minimum of ten (10) days notice of cancellation or changes of coverage be given to the City of San José; (c) the insurance is primary insurance as respects any other valid and collectible insurance the City of San José may possess, and any other insurance the City may have will be considered excess insurance only; (d) this policy will act for each insured and additional insured as if a separate policy had been written for each. (This will not act to increase the policy's limits of liability;) and (e) these requirements are subject to amendment or waiver if so approved in writing by the City's Risk Manager.
- DEDUCTIBLES AND SELF - INSURED RETENTIONS.** Any deductibles or self-insured retentions must be declared to, and approved by City's Risk Manager. At the option of City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects City, its officers, employees, agents and contractors; or Client shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by the City's Risk Manager.

**SAN JOSE CONVENTION & CULTURAL FACILITIES
GENERAL RULES AND REGULATIONS**

1. **Amplified Sound/Noise Level.** Client understands that other functions may be scheduled in different portions of the Facility, at the same time as the Event. Client agrees to ensure that amplified sound used in connection with the Event shall not disrupt or interfere with other events or persons using the Facility. Furthermore, Client shall immediately comply with Director's request to reduce the noise generated by the Event.
2. **Animals.** Client may not bring or allow any animals to be brought into the Facility, without the prior written consent of Director, except that guide dogs used by a visually impaired person may enter the Facility without the Director's prior consent. If any animal is brought into the Facility in connection with the Event, Client shall ensure that the animal is adequately controlled and supervised and that all other appropriate safety measures are in place to protect persons in and out of the Facility. Furthermore, Client shall ensure that any animal brought to the Facility is treated in a humane manner and in compliance with all laws regarding transportation and handling of animals and Client shall obtain any additional insurance coverage required by City's Risk Manager prior to allowing an animal to enter the Facility.
3. **Condition of Facility.** City and Client shall conduct a walk through prior to the end of the last Move-out Day to determine the condition of the Facility. The Facility and any equipment used by Client shall each be in at least as good condition and repair as before Client's use thereof, except for ordinary wear and tear. Client shall be charged a fee for failure to leave the Facility in such condition as described herein, in addition to any other right and remedy the City may have.
4. **Control of Facility.** The Facility, including keys thereto, shall be at all times under control of the Director who shall have the right to enter the Facility, and all portions thereof, at all times during the period covered by this Agreement. The entrances and exits of the Facility shall be locked and unlocked by the Director at such times as may be required for Client's use of the Facility. Client, at its own expense, must at all times place proper security personnel at appropriate entrances and exits when the same are unlocked, including, without limitation, a minimum of one off-duty San José Police Officer at the loading dock entrance on Move-in and Move-out Days. Client shall file with the Director, at least fourteen (14) days prior to the first Move-in Day, a full and detailed security plan. Client's security plan is subject to approval of the Director.
5. **Damages to the Facility.** The City agrees to repair or replace, as the case may be, any defects or damage to the Facility that are identified in the walk-through by Client and City and agreed to by City as likely to interfere with Client's use and occupancy of the Facility. After the Event, City and Client agree to confer on all damage or other problems alleged by the City to be the responsibility of Client, as provided herein below. Client agrees to pay costs of repair or replacement for any and all damages to the Facility and other property of City, caused by Client's officers, agents, employees, contractors (including independent contractors), exhibitors, registrants or other persons attending the Event with the express or implied permission or invitation of Client. Such responsibility shall not cover damage caused by the negligence or willful misconduct of City, its officers, agents, contractors or employees.
6. **Deliveries and Storage.** Client understands and agrees that the Facility has very limited storage space and that Client is responsible for arranging shipment and storage of items related to the Event prior to the Move-in Days. Shipments of equipment and other items necessary to hold the Event shall be accepted at the Facility on the Show Days or Move-in Days specified in this Agreement, and City shall not accept delivery of shipments on any other date. If City determines, in its sole discretion, that arrangements should be made for storage, receipt, handling, care or custody of anything shipped or otherwise delivered to the Facility, whether prior to, during or subsequent to Client's use of the Facility and Client fails to make such arrangements, City and its officers, agents and employees may make arrangements for storage at Client's sole cost, and shall act solely for the accommodation of Client and shall not be liable for any loss, damage or injury to such property. City and Client understand and agree that City is not a bailee, and is therefore not responsible for any damage to Client's property or the property of Client's agents, contractors, employees, directors, or representatives.
7. **Distribution of Materials.** Client may distribute or circulate, or permit to be distributed or circulated, only such reasonable advertising matter or programs pertaining to the Facility, the Event, the Client or the Exhibitor in the entrance to or in the Facility. Director may deny distribution of any materials not in compliance with this Section.

8.

**SAN JOSE CONVENTION & CULTURAL FACILITIES
GENERAL RULES AND REGULATIONS**

Event Set Up and Personnel Levels. Subject to the provisions of this Section, Director and Client shall consult upon the number of personnel, set up and optional equipment needed for the Event. Client shall file with the Director, at least twenty-one (21) days prior to the first Move-in Day, a full and detailed description of:

- a. the Facility set-up, all equipment, services and stage requirements required by Client;
- b. the number of personnel to be utilized by Client during the Event, which may include, without limitation, contractors, security personnel, emergency medical personnel, event security personnel, San José Police Officers, stagehands, projectionists, ticket sellers, ticket takers, necessary labor for move-in and move-out, management for the event, audio/visual services, ushers and door guards; and
- c. any other information that may be reasonably required by the Director concerning the Event.

While Client is responsible for hiring all personnel required for the Event, Event staffing plans and qualifications of required personnel are subject to the approval of the Director. Client shall only select and use contractors, decorating companies and service contractors for the Event which demonstrate to Director that they possess the necessary experience and qualifications for such tasks. If Director has not notified Client of its disapproval of a contractor or decorating company one (1) week after receipt of notice that Client intends to use such contractor or decorating company, Director shall be deemed to consent to such person.

City shall make available no City employee for Client's use unless the desired services of a City employee coincide, in the Director's judgment, with his or her regularly assigned duties. Client shall pay for all personnel, without cost to or reimbursement from City, at the established rates for such personnel on the date of the Event. If requested, City shall assist Client in obtaining information on the established rates for any required personnel.

Additional equipment, services and/or changes to stage requirements requested less than twenty-one (21) days prior to the Event are only available at the discretion of the Director and may be subject to additional charges. If Client requests changes in personnel levels for the Event less than twenty-one (21) days prior to the Event, Client shall reimburse City for the time expended by City employees to revise the City's work plans for the Event to accommodate the change.

If the information required by this Section is not provided to the Director in a timely manner, Director will determine the necessary staffing, set-up, optional equipment and stage requirements based upon the information readily available to Director. City shall not be obligated to make available set-up, optional equipment or stage requirements in excess of those determined by the Director. Furthermore, Client shall reimburse City for the time spent and/or costs incurred by any City employee in determining necessary staffing, set-up, optional equipment and stage requirements and in making available such items to Client.

9. **Exhibit Floor Plans.** Client shall submit to the Director a preliminary floor plan of the exhibit and registration areas drawn to scale indicating dimensions of all seating areas, stages, exhibit booths and aisles, no less than six (6) months prior to the Event.

Client shall submit to the Director eight (8) originals of a complete floor plan for the Event, for approval, no less than sixty (60) days prior to the first contracted move-in day for the Event. Any changes or alterations required by the Fire Marshal must be incorporated into the floor plan approved and signed by the Fire Marshal. An original copy of the complete and final floor plan, signed by the Fire Marshal, shall be submitted by Client to the Director no less than forty-five (45) days prior to the first contracted move-in day for the Event. The Fire Marshal shall have final approval on all submitted plans. Client shall not commence occupancy of any portion of the Facility, or move any property into the Facility, until the Director has received and reviewed a complete and final floor plan signed by the City's Fire Marshal.

10. **Floor Load Capacity.** Maximum Load-Bearing Capacity of Floors. Client acknowledges and understands that the maximum load-bearing capacity of the floors of the Exhibit Halls is three hundred fifty (350) pounds per square foot.

11. **Loading Access.** All exhibits, fixtures, materials, displays and other property necessary for an Event shall be brought into and out of the Facility only at such entrances as may be designated by the Director

12.

**SAN JOSE CONVENTION & CULTURAL FACILITIES
GENERAL RULES AND REGULATIONS**

Obstructions and Fire Hazards. Client shall not engage in any activity, or permit any of its officers, agents, contractors (including independent contractors), subcontractors, exhibitors, registrants and other persons attending the Events, to engage in any activity, which will obstruct or interfere with the rights of any other user of the Facility or otherwise interfere with free access to and from the Facility or any other portions of the San José Convention and Cultural Facilities or will cause damage to the Facility, or is prohibited by a standard form of fire insurance policy, or will in any way increase or affect the then existing rate of any fire or other insurance at the Facility. No open flames including candles shall be permitted in the facilities, without express written consent of Director.

Client shall pay for any charges imposed by the Fire Department for responding to a fire alarm at the Facility during the Event or otherwise as a result of the Event; unless such fire alarm was caused by the City's negligence or willful misconduct.

13. **Opening Hours.** Client shall open the doors of its Event as advertised unless otherwise agreed to by Director.
14. **Painting.** No painting is allowed in the Facility, other than minor touch-up painting
15. **Pyrotechnic Permit and Insurance Required.** Client must obtain a permit from the San José Fire Department and deliver to Director a copy of such permit no less than seven (7) days prior to any use of fireworks, flashpots or explosives or similar items (referred to as "pyrotechnics"). Fire liability insurance, approved by City's Risk Manager, must be in place prior to any pyrotechnics being allowed at the Facility.
16. **Rigging.** Rigging plans and specifications shall be submitted to the Director, for approval no less than fourteen (14) days prior to the event. Cost of installation, maintenance and removal of such rigging shall be the sole responsibility of the Client. Client shall not do nor permit to be done anything which may interfere with the effectiveness or accessibility of utility, heating, ventilating or air conditioning systems or portions thereof in the Facility.
17. **Seating Capacity, Facility Capacity.** Client shall not sell or permit to be sold or distributed tickets or passes in excess of the capacity of the Facility, nor admit to the Facility a larger number of persons than can legally, safely and freely move about therein. The maximum capacity for the Facility is on file with the Director.
18. **Security Deposit.** Director may require Client to deliver to City a reasonable security deposit if a prior event held by Client resulted in damage to the Facility or, if Director determines in his or her reasonable judgment, that there is a risk of damage to the Facility. Director shall give client notice that a security deposit will be required at least five (5) business days prior to the due date. Any or all of the security deposit that is not needed to satisfy such costs will be refunded without interest to Client upon the expiration or termination of this Agreement.
19. **Services Provided.** City shall provide such regularly provided heating/air conditioning and overhead light for ordinary use in the areas occupied by Client, as described on the Summary Pages. City will provide without extra charge (i) cleaning consisting of washing, mopping, sweeping, vacuuming, trash removal and maintaining supplies as needed in the areas accessible to the general public and Event attendees, but not including exhibit space and carpeted aisle space, (ii) between session cleanup as possible, if approved by Director for events with more than one session scheduled on a single day, (iii) the initial set-up for each room to be utilized by Client under this Agreement (including, subject to availability, tables, chairs, lecterns, trash receptacles, and one paging microphone in the exhibit hall), (iv) an Event coordinator to oversee and support the Event, and (v) if available, dressing rooms, box offices and show manager offices.
20. **Signs and Banners.** Client is strictly prohibited from affixing or attaching any signs, banners, posters, placards, displays or other materials to walls, doors, panels, columns or other portions of the Facility by any method, except as approved by Director. All banners and advertising located at the Facility are subject to advertising fees. Installation and removal of banners and advertising must be provided by Client, at Client's expense. Any damage to the Facility caused by any such prohibited affixation or attachment shall be the responsibility of Client, and Client shall be fully liable to City for any such damage. Furthermore, Client understands that no advertisement of the Event may be placed in the public right of way, except as permitted in Chapter 23 of the San José Municipal Code and, that Client shall be liable for payment of charges imposed by City for removal of any illegal signs advertising the Event or any portion thereof.
21. **Tours.** City reserves the right to conduct public tours and site inspections of the Facility during the period of occupancy in such a manner as to not interfere with the Client's event.

**SAN JOSE CONVENTION & CULTURAL FACILITIES
GENERAL RULES AND REGULATIONS**

22. Utility Connections. Gas and plumbing connections, including but not limited to the installation, maintenance, and removal thereof, may be made by Client and/or Client's contractors but only if Client and/or Client's contractors have been approved in writing no less than fourteen (14) days prior to the Event by the Director, and the work to be performed by Client and/or Client's contractors shall be done at Client's sole expense. Further, Client shall not do nor permit to be done anything that may interfere with the effectiveness or accessibility of utility, heating, ventilating or air conditioning systems or portions thereof in the Facility.

APPENDIX IV

Private Activity Requirements SUMMARY OF INTERNAL REVENUE SERVICE PROCEDURE 97-13

1. Compensation and Term

- a. General. Compensation for management services must be reasonable, with no compensation based on a share of net profits. But reimbursement to the manager for actual and direct expenses paid by the manager to unrelated parties are not treated as compensation. Also, a productivity reward equal to a stated dollar amount based on increases or decreases in gross revenues, or reductions in total expenses (but not both increases in gross revenues and reductions in total expenses) generally does not cause the compensation to be based on a share of net profits.
- b. Permitted Arrangements. The management contract must be described in Paragraph (1), (2), (3) or (4) below:

	<u>Compensation Type</u>	<u>Maximum Contract Term</u>
(1)	At least 95% Periodic Fixed Fee	15 years
(2)	At least 80% Periodic Fixed Fee	10 years
(3)	At least 50% Periodic Fixed Fee	5 years subject to termination without penalty by the City after 3rd year
(4)	Per-unit Fee or Periodic Fixed Fee/ Per-unit Fee Combination	3 years subject to termination without penalty by the City after 2nd year

- c. Definitions. A "Periodic Fixed Fee" is a stated dollar amount for services rendered for a specified period of time (for example, a stated dollar amount per month). The amount may automatically increase according to a specified objective, external standard that is not linked to the output or efficiency of the facility, such as the Consumer Price Index. A "per-unit" fee is a fee based on a unit of service provided, such as an 18-hole round of golf.

- d. Compensation Mix. If a Periodic Fee (i.e. \$x per month) comprises at least 50% of the compensation as described in (1), (2) or (3) above, the portion of the compensation not fixed may be based on a percentage of gross revenues or expenses (but not both).
 - e. One–time Incentive Award for 95% and 80% Fixed Fee. For the 95% and 80% Fixed Fee arrangements, a fee does not fail to qualify as a Periodic Fixed Fee as a result of the one–time incentive award during the term of the contract under which compensation automatically increases when a gross revenue or expense target (but not both) is reached, if that award is equal to a single, stated dollar amount.
2. Termination without Penalty.
- a. General. Under the 95% and 80% Periodic Fixed Fee arrangements, it is not necessary for the City to reserve the right to terminate the contract. However, for the 50% and Per Unit or Periodic Fixed Fee/Per Unit combination, the City must have the right to terminate on reasonable notice, without penalty or cause, at the end of the 3rd year or 2nd year, respectively.
 - b. Prohibited Penalties. The management contract may not include “prohibited termination penalties” such as a limit on the City’s right to compete with the service provider, a requirement that the City purchase equipment, goods or services from the service provider, or a requirement that the owner pay liquidated damages upon termination.
 - c. Allowable Penalties. The management contract may include “permitted termination penalties” such as a requirement that the owner reimburse the service provider for ordinary and necessary expenses, or a restriction on the owner against hiring key personnel of the service provider.

APPENDIX V

INSURANCE PROVISIONS

Operator/Manager, at Operator's/Manager's sole cost and expense, shall procure and maintain for the duration of this Agreement insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the services hereunder by the Operator/Manager, his agents, representatives, employees or subcontractors.

A. Minimum Scope of Insurance

Coverage shall be at least as broad as:

1. The coverage described in Insurance Services Office Form Number GL 0002 (Ed. 1/96) covering Commercial General Liability together with Insurance Services Office Form Number GL 0404 covering Broad Form Comprehensive General Liability; or that described in Insurance Services Office Commercial General Liability coverage ("occurrence") Form Number CG 0001 (Ed. 01/96), including X, C, U (explosion, collapse, underground) coverage, Liquor Liability, Fire Legal Liability; and
2. The coverage described in Insurance Services Office Form Number CA 0001 (Ed. 12/93) covering Automobile Liability, Code 1 "any auto," or Code 2 "owned autos" and Endorsement CA 0025. Coverage shall also include Code 8 "hired autos" and Code 9 "nonowned autos;" and
3. Worker's Compensation insurance as required by the California Labor Code and Employers Liability insurance; and
4. Crime Coverage.

B. Minimum Limits of Insurance

Operator/Manager shall maintain limits no less than:

1. **Commercial General Liability**: \$5,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit; \$5,000,000 Liquor Liability, \$1,000,000 Fire Legal Liability; and
2. **Automobile Liability**: \$1,000,000 combined single limit per accident for bodily injury and property damage; and

3. **Workers' Compensation and Employers' Liability:** Workers' Compensation limits as required by the California Labor and Employers' Liability limits of \$1,000,000 per accident; and
4. **Crime Coverage:** A combination Crime policy with minimum limits not less than \$500,000 for

Form A: Employee Dishonesty

Form B: Forgery or Alteration

Form C: Theft, Disappearance, Destruction Inside/Outside Premises

Form D: Robbery and Safe Burglary Inside/Outside Premises

C. Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared to, and approved by, the CITY. At the option of the CITY, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the CITY, its officials, employees, agents and contractors; or the Operator/Manager shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by the CITY.

D. Other Insurance Provisions

The policies are to contain, or be endorsed to contain, the following provisions:

1. **Commercial General Liability and Automobile Liability Coverages**

- a. The CITY, its officials, employees, agents and contractors are to be covered as additional insureds as respects: liability arising out of activities performed by, or on behalf of, the Operator/Manager; products and completed operations of the Operator/Manager; premises owned, leased or used by the Operator/Manager; and automobiles owned, leased, hired or borrowed by the Operator/Manager. The coverage shall contain no special limitations on the scope of protection afforded to the CITY, its officials, employees, agents and contractors.
- b. The Operator's/Manager's insurance coverage shall be primary insurance as respects the CITY, its officials, employees, agents and contractors. Any insurance or self-insurance maintained by the CITY, its officials, employees, agents or contractors shall be excess of the Operator's/Manager's insurance and shall not contribute with it.
- c. Any failure to comply with reporting provisions of the policies by Operator/Manager shall not affect coverage provided to the CITY, its officials, employees, agents, or contractors.

- d. Coverage shall state that the Operator's/Manager's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

2. **All Coverages**

Each insurance policy required by this Agreement shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in limits except after thirty (30) days' prior written notice has been given to the CITY.

E. Acceptability of Insurance

Insurance is to be placed with insurers acceptable to the CITY's Risk Manager.

F. Verification of Coverage

Operator/Manager shall furnish the CITY with certificates of insurance and with original endorsements affecting coverage required by this Agreement. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Proof of insurance shall be mailed to the following address or any subsequent address as may be directed in writing by the Risk Manager:

CITY OF SAN JOSÉ
Risk Manager
801 N. First Street, Room 110
San Jose, CA 95110-1704

G. Subcontractors

Operator/Manager's shall include all subcontractors as insureds under its policies or shall obtain separate certificates and endorsements for each subcontractor.

APPENDIX VI

GENERAL AGREEMENT PROVISIONS

1. INDEMNIFICATION

Operator/Manager, for and on behalf of its directors, officers, employees and agents, covenants and hereby agrees to indemnify, defend, protect and hold harmless City, its officers, employees, contractors and agents, from and against any and all claims, demands, obligations, liabilities, losses, costs, expenses, penalties, suits or judgments, at any time received, incurred or accrued by City, its officers, agents, employees, contractors or members of the public using the Conference Center, arising out of or resulting in whole or in part from any act (or failure to act) of Operator/Manager, its officers, employees, contractors, agents, clients, permittees or invitees, or which results from their noncompliance with any laws respecting the condition, use, occupation or safety of the Conference Center, or any part thereof, or which arises from Operator/Manager's services under the Agreement or which arises from Operator/Manager's failure to do anything required under this Agreement, except as may arise from the sole active negligence or the sole willful misconduct of City, its officers, employees or agents. City's right to full indemnity hereunder shall arise notwithstanding that principles of joint, several or concurrent liability or comparative negligence, might otherwise impose liability on City pursuant to statutes, ordinances, regulations or other laws. This Section shall survive the expiration or earlier termination of this Agreement. The acceptance by City of Operator/Manager's services and duties shall not operate as a waiver of such right of indemnification.

2. HAZARDOUS MATERIALS

- a. **Definition of "Hazardous Materials"** - For purposes of this provision, "Hazardous Materials" shall mean any and all (a) substances, products, by-products, waste, or other materials of any nature or kind whatsoever which is or becomes listed, regulated or addressed under any Environmental Laws, and (b) any materials, substances, products, by-products, waste, or other materials of any nature or kind whatsoever whose presence in and of itself or in combination with other materials, substances, products, by-products, or waste may give rise to liability under any Environmental Law or any statutory or common law theory based on negligence, trespass, intentional tort, nuisance, strict or absolute liability or under any reported decisions of any state or federal court; and (c) any substance, product, by-product, waste or any other material which may be hazardous or harmful to the air, water, soil, environment or affect industrial hygiene, occupational, health, safety and/or general welfare conditions, including without limitation, petroleum and/or asbestos materials, products, by-products, or waste.

- b. **Use and Storage of Hazardous Materials Prohibited** - The use and storage of Hazardous Materials by the Operator/Manager in the Conference Center is prohibited. Upon becoming aware of any release of a Hazardous Material in the Conference Center, the Operator/Manager shall immediately report such release to City and to any other appropriate public agency. The Operator/Manager shall immediately report the release of any Hazardous Material to the City even where the quantities released would not be otherwise reportable to another public entity. This reporting obligation exists with regard to any release of Hazardous Material within the Conference Center and is not limited to releases of those Hazardous Materials used by the Operator/Manager.

3. INSURANCE

Operator/Manager agrees to have and maintain the policies set forth in APPENDIX III, entitled "INSURANCE PROVISIONS," which is attached hereto and incorporated herein. All policies, endorsements, certificates and/or binders shall be subject to approval by the Director of Finance or the Director's authorized designee ("Risk Manager") as to form and content. These requirements are subject to amendment or waiver if so approved in writing by the Risk Manager. Operator/Manager agrees to provide CITY with a copy of said policies, certificates and/or endorsements before work commences under this Agreement. CITY shall not be obligated to take out insurance on Operator/Manager's property.

4. AMERICANS WITH DISABILITIES ACT (ADA)

Operator/Manager shall be solely and fully responsible for complying with the Americans with Disabilities Act of 1990 ("ADA") in connection with: (a) any use of the facilities by guests or services provided by Operator/Manager to Customers; and (b) modifying its policies, practices, and procedures to comply with the ADA. Operator/Manager shall develop a workplan to correct or avoid any violations or non-compliance with the ADA. Operator/Manager shall deliver to the CITY, upon CITY's request, a copy of each report and workplan. CITY's approval of or acceptance of any aspect of Operator/Manager's activities under this Agreement shall not be deemed or construed in any way as a representation that such item, activity or practice complies with the ADA. Operator/Manager agrees to indemnify, defend, and hold the CITY harmless from any and all costs incurred by CITY with respect to Operator/Manager's failure to comply with the ADA.

5. DISPLACED JANITOR OPPORTUNITY ACT OF 2001

Contractor shall comply with the Displaced Janitor Opportunity Act of 2001, found at California Labor Code Sections 1060-1065. Proposers should consult with their own attorney regarding their obligations under this law. However proposers should be aware

that as a successful proposer, they will be obliged to comply with the transition notification and hiring provisions of this law.

6. Financial Responsibilities

The City of San Jose will be responsible for all debt service payments as of date of Notice to Proceed, and will retain all Transient & Occupancy Tax (TOT) proceeds. The Contractor will be responsible for all operational cost items, including all routine and minor repairs, equipment servicing, building maintenance and preventative maintenance.

The Contractor will retain revenues for any pass through charges for centralized services.

7. APPROVAL RIGHT OF MANAGERS

The City reserves the right of approval of the Manager appointed by the Contractor to operate the McEnery Convention Center facilities as well as the Sales and Marketing Manager. Names and resumes of individuals intended to fill these two positions shall be submitted to the City during negotiations, prior to execution of the contract.

5. CITY USE, COMMUNITY FREE USE AND PUBLIC ACCESS:

The budget office allocates \$180,000 for City Departments to use Convention Center Facilities. It's known as the City Use Fund, which we manage. There is no specific Public Use provision.

6. TAXES AND ASSESSMENTS

- a. **Payment of Taxes, fees** -- Generally OPERATOR/MANAGER shall be responsible for payment of all taxes, fees contributions or charges applicable to the conduct of OPERATOR/Manager's business.
- b. **Possessory Interest Tax** -- It is the understanding of the CITY and Operator/Manager that no interest in the Conference Center property or structures is created by this Agreement because it is only an agreement to provide Conference Center Management Services. Nevertheless, Operator/Manager recognizes and agrees that the assessor for the County of Santa Clara County may determine that the Operator/Manager's right to operate and manage the Conference Center as set forth in this Agreement creates a possessory interest subject to a possessory interest tax. Operator/Manager shall be solely responsible for paying any possessory interest tax or taxes imposed upon Operator/Manager as a result of its operation and management of the Conference Center Management Services at the Conference Center.
- c. **Tax - Hold Harmless** -- Operator/Manager shall protect, defend, indemnify and hold CITY, including the Conference Center, and any improvements now

or hereafter in the Conference Center, free and harmless from any liability, loss, or damage resulting from any taxes, assessments, or other charges required by this Agreement to be paid by Operator/Manager and from all interests, penalties, and other sums imposed thereon and from any proceedings to enforce collection of any such taxes, assessments, or other charges. During the term of this Agreement and any extensions thereof, the Operator/Manager shall pay the San Jose Business Tax required by Chapter 4.76 of the San Jose Municipal Code.

7. INDEPENDENT CONTRACTOR

Operator/Manager, in the performance of this Agreement, is an independent contractor. Operator/Manager shall maintain complete control over all of Operator/Manager's employees, any subcontractors, any consultants, and Operator/Manager's operations. Neither Operator/Manager nor any person retained by Operator/Manager may represent, act, or purport to act as the agent, representative or employee of CITY. Neither Operator/Manager nor CITY is granted any right or authority to assume or create any obligation on behalf of the other except as otherwise expressly provided in this Agreement.

8. RECORDS, REPORTING AND RIGHT TO AUDIT

Operator/Manager/Manager will be required to complete records and books of account prepared in accordance with generally accepted accounting principles relating to the operation and management of the Conference Center in accordance with industry standards and reflecting all matters to be covered by statements pertaining to the obligations under the Agreement for a minimum of four (4) years. The City may, at any reasonable time during normal business hours and with reasonable notice at the Operator/Manager's expense, examine, copy and audit (or cause to be examined and audited by the City's Auditor or by an independent certified public accountant selected by the City), such records and books of the Operator/Manager.

Operator/Manager shall furnish to the City monthly reports prepared in accordance with generally accepted accounting principles and audited financial statements no later than seventy-five (75) calendar days following the end of the Operator/Manager's fiscal year., which shall be prepared in accordance with generally accepted accounting principles.

Operator/Manager agrees that the City's authorized representatives, at any time; upon reasonable advance notice to Operator/Manager, during normal business hours, shall have access to and right to examine the Conference Center and the Operator/Manager's performance under the Agreement.

9. ASSIGNABILITY

The parties agree that the expertise and experience of Operator/Manager are material considerations for this Agreement. Unless specifically authorized by this Agreement, Operator/Manager may not assign the performance of any obligation or interest under this Agreement without the prior written consent of CITY which consent is at the absolute discretion of CITY. Any attempt by Operator/ Manager to assign this Agreement, in violation of this Section, will be voidable at CITY's sole option.

10. SUBCONTRACTORS

- a. **Authorized Subcontractors** -- Notwithstanding SECTION 8 above, Operator/Manager may use designated subcontractors approved in advance by Director in performing Operator/Manager's services. Operator/Manager shall be responsible for directing the work of the subcontractors and for any compensation due to such subcontractors. Operator/Manager must obtain Director's prior written consent in order to change or add subcontractors.
- b. **Compliance with this Agreement** -- Operator/Manager's subcontracting of any portion of its obligations under this Agreement shall not relieve it from liability and responsibility for the performance of such obligations required to be performed by Operator/Manager under this Agreement. Operator/ Manager shall ensure that Operator/Manager's subcontractors comply with this Agreement. At CITY's request, Operator/Manager shall require any or all of Operator/Manager's subcontractors to sign an Agreement with Operator/Manager requiring compliance with this Agreement.

11. GIFTS

- a. **Prohibition of Gifts** -- Operator/Manager acknowledges that Chapter 12.08 of the San Jose Municipal Code prohibits CITY's officers and designated employees from accepting gifts as defined in Chapter 12.08.
- b. **No Offer** -- Operator/Manager agrees not to offer any CITY officer or designated employee any gift prohibited by Chapter 12.08.
- c. **Breach of Management Services Agreement** -- Operator/Manager's offer or giving of any gift prohibited by Chapter 12.08 will constitute a material breach of this Agreement. In addition to any other remedies CITY may have in law or equity, CITY may terminate this Agreement for such breach as provided in Section 9 of this Agreement.

12. DISQUALIFICATION OF FORMER EMPLOYEES

Operator/Manager is familiar with Chapter 12.10 of the San Jose Municipal Code ("Revolving Door Ordinance") relating to the disqualification of CITY's former officers and employees in matters which are connected with their former duties or official responsibilities. Operator/Manager shall not utilize either directly or indirectly any officer, employee, or agent of Operator/Manager to perform services under this Agreement, if in the performance of such services, the officer, employee, or agent would be in violation of the Revolving Door Ordinance.

13. MISCELLANEOUS

- a. **Licenses and Permits** -- Operator/Manager shall obtain all licenses, permits, certificates, consents, approvals or other entitlements (collectively, "Licenses") required for Operator/Manager's operation of the Conference Center.
- b. **Conflict of Interest** -- Operator/Manager shall avoid all conflict of interest or the appearance of conflict of interest in performance of this Agreement.
- c. **Nondiscrimination** -- Operator/Manager agrees that there shall be no discrimination against, or segregation of, any person based on race, sex, color, age, religion, sexual orientation, disability, ethnicity, national origin, marital status, or family status, in connection with or related to the performance of this Agreement.
- d. **Responsibility for City Property** -- Except as otherwise provided in this Agreement, Operator/Manager assumes the risk of and shall be responsible for any loss or damage to any equipment or other property delivered to it by the CITY for use by Operator/Manager when providing the Catering Management Services at the Conference Center. Upon the expiration or earlier termination of the Agreement, Operator/Manager shall return any such equipment or property to the CITY in the condition in which Operator/Manager received it, except for reasonable wear and tear.

SAMPLE CONVENTION CENTER AND CULTURAL FACILITIES

Maintenance Definitions

	<u>Operation/ Servicing</u>	<u>Preventive Maintenance</u>	<u>Scheduled Repairs</u>	<u>Emergency Repairs</u>	<u>Unit Replacement</u>	<u>Minor Improvements</u>
<u>HVAC</u>						
<input type="checkbox"/> Heating System	...OPERATOR...	...OPERATOR...	...OPERATOR.....	OPERATOR.....	City...	...OPERATOR...
<input type="checkbox"/> Vent/Air Handling	...OPERATOR...	...OPERATOR...	...OPERATOR.....	OPERATOR.....	City...	...OPERATOR...
<input type="checkbox"/> Air Conditioning	...OPERATOR...	...OPERATOR...	...OPERATOR.....	OPERATOR.....	City...	...OPERATOR...
<input type="checkbox"/> Controls System	...OPERATOR...	...OPERATOR...	...OPERATOR.....	OPERATOR.....	City...	...OPERATOR...
<u>Electrical</u>						
<input type="checkbox"/> Main & Sub Panels *	...OPERATOR...	...OPERATOR...	...OPERATOR.....	OPERATOR.....	City....	...OPERATOR...
<input type="checkbox"/> Outlets & Switches	...OPERATOR...	...OPERATOR...	...OPERATOR.....	OPERATOR.....	OPERATOR...	...OPERATOR...
<input type="checkbox"/> Light Fixtures	...OPERATOR...	...OPERATOR...	...OPERATOR.....	OPERATOR.....	OPERATOR...	...OPERATOR...
<input type="checkbox"/> Lamps	...OPERATOR...	...OPERATOR...	...OPERATOR.....	OPERATOR.....	OPERATOR...	...OPERATOR...
<input type="checkbox"/> Light Fixtures	...OPERATOR...	...OPERATOR...	...OPERATOR.....	OPERATOR.....	OPERATOR...	...OPERATOR...
<input type="checkbox"/> Lamps	...OPERATOR...	...OPERATOR...	...OPERATOR.....	OPERATOR.....	OPERATOR...	...OPERATOR...
<input type="checkbox"/> Cabling	...OPERATOR ...	...OPERATOR...	...OPERATOR.....	OPERATOR.....	OPERATOR...	...OPERATOR...
<input type="checkbox"/> Appliances	...OPERATOR ...	...OPERATOR...	...OPERATOR.....	OPERATOR.....	OPERATOR...	...OPERATOR...
<input type="checkbox"/> Pump – Drainage *	...City...	...City...	...City...	...City...	...City.....	...City.....
<input type="checkbox"/> Emergency Generator *	...OPERATOR...	...OPERATOR...	...OPERATOR.....	OPERATOR.....	OPERATOR...	...OPERATOR...
<input type="checkbox"/> Exterior Lighting *	...OPERATOR...	...OPERATOR...	...OPERATOR.....	OPERATOR.....	City...	...OPERATOR...
<input type="checkbox"/> Elevators	...OPERATOR...	...OPERATOR...	...OPERATOR.....	OPERATOR.....	City...	...OPERATOR...
<input type="checkbox"/> Other Electrical	...OPERATOR...	...OPERATOR...	...OPERATOR.....	OPERATOR.....	OPERATOR...	...OPERATOR...

Footnotes:

(*) Shared systems requiring mutual coordination with OPERATOR

SAMPLE CONVENTION CENTER AND CULTURAL FACILITIES

Maintenance Definitions

Page 3 of 3

	<u>Operation/ Servicing</u>	<u>Preventive Maintenance</u>	<u>Scheduled Repairs</u>	<u>Emergency Repairs</u>	<u>Unit Replacement</u>	<u>Minor Improvements</u>
<u>Plumbing</u>						
<input type="checkbox"/> Water Heating System	...OPERATOR...	...OPERATOR...	...OPERATOR.....	...OPERATOR.....	City...	...OPERATOR...
<input type="checkbox"/> Water Lines & Fixtures	...OPERATOR...	...OPERATOR...	...OPERATOR.....	City...	...City...	...OPERATOR...
<input type="checkbox"/> Sewer Lines and Fixtures *	...OPERATOR...	...OPERATOR...	...OPERATOR.....	City...	...City...	...OPERATOR...
<input type="checkbox"/> Water Fountains	...OPERATOR...	...OPERATOR...	...OPERATOR.....	...OPERATOR.....	City...	...OPERATOR...
<input type="checkbox"/> Drinking Fountains	...OPERATOR...	...OPERATOR...	...OPERATOR.....	...OPERATOR.....	...OPERATOR...	...OPERATOR...
<u>Building Safety Systems</u>						
<input type="checkbox"/> Intrusion Alarm	...City.....	...City.....	...City.....	...City.....	...City...	...City...
<input type="checkbox"/> Fire Alarm System *	...OPERATOR. ...	...OPERATOR...	...OPERATOR.....	...OPERATOR.....	City...	...OPERATOR...
<input type="checkbox"/> Sprinkler System *	...OPERATOR. ...	...OPERATOR...	...OPERATOR.....	...OPERATOR.....	City...	...OPERATOR...
<input type="checkbox"/> Fire Extinguisher	...OPERATOR. ...	OPERATOR...	...OPERATOR.....	...OPERATOR.....	City...	...OPERATOR...

Footnotes:

(*) Shared systems requiring mutual coordination with OPERATOR

**EXHIBIT A
PROPOSER FORM**

PROPOSER

Company Name:

Address: _____

City/State/Zip Code: _____

Contact Name/Title: _____

Telephone: _____

Fax: _____

Email: _____

PROPOSER'S REPRESENTATIONS

Proposer understands, agrees, and warrants:

1. That Proposer has carefully read and fully understands the information that was provided by the City to serve as the basis for submission of this proposal to provide lease, management and/or franchise services for the Convention Center and Other Cultural Facilities.
2. That Proposer has the capability to successfully undertake and complete the responsibilities and obligations of the proposal being submitted.
3. That all information contained in the proposal is true and correct to the best of the Proposer's knowledge.
4. That the Proposer acknowledges its commitment to follow through with all proposed programs and features accepted by the City through the negotiation process, should the Proposer be selected as the Operator/Manager for the Convention Center and Other Cultural Facilities. Proposer further agrees that this proposals response will be guaranteed for 120 days from the date below, and that this proposal may be extended beyond that date only by mutual agreement of the City and Proposer.
5. That Proposer did not, in any way, collude, conspire or agree, directly or indirectly, with any person, firm, corporation or other Proposer in regard to the amount, terms, or conditions of this proposal.
8. That proposer did not receive unauthorized information from: any City staff member or Consultant during the Proposal period except as provided for in the Request for Proposal package, addenda thereto, or the pre-proposal conference.
9. That by submission of this proposal, the Proposer acknowledges that the City has the right to make any inquiry it deems appropriate to substantiate or supplement information supplied by Proposer and Proposer hereby grants the City permission to make said inquiries, and to provide any and all requested documentation in a timely manner.

PROPOSER'S SIGNATURE

No Proposal shall be accepted which has not been signed in ink in the appropriate space below:

By signing below, the submission of a proposal shall be deemed a representation and certification by the Proposer that they have investigated all aspects of the RFP, that they are aware of the applicable facts pertaining to the RFP process, its procedures and requirements, and that they have read and understand the RFP. No request for modification of the proposal shall be considered after its submission on the grounds that the Proposer was not fully informed as to any fact or condition.

1. If Proposer is a PARTNERSHIP or JOINT VENTURE, at least two (2) Partners or each of the Joint Venturers shall sign here (include a notarized affidavit attesting to the authenticity of said signatures):

_____ Partnership or Joint Venture Name (type or print)

Date: _____ By: _____
Member of the Partnership or Joint Venture
(signature)

Date: _____ By: _____
Member of the Partnership or Joint Venture
(signature)

2. If Proposer is a CORPORATION, the duly authorized officer(s) shall sign as follows:

The undersigned certify that they are respectively:

_____ and _____
Title Title

of the corporation named below; that they are designated to sign this Proposal Cost Form by resolution (attach a certified copy, with corporate seal, if applicable, notarized as to its authenticity or Secretary's certificate of authorization) for and on behalf of the below named CORPORATION, and that they are authorized to execute same for and on behalf of said CORPORATION.

_____ Corporation Name (type or print)

By: _____ Date: _____
Title: _____

By: _____ Date: _____
Title: _____

EXHIBIT B
PROPOSER'S QUESTIONNAIRE

All information requested in the Questionnaire shall be furnished by the proposer, and shall be submitted with the proposal. Statements shall be complete and accurate and in the form requested. Omission, inaccuracy or misstatement may be cause for the rejection of a proposal.

1. Name of proposer exactly as it is to appear on a management services agreement and address which proposer would designate under the Notice provision of the agreement:

2. Proposer, if selected, intends to carry on the business as: Partnership (), Joint Venture (), Corporation (), Other (). If "Other", attach explanation.

3. If a partnership or joint venture, attach a copy of the partnership agreement or joint venture agreement and identify the participants (both general and limited partners):

A.	NAME	ADDRESS	SHARE
	_____	_____	_____
	_____	_____	_____
	_____	_____	_____

B. Date of Organization: _____

C. General or Limited Partnership: _____
(if applicable)

D. Agreement Recorded: _____
County State Date

E. Registered in California? _____ If so, when? _____

4. If a corporation, answer the following:

A. When incorporated? _____

B. In what state? _____

C. Authorized to do business in California? _____
If so, what date? _____

D. Name, address, years in the corporation, and percentage of stock held by the following officers:

President: _____ Years: _____ Stock %: _____

Vice President: _____ Years: _____ Stock %: _____

Secretary: _____ Years: _____ Stock %: _____

Treasurer: _____ Years: _____ Stock %: _____

Other: _____ Years: _____ Stock %: _____

E. Name, address and percentage of stock held by each Member of the Board of Directors:

Chairman: _____ Stock %: _____

Member: _____ Stock %: _____

Member: _____ Stock %: _____

Member: _____ Stock %: _____

F. Name, address and shares of stock held by other principal stockholders:
(Principal Stockholder is defined as a stockholder who holds 10% or more of
outstanding stock of the corporation).

Total capitalization: \$ _____

Amount of capital stock subscribed: \$ _____

Amount paid in: \$ _____

Questions 5 thru 11 to be answered by all Proposers

5. Have you ever had a bond or surety denied, canceled, or forfeited?

YES () NO () If yes, state name of bonding company, date, amount of bond and
reason for such cancellation or forfeiture in an attached statement.

6. Have you ever declared bankruptcy or been declared bankrupt?

YES () NO () If yes, state date, court jurisdiction, docket number, amount of liabilities and amount of assets.

7. Have any agreements held by you for conference center operations, hotel management services or franchise services ever been terminated for cause?

YES () NO () If yes, give details.

8. Have you ever been sued by any other jurisdiction or Proposer for issues pertaining to fee payment, performance, or other issues relating to conference center operations, hotel management services or franchise service

YES () NO () If yes, give details.

9. Are you currently engaged in merger or acquisition negotiations, or do you anticipate entering into merger or acquisition negotiations within the time period of this Request for Proposals?

YES () NO () If yes, give details. Attach copy of such agreement(s).

10. Are you now engaged in any litigation which does now or could in the future affect your ability to pay fees or perform under an Agreement with the City to operate/manage the Conference Center?

YES () NO () If yes, give details.

11. Provide copies you're the last three years of your company's most recent annual reports or, if not available, your company's most recent audited financial statements for a fiscal year period. List details for any and all past (within the last ten years) or present litigation between the company and any client. If there has been none, so indicate.

The undersigned hereby declares under penalty of perjury that all statements, answers and representations made in this questionnaire are true and accurate, including all supplementary statements hereto attached. In the case of a corporate proposer, the signature of one duly authorized representative is sufficient.

Signature

Signature

(Please Print or Type name)

(Please Print or Type name)

Title

Title

EXHIBIT C
EMPLOYEE WORK ENVIRONMENT QUESTIONNAIRE

SECTION I: CONTRACTOR INFORMATION

Contractor Name: _____ Date: _____

Address: _____

Phone: _____ FAX: _____

Prepared by: _____ Title: _____

SECTION II: EMPLOYEE HEALTH BENEFITS

1. Does your company provide a health insurance plan or program for employees?

NO, we do not provide a health insurance plan or program for employees.

YES, we do provide a health insurance plan or program for employees.

If the answer is no, does your company provide benefits in lieu of a health insurance plan? (Be specific. Describe.)

2. If the answer to Question 1 above is yes, please answer the following questions:

2a. Please list the health insurance plan(s) or program(s) offered to your employees (use additional sheets if necessary)

2b. What is the contribution by the employee per pay period to this plan?

\$_____ for single coverage, no dependents

\$_____ for family coverage, with dependents

Pay period is (circle one): weekly bi-weekly semi-monthly monthly

2c. What is the contribution by the company, per employee, per pay period, to this plan?

\$_____ for single coverage, no dependents

\$_____ for family coverage, with dependents

2d. How long must the employee be employed by your company before they are eligible for health insurance coverage?

_____ days/month/year

2e. What job classifications of your employees are covered by the insurance program outlined above? (Use additional sheets if necessary.)

2f. Does your health insurance coverage pertain to part-time and full-time employees? Yes No
 If no, please explain.

SECTION III: EMPLOYEE BASIC BENEFITS

1. Indicate the basic benefits your workers receive.

Years of Service	# of Vacation Days	# of Sick Days	# of Personal Days
After 1 year			
After 5 years			
After 10 years			

Other (explain)

2. Indicate the paid holidays your workers receive by placing check mark to the left of each.

<input type="checkbox"/>	New Year's Day	<input type="checkbox"/>	Independence Day	<input type="checkbox"/>	Christmas
<input type="checkbox"/>	Martin Luther King Jr. Day	<input type="checkbox"/>	Labor Day	<input type="checkbox"/>	Floating Holiday
<input type="checkbox"/>	Washington's Birthday	<input type="checkbox"/>	Veterans' Day	<input type="checkbox"/>	Other:
<input type="checkbox"/>	Memorial Day	<input type="checkbox"/>	Thanksgiving Day	<input type="checkbox"/>	Other:

3. Do you allow for unpaid leave? Yes, please explain policy.

SECTION IV: EMPLOYEE COMPLAINT PROCEDURE

Does your company have an employee complaint resolution procedure?

YES, a copy of our company's employee complaint resolution procedure is attached.

NO, our company does not have an employee complaint resolution procedure.

SECTION V: COMPLIANCE WITH STATE AND FEDERAL WORKPLACE STANDARDS

Have any of the following State or Federal Regulatory agencies obtained final orders or final judgments finding a violation by your company of State or Federal law relating to the treatment of your employees? If your answer is yes to any of the questions below, please provide the date of entry of the final judgment or order, the agency which obtained the order, and a brief description of the nature of the violation on a separate sheet of paper.

a. California Department of Fair Employment and Housing Department (DFEH).

NO, our company has not had any final judgment or administrative order.

YES, our company has had final judgment(s) or administrative order(s).

b. California Department of Industrial Relations (Cal OSHA).

NO, our company has not had any final judgment(s) or administrative order(s)

YES, our company has had final judgment(s) or administrative order(s).

c. California Department of Industrial Relations (Minimum Wage, hours or working conditions) Labor Board

NO, our company has not had any final judgment(s) or administrative order(s).

YES, our company has had final judgment(s) or administrative order(s).

SECTION V: WARRANTY AND REPRESENTATION

By signing below, proposer warrants and represents that if proposer is successful, the above listed benefits and complaint procedure will be maintained for the term of the agreement, and proposer declares that, to the best of its ability, it intends to ensure that essential services and labor for which it has been contracted will be provided efficiently and without interruption.

Signature Date

Name and Title

Convention Center and Cultural Facilities
Request for Proposals

Exhibit D

Five-Year Financial Proforma
Proposer: (Name of Firm)

	2004	2005	2006	2007	2008
Revenues					
- Building Rental					
- Audio/Visual Services					
- Electrical/Utility Services					
- Equipment Rentals					
- Food & Beverage Services					
- Labor					
- Networking Services					
- Telecommunication Services					
- Other					
TOTAL REVENUE	\$ -	\$ -	\$ -	\$ -	\$ -
Direct Expenses					
- Salaries & Benefits					
- Contract Services					
- Operating Supplies					
- Repairs & Maintenance					
- Sales & Marketing					
- Utilities					
- Other					
Total Direct Expenses	\$ -	\$ -	\$ -	\$ -	\$ -
Indirect Expenses					
- Administrative and General					
- Other					
Total Indirect Expenses	\$ -	\$ -	\$ -	\$ -	\$ -
TOTAL EXPENSES					
GROSS OPERATING PROFIT	\$ -	\$ -	\$ -	\$ -	\$ -
Management Fees					
NET PROFIT (LOSS) BEFORE DEPRECIATION	\$ -	\$ -	\$ -	\$ -	\$ -