

DISTRICT MANAGEMENT AGREEMENT

**Agreement between the City of San Diego and Ocean Beach Merchants
Association, Inc.
for the Management and Administration of the
Newport Avenue Maintenance Assessment District
Commencing Fiscal Year 2022**

THIS MANAGEMENT AGREEMENT (Agreement) is made and entered into by and between the City of San Diego, a municipal corporation (City), and Newport Avenue (Contractor).

RECITALS

WHEREAS, the Newport Avenue Maintenance Assessment District (District) is governed by Article XIID of the California Constitution, the Proposition 218 Omnibus Implementation Act (California Government Code sections 53750 – 53758), the San Diego Maintenance Assessment Districts Ordinance (San Diego Municipal Code sections 65.0201 – 65.0234), and San Diego City Council Policy 100-21 (collectively, “District Laws”); and

WHEREAS, Contractor is an “Owners’ Association” as defined in the District Laws; and

WHEREAS, Contractor, as the Owners Association, seeks to represent the interests of the Property Owners located within the District in accordance with the San Diego Municipal Code section 65.0217; and

WHEREAS, pursuant to San Diego Municipal Code section 65.0218, an agreement between the City and an owners’ association for administration of a district may be awarded without a competitive process; and

WHEREAS, the City desires to retain the services of Contractor to administer all contracts necessary to provide the Improvements and Activities within the District as well as managing the day to day operations of the District; and

WHEREAS, the boundaries of the District are generally defined as follows: along Newport Avenue between Sunset Cliffs Boulevard and Abbott Street, including the corner wrap around at Bacon and Cable Street intersections; and

WHEREAS, every year the City Council approves an Annual Report that includes a budget for the Improvements and Activities to be provided within the District for the applicable fiscal year (Annual Report); and

WHEREAS, all capitalized terms not otherwise defined in this Agreement shall have the same meaning as identified in the District Laws;

NOW, THEREFORE, in consideration of the mutual covenants and conditions set forth herein, and for other valuable consideration which is hereby acknowledged, City and Contractor hereby agree as follows:

**ARTICLE I
SCOPE OF SERVICES**

1.1 Services

- 1.1.1 Contractor shall provide the following services in accordance with the “Maintenance Assessment Districts Procedural Ordinance” Chapter 6, Article 5, Division 2 of the San Diego Municipal Code and as set forth in the District Management Plan and Assessment Engineer’s Report approved by the City Council in connection with the formation of the District (collectively, the “Engineer’s Report”): i) Administration services for all contracts necessary to provide the activities, services, and improvements identified in the Engineer’s Report (collectively, “Improvements and Activities”) within the District; ii) Management of the day to day operations of the District; and iii) Preparation of financial statements for the District.
- 1.1.2 Contractor shall perform all duties as reasonable and necessary to accomplish the intent of this Agreement in a manner consistent with the standards outlined in this Agreement and the Engineer’s Report.

1.2 Specific Requirements

- 1.2.1 Contractor, at a minimum, shall provide the maintenance standards described in the Scope of Work (Exhibit B) within the boundaries of the District and for any Zone within the District, consistent with the Annual Report approved by City Council in the current fiscal year and as authorized pursuant to the Engineer’s Report.
- 1.2.2 Contractor shall conduct on-site inspections of all work done under this Agreement in the District and shall submit a report to the City indicating that such on-site inspections have been completed.
- 1.2.3 The City, upon receiving a complaint in connection with Contractor’s obligations under this Agreement, may forward the complaint to Contractor for response. Once received, Contractor shall respond in writing to the City as well as other relevant parties identified by the City. Contractor shall provide its written response within 7 calendar days. Contractor’s written response must include proposed corrective action and must be adequate to address the identified issue(s). Contractor is subject to withholding, reduction, and suspension under Articles V and VI of this Agreement for failure to provide timely written response or failure to perform corrective action in accordance with this section 1.2.3.
- 1.2.4 Contractor shall correct deficient work reported to Contractor by City staff pursuant to Section 5.1.6, or any other deficiency reported by City to the Contractor, within thirty calendar days.
- 1.2.5 Contractor shall conduct at least one noticed meeting per year which shall include the Property Owners, any applicable Property Owners’ designated representatives

pursuant to Municipal Code section 65.0212, and City staff, to discuss the budget, Improvements, and Activities for the upcoming fiscal year.

- 1.2.6 In addition to the annual noticed meeting required in Municipal Code section 65.0218(f), Contractor shall hold at least three other noticed meetings per year, which must be open to the public and Property Owners within the District, to receive comments on all matters related to the District, including input on bids or proposals received by the Contractor for any contracts for Improvements and Activities of the District, evaluation of the performance of any contractor for the District, and advice to the Contractor regarding the Improvements and Activities for the District. With respect to any such meeting, The Contract Administrator may modify the annual budget prior to submitting it to the City Council for consideration. Contractor shall use its best efforts to contact in writing the City, the relevant community planning group, and designated Property Owners' representatives of the District, and provide notice in community newspapers, or if unavailable, other local resources customarily used to distribute information within the District.
- 1.2.7 Contractor shall submit to the City a prospective annual report pursuant to section 65.0220 for the Improvements and Activities for the District, including a line item budget for the upcoming fiscal year, no later than April 1 of each year. The prospective annual report shall be consistent with the Engineer's Report, and shall contain all information and meet all requirements described in Municipal Code section 65.0220 (a) and (b). Contractor shall budget and maintain reserves in accordance with Section V of the Maintenance Assessment District Council Policy 100-21 and the Engineer's Report. The proposed District budget for Improvements and Activities will be brought forward to City Council for consideration as part of the annual plan for the upcoming fiscal year.
- 1.2.8 Contractor shall maintain separate books and records of costs associated with Contractor's responsibilities under this Agreement, which shall be available for audit at any time during normal business hours and as often as the City deems necessary. All records shall be made available within the City of San Diego, and the City or its designee shall be allowed to audit, examine, and make excerpts from such data pertaining to all matters covered by the agreement. The Contractor shall maintain such books and records for a period of three years following completion of the agreement. The District shall pay for the costs of any audit performed by or at the direction of the City.

ARTICLE II SERVICES PROVIDED BY THE CITY

2.1 Annual Report and District Budget

- 2.1.1 The City will carry out all actions reasonably necessary for processing the Annual Report for the Improvements, Activities, administration and reserves for the District.

- 2.1.2 The City will review and consider the Contractor's prospective annual report and budget for the Improvements, Activities, administration and reserves of the District.
- 2.1.3 The City may, at its sole discretion, amend line items in the District budget upon a written request from Contractor, provided the amendments would not increase the total amount authorized for reimbursement to Contractor.

2.2 Services

- 2.2.1 The City reserves the right to deploy its public safety personnel in a manner which, in the City's sole discretion, best serves the needs of the public. Further, nothing in this Agreement shall be deemed to abrogate or waive the provisions of California Government Code section 845.
- 2.2.2 The City will coordinate the collection of Assessments with the County of San Diego and provide administrative services, assistance, and information to Contractor.

**ARTICLE III
CONTRACT ADMINISTRATION, ROLES, AND DUTIES**

3.1 City's Contract Administrator

City's Economic Development Department is the Contract Administrator for purposes of this Agreement. Contractor shall communicate with City Staff at the Department on all matters related to the administration of the Agreement and Contractor's performance of its obligations and duties rendered. The Mayor or designee (City Representative) shall be the primary contact between the City and Contractor for purposes of this Agreement (see Exhibit D).

3.2 Contractor as Owners' Association

- 3.2.1 Contractor shall serve as the Owners' Association for the District. Contractor is currently, and shall remain throughout the Term of this Agreement, a private non-profit entity which represents, and whose membership includes, the assessed property owners or property owners' representatives in the District.
- 3.2.2 As the Owners' Association, Contractor shall comply with the Ralph M. Brown Act, California Government Code section 54950 et seq., at all times when matters within the subject matter of the District are heard, discussed, or deliberated, and with the California Public Records Act, California Government Code section 6250 et seq., for all documents relating to Improvements and Activities of the District. Board members, officers, and members of the Owners' Association are intended and understood to represent and further the interest of the property owners located within the District. Each property owner or property owner's representative paying the assessment shall have the right to vote in, and seek nomination in, annual elections to the board of directors of the Owners' Association.

3.3 Contractor's Representatives

- 3.3.1 Contractor agrees that a designated officer of Contractor (Contractor Representative) shall be the primary contact between Contractor and the City for the purposes of this Agreement (see Exhibit D). The Contractor Representative shall coordinate Contractor's activities for the engagement and shall participate in all phases of the engagement. In order to simplify invoice processing, it is agreed by Contractor that the Contractor Representative shall act as billing agent for work provided by Contractor. Contractor shall notify the City within ten calendar days of replacement of the Contractor Representative and shall provide an amended Exhibit D to reflect the replacement.
- 3.3.2 Contractor's management of the services of this Agreement is of substantial concern and importance to the City, requiring coordination with City services. The quality of performance will reflect on the City and its management. Accordingly, the City requires Contractor to inform the City on a regular basis of any changes in the Officers of Contractor and of the identity of its subcontractors and their areas of responsibility.
- 3.3.3 In addition to compliance with all applicable laws, rules, regulations, ordinances, resolutions, and policies of the federal, state, and local governments as they pertain to this Agreement, Contractor shall comply immediately with any and all directives issued by the City, through its Administrator, or other authorized representatives, under authority of any law, rule, ordinance, or regulation.

3.4 Delegation of Duties

Contractor is an independent contractor. Contractor shall administer the District Improvements and Activities and may engage one or more contractors to provide routine maintenance services including trash collection and disposal, graffiti removal, repair, landscaping, and lighting improvements or otherwise Improvements and Activities listed in within the District's Engineer Report and Annual Report. Accordingly, Contractor's duties specified in this Agreement may not be delegated by Contractor without the prior written consent of the City.

ARTICLE IV CONTRACTS AWARDED BY CONTRACTOR

4.1 Procurement Policy

Contractor shall comply with the Conflict of Interest and Procurement Policy for Nonprofit Corporations Contracting with the City of San Diego, attached hereto as Exhibit E. Neither the Contractor nor any of its board members shall have a financial interest in any contract awarded for the District.

4.2 Subcontractors Policy

Contractor must ensure that all Subcontractors engaged for the purpose of providing improvements, activities, maintenance or service required of, or administered by, Contractor pursuant to this Agreement meet all obligations required in Article X.

ARTICLE V COMPENSATION AND REIMBURSEMENT

5.1 Invoices

- 5.1.1 Contractor shall submit monthly reimbursement requests to the City along with all supporting receipts, invoices, checks, payroll statements, bank statements, and all other records of services performed. Each expenditure submitted for reimbursement must show as cleared on the submitted bank statements. If Contractor is required to return funds to the District account in accordance with section 5.4.1, Contractor shall include, in a monthly reimbursement request, the amount to be returned and any supporting records. The reimbursement amount will be adjusted accordingly. Additionally, Contractor is permitted to submit reimbursement requests for expenses incurred after July 1, 2021 and incurred in connection with providing services, Improvements, and Activities described in this Agreement.
- 5.1.2 The City will reimburse Contractor from District assessment funds within thirty days of receipt of a proper reimbursement request. The request must include both a Trial Balance and Summary of Expenses as of the period claimed. The Summary of Expenses shall detail expenses by expenditure category and line item as reflected in the City Council-approved current fiscal year Engineer's Report for the first year of formation and subsequent Annual Reports each fiscal year.
- 5.1.3 All invoices shall include the names and rates of pay for contracted personnel who have performed services on behalf of the District, the hours worked, and details of any reasonable and necessary out-of-pocket expenses. Reimbursement requests shall be signed by a representative of Contractor's board, not the Executive Director.
- 5.1.4 Contractor shall not request, nor shall it be entitled to, reimbursement under this Agreement for any expenditure that has been or will be properly charged to a funding source other than District assessment funds.
- 5.1.5 Contractor shall not request reimbursement under this Agreement for any expenditure that has been or will be properly charged to a funding agency other than the City.
- 5.1.6 If the City receives an invoice for Improvements or Activities that have been provided in a manner that fails to meet industry best practice standards, fails to meet the quality or acceptability required under this Agreement, or is otherwise found to be deficient or incomplete (deficient work), the City shall have the right

to withhold all or a portion of the requested reimbursement amounts related to the deficient work until Contractor has demonstrated that the deficient work has been completed satisfactorily. Upon discovery of deficient work, City agrees it will provide written communication to Contractor with a description of the deficient work and any corrective action necessary to entitle Contractor to reimbursement. If the deficient work is not satisfactorily corrected within thirty calendar days, the Mayor or designee may use such findings as the basis for termination of this Agreement for cause pursuant to Article VI hereof and Municipal Code section 65.0218(n).

5.2 Compensation

- 5.2.1 Contractor shall be compensated for its services pursuant to this Agreement solely by the terms of this Section 5.2. In any given fiscal year, Contractor is entitled to receive an amount of up to 15 percent of budgeted annual expenditures, as reflected in the District annual report in order to pay for Administrative expenses as defined by Municipal Code section 65.0202. Contractor shall not be authorized to include charges for Administration on any amounts paid by Contractor that contain any administrative expense charges by the billing entity. If Contractor enters into any contracts with third parties for the performance of any of Contractor's duties under this Agreement and any such contract includes an administrative expenses charge, Contractor shall not be entitled to receive Administration reimbursements for its own administrative expense activities related to the work performed by third party contractors.
- 5.2.2 The Administrative expenses reimbursement to Contractor shall be limited to 15 percent of the budgeted annual expenditures in the District.
- 5.2.3 The City shall be compensated a flat rate of \$3,500 associated with the annual budget processing, property tax enrollment and collections, professional engineering services, and audit services from the District budget. The City reserves the right however, to amend this section, including, without limitation, the District budget, should the City experience revenue shortfalls in which negatively impact the General Fund and/or the City's ability to fund basic City services.
- 5.2.4 The City will not reimburse Contractor for any expenditure that has been or may be properly charged to, or reimbursed by (1) a City funding source other than District assessment funds; or (2) a public agency other than the City.
- 5.2.6 Contractor agrees that the City's monetary contribution is limited to the amount provided for in this Agreement, and that the City shall not be responsible for cash costs or support services other than as provided for in this Agreement.

5.3 Advances

- 5.3.1 Upon a written request from Contractor, the City may make an annual cash advance of three months of working capital to Contractor based on the District's monthly

cash flow budget requirements related to the City Council-approved current fiscal year District annual report and budget. If the District reserves are not adequate to cover the working capital advance request, an advance will be based on available cash at the time of the request.

- 5.3.2 The advance will be returned on or before the termination of this Agreement as either a reduction of the final reimbursement request or a transfer of funds from Contractor. Contractor shall indicate in writing, no later than six months prior to the termination of this Agreement, detailing how the advance shall be returned to the City.

5.4 Other Revenue/ Non-Public Funds

- 5.4.1 If the Contractor receives revenue directly generated by activities carried out with any District assessment funds, then a portion of that revenue must be returned to the District account based on the District's proportional monetary contribution toward the activity generating the revenue. All revenue owed to the District pursuant to this section must be returned in accordance with section 5.1.1 prior to the end of the fiscal year in which the revenue was generated.

- 5.4.2 In the event Contractor collects any funds other than District assessment funds ("Non-Public Funds"), such Non-Public Funds may be utilized or obligated by Contractor for activities and/or improvements and shall not be subject to the provisions in this Agreement, with the exception of Sections 10.2.1 and 3.3.3, so long as Contractor does not utilize or obligate any District assessment funds towards:

- (1) any portion of the proposed activity or improvement to which Contractor proposes the use of Non-Public Funds; and
- (2) any staff time or resources associated with the proposed activity or improvement to which Contractor proposes the use of Non-Public Funds, including but not limited to facilitating committee or board discussions, implementing the proposed activity or improvement, soliciting for goods or services necessary for implementation, and accounting or reporting on the proposed activity or improvement. Notwithstanding the foregoing sentence, Contractor's use of District assessment funds for purposes of generating reports pertaining to Non-Public Funds in accordance with the requirements set forth in Exhibit B of this Agreement shall not, by itself, subject such Non-Public Funds to the provisions in this Agreement.

**ARTICLE VI
SUSPENSION AND TERMINATION**

6.1 City's Right to Suspend Payment

If Contractor fails to perform any of its obligations as set forth in this Agreement, the City shall have the right to suspend the payment of Administration costs to Contractor, or withhold an amount deemed appropriate, in the sole and absolute discretion of the City, until such time as Contractor is in compliance with the terms of this Agreement. If, as a result of Contractor's failure to perform, the City elects to withhold payment, the City shall give Contractor written notice of its intention to suspend payment of Administration costs until Contractor has cured its noncompliance. Such notice shall provide Contractor with a description of the failure to perform upon which the City has based its suspension of payment hereunder. Upon the performance by Contractor of its obligations under this Agreement, the City shall resume payments of Administrative costs to Contractor in conformance with the terms of Article III set forth above. If the deficiency is not satisfactorily corrected within thirty calendar days, the Mayor or designee may deem such findings as the basis for termination of this Agreement for cause pursuant to Article VI hereof and Municipal Code section 65.0218(n).

6.2 City's Right To Terminate

Contractor's failure to comply with any terms or conditions of this Agreement may result in termination of the Agreement.

6.2.1 City's Right To Terminate For Default

Contractor's failure to satisfactorily perform any obligation required by this Agreement constitutes a default. Examples of default include Contractor's failure to do the following: (1) perform the services of the required quality or within the time specified; (2) perform any of the obligations of this Contract; (3) make sufficient progress in performance which may jeopardize full performance; (4) comply with applicable laws; and (5) comply with all notice, review, training and other requirements in Exhibit H, Accountability Provisions.

If the nature of the default could endanger the public's health and safety, Contractor shall cure the default within twenty-four hours of receipt of notice of the default. If Contractor fails to fully and timely cure the default, then the Mayor or designee may, in its sole and absolute discretion, immediately terminate this Agreement.

For all other defaults except non-curable defaults, as described below, the Mayor or designee shall promptly give Contractor written notice of the occurrence of the default, and shall allow Contractor thirty (30) days thereafter to cure the default, or to submit a written plan of action for Contractor to promptly cure the default. Failure to cure the default within the thirty-day period, or timely submit an plan of action within the thirty-day period that would promptly cure the default, or failure to adhere to the plan of action, shall entitle the Mayor or designee to immediately

terminate this Agreement. Contract Administrator, in its sole discretion, shall determine whether a submitted plan of action adequately sets forth a plan to promptly cure the default.

In addition to all other Right to Terminate, the Mayor or designee may terminate the Agreement for cause in accordance with Article VI hereof and Municipal Code section 65.0218(n) if the default is not curable (“non-curable default”). Non-curable default shall include the following: (1) any intentional breach; (2) acts of willful misconduct or acts constituting gross negligence; and (3) Contractor’s, or its Subcontractors, demonstrated record of repetitive or recurring default, considered cumulatively, under the terms of this Agreement, including repeated failure to perform work to industry best practice standard, repetitive notices of deficient work under section 5.1.6, repetitive failure to comply with section 1.2.4, or other repeated failure to perform work as described in Exhibit B, Scope of Work.

6.2.2 City’s Right to Terminate For Convenience

Notwithstanding any other provision of this Agreement, the City Council may terminate this Agreement for any reason and at any time, provided the termination is carried out in accordance with Municipal Code section 65.0218(n).

6.2.3 City’s Right to Terminate for Bankruptcy or Assignment for the Benefit of Creditors

If Contractor files a voluntary petition in bankruptcy, is adjudicated bankrupt, or makes a general assignment for the benefit of creditors, the City may at its option and without further notice to, or demand upon Contractor, terminate this Contract, and terminate each and every right of Contractor, and any person claiming rights by and through Contractor under this Contract.

6.3 **Remedies Cumulative**

City’s remedies are cumulative and are not intended to be exclusive of any other remedies or means of redress to which City may be lawfully entitled in case of any breach or threatened breach of any provision of this Contract.

6.4 **Notice and Hearing for Termination for Convenience**

The City Council may terminate this Agreement with Contractor for convenience by resolution after completing the following:

6.4.1 The City Council adopts a resolution of intention to terminate the Agreement; and

6.4.2 Contractor is provided thirty (30) calendar days’ written notice of a public hearing on the City’s intention to terminate this Agreement; and

6.4.3 A public hearing is held on the City's intention to terminate this Agreement with Contractor.

6.5 Contractor's Obligations and Rights Following Contract Termination

6.5.1 Upon termination of this Agreement, the City shall assume administration of the District as defined in Municipal Code section 65.0202 and provide the Improvements and Activities for the District. Contractor shall transmit to the City all funds, books, records, data, equipment and other assets of the District no later than thirty calendar days after receipt of written notice of termination. Until the actual transfer of these assets is complete, Contractor shall continue to administer the contracts necessary to provide the Improvements and Activities for the District so that there is no interruption in or loss of service to Property Owners within the District.

6.5.2 Following a termination of this Agreement, Contractor may be entitled to permitted costs as set forth in Article V until the actual transfer of all District assets to the City is complete. By accepting payment for completion of obligations as called for in this section, Contractor discharges City of all of City's payment obligations and liabilities under this Agreement with regard to the affected performance.

6.6 Contractor's Right To Terminate

Contractor may terminate this agreement for any reason after providing ninety calendar days written notice of its intent to terminate to the City. Contractor shall transmit to the City all funds, books, records, data, equipment and other assets of the District no later than ninety calendar days of issuance of written notice of termination. Until the actual transfer of these assets is complete, Contractor shall continue to administer the contracts necessary to provide the Improvements and Activities for the District so that there is no interruption in or loss of service to Property Owners within the District.

**ARTICLE VII
EFFECTIVE DATE AND TERM**

7.1 Effective Date

This Agreement is effective on the last date that the contract is signed by the parties and approved by the City Attorney in accordance with Charter section 40.

7.2 Term

This Agreement shall be effective as of the Effective Date and shall terminate on June 30, 2022 unless extended, at the City's sole discretion, or terminated earlier in accordance with the terms of this Agreement. City may extend the Term by one year, up to four times, upon written notice by Contract Administrator to Contractor. Contract Administrator may authorize up to four one-year extensions and under no circumstance shall this Agreement exceed five years.

**ARTICLE VIII
DOCUMENTS, RECORDS, AND REPORTS**

8.1 Ownership Of Documents

- 8.1.1 Contractor shall own and retain all documents, including, but not limited to reports and maps prepared in connection with or related to the Scope of Services, including Exhibit B Scope of Work.
- 8.1.2 Contractor shall require that each Subcontractor retain all documents, including, but not limited to reports and maps prepared in connection with or related to the Scope of Services, including Exhibit B Scope of Work

8.2 Documents and Records

- 8.2.1 At any time during normal business hours and as often as the City deems necessary, Contractor and all subcontractors shall make available to the City for auditing, examination and copying at reasonable locations within the City of San Diego all data and records relating to all matters covered by this Agreement. Contractor and all subcontractors will permit the City to make audits of all invoices, materials, payrolls, records of personnel, and other data and media relating to all matters covered in this Agreement.
- 8.2.2 Contractor and subcontractors shall maintain such data and records for a period of three years following receipt of the final payment of this Agreement. With respect to receipts, invoices, checks, payroll statements, bank statements, and all other evidence of payments for which Contractor is reimbursed by the City pursuant to this Agreement, Contractor shall maintain such documentation at its principal place of business in the City of San Diego for the required period of time. With respect to all records covered by this Section 8.2, if Contractor does not make them available within the City of San Diego, then Contractor shall pay all City's travel related costs to audit records associated with this Agreement where records are maintained. The District shall pay for the costs of any audit performed by or at the direction of the City.
- 8.2.3 Contractor shall post all regular meeting agendas and any non-confidential back-up materials; approved meeting minutes; Contractor's Articles of Incorporation or Formation, including any and all amendments thereto; Contractor's Bylaws, including any and all amendments thereto; any annual audits or financial disclosures, the Annual Report; Contractor's tax returns, including any and all amendments thereto; any and all determinations of Contractor's tax-exempt status by the Internal Revenue Service or Franchise Tax Board; and any other information or materials required by this Agreement to be posted on a website. All such items shall be posted not more than ten business days after they become available. Social security numbers, employer identification numbers, and other confidential information must be redacted from the posted materials.

8.3 Financial Reports

Contractor shall provide an audited financial statement of all reimbursements and working capital advances paid to Contractor with District funds within ninety days after the end of Contractor's fiscal year. The financial statements must be prepared in accordance with Generally Accepted Accounting Principles (GAAP) and audited by an independent Certified Public Accountant (CPA) as selected or approved by the City in accordance with Generally Accepted Auditing Standards (GAAS). The statements must include a Statement of Expenditures of the District's funds identified in the same expenditure classifications as contained in the City Council-approved District Budget and show a comparison to the budgeted amounts, and a Statement of Compliance with the terms of this Agreement signed by Contractor. Failure to comply with these requirements could result in suspension of any current payments or possible future funding, which shall be at the sole discretion of the City.

ARTICLE IX ACCEPTABILITY OF WORK

The City shall decide any and all questions that may arise as to the quality or acceptability of the services performed, the manner of performance, the interpretation of instructions to Contractor, the acceptable completion of this Agreement, and the amount of compensation due. In the event Contractor believes that any requirement of the City interferes with or affects the independence of Contractor, Contractor shall confer with the City in order to resolve any possible conflict. In the event Contractor and the City cannot agree as to the quality or acceptability of the work, the manner of performance and/or the compensation payable to Contractor in this Agreement, the City or Contractor shall give to the other written notice thereof. No later than ten calendar days thereafter, Contractor and the City shall each prepare a written report that supports its position and file the same with the other party. Thereafter, the City shall, with reasonable diligence, determine the quality or acceptability of the work, the manner of performance, and/or the compensation payable to Contractor. This is not intended to be in any arbitration dispute between the parties of this Agreement.

ARTICLE X SUBCONTRACTORS

10.1 Subcontractors List and Subcontracts

10.1.1 On or before the date this Agreement is executed by the Parties, Contractor shall provide the City with each of the following:

- 10.1.1.1 a completed Subcontractors List (Attached as Exhibit I), listing the names and contact information of all Subcontractors it has hired or retained, or intends to hire or retain, in connection with this Agreement, which the City will forward to Equal Opportunity Contracting Program (EOCP); and

- 10.1.1.2 a copy of all subcontracts entered into in connection with this Agreement, including the scope of work, along with a written statement describing the justification for the Subcontractor services, and an itemization of all costs for the Subcontractor services.
- 10.1.2 If, during the term of this Agreement, Contractor identifies a need for additional Subcontractor services, Contractor shall, within ten calendar days of the date of any subcontract for such services, provide the City with each of the following:
 - 10.1.2.1 a copy of the subcontract, including the scope of work, along with a written statement describing the justification for the additional Subcontractor services, and an itemization of all costs for the additional Subcontractor services; and
 - 10.1.2.2 an updated Exhibit I, Subcontractors List that includes the name and contact information of any new or substitute Subcontractor hired to provide the additional Subcontractor services, which the City will forward to EOCP.
- 10.1.3 Contractor shall procure the services of all Subcontractors in conformance with the procedures set forth in Exhibit E. Contractor shall maintain documentation of the process used to procure any such Subcontractor services, and shall provide a copy of all such documentation to the City within ten calendar days of any written request by the City.

10.2 Required Language for Subcontracts

- 10.2.1 Contractor shall ensure that all subcontracts entered into in connection with this Agreement contain language which requires Subcontractors to at all times comply with all applicable laws, statutes, ordinances, and regulations of City, county, state, and federal governments. Subcontractor shall also comply with all notices issued by the City under the authority of all current or future laws, statutes, ordinances, or regulations.
- 10.2.2 Subcontractor shall obtain all insurance coverage required of Contractor in this Agreement. Subcontractor shall maintain, in full force and effect, such insurance coverage during any and all work performed in connection with this Agreement. Subcontractor shall not begin work on a subcontract until all insurance required of the Subcontractor under this Section has been obtained.
- 10.2.3 If the City is made a party to any judicial or administrative proceeding to resolve the dispute between Contractor and Subcontractor, Contractor shall defend and indemnify the City as described herein.
- 10.2.4 All other requirements identified in the Exhibit G, General Terms and Provisions.

10.3 Prohibition on Use of Certain Subcontractors. Contractor shall not employ, award any contract to, engage the services of, or fund any Subcontractor during any period of federal, state, or local debarment, suspension, or ineligibility of Subcontractor, when Contractor has been noticed of such debarment, suspension, or ineligibility.

10.4 Definition of Subcontractor. For purposes of this Agreement, the term “Subcontractor” means any person or entity with which Contractor contracts for the performance of services or the supplying of materials that will be paid for in whole or in part with funds received by Contractor pursuant to this Agreement.

ARTICLE XI INFORMAL DISPUTE RESOLUTION

If Contractor and the City have any dispute as to their respective rights and obligations under this Agreement, or the meaning or interpretation of any provisions hereof, they shall first attempt to resolve such disputes by informal discussion between their respective representatives. Within five calendar days of determining the existence of any such dispute, the determining party shall initiate efforts to informally meet by delivering written notice to the other party that describes the dispute. The parties shall seek to meet within five days of the second party’s receipt of such notice, or at such time thereafter as is reasonable under the circumstances. If the dispute cannot be resolved in this manner, Article XI of Exhibit G, General Terms and Provisions shall apply.

ARTICLE XII INDEMNIFICATION

Contractor agrees to indemnify, defend, and hold the City free and harmless from and against any and all actions, suits, proceedings, liability, claims, demands, liens, or judgments for death of or injury to any person or damage to any property whatsoever alleged to be caused, or caused, by any act or omission of the Contractor or any officer, contractor, agent, or employee of the Contractor and all expenses of investigating and defending against same.

ARTICLE XIII INSURANCE

13.1 Minimum Required Coverages

13.1.1 Contractor’s Insurance. Contractor shall complete all insurance requirements described in Article VII of the General Terms and Provisions, attached hereto as Exhibit G.

13.1.2 Subcontractor’s Insurance. Contractor shall ensure that all Subcontractors used on work subject to this Agreement meet all insurance requirements described in Exhibit G. Contractor shall not allow any Subcontractor to commence work on public property, unless and until all insurance required of the Subcontractor, as described in Exhibit F has been obtained.

13.1.3 **Endorsements.** All insurance policies shall contain, or be endorsed to contain, all Other Insurance Provisions described in Article VII of Exhibit G. All endorsements required under this Agreement shall be in full force and effect for the entire term of this Agreement. There shall be no endorsement or modification of the policies limiting the scope of coverage for insured versus insured claims, or for contractual liability.

13.2 Prerequisites To Commencement Of Work

Prior to the execution of this Agreement by the Parties and approval by the City Attorney in accordance with Charter Section 40, and prior to Contractor's performance of its obligations and/or duties under this Agreement, Contractor shall furnish City with original certificates and amendatory endorsements or copies of the applicable policy language effecting coverage required by this clause. Contractor shall not allow any Subcontractor to commence work on public property, unless and until all insurance required of the Subcontractor, as described in this Agreement, including Exhibit F, has been obtained.

13.3 City's Right To Request And Review Contractor's Insurance Policies

The City reserves its right to request, and Contractor shall immediately submit to the City upon the City's request, copies of any policy required under this Agreement, including attachments, and its right to review, at any time, Contractor's insurance coverage, limits, deductibles, and self-insured retentions to determine if they are acceptable to the City. If the City determines that such insurance coverage, limits, deductibles, and/or self-insured retentions are unacceptable, the City and Contractor shall amend this Agreement to adjust such insurance coverage, limits, deductibles, and/or self-insured retentions to a level acceptable to the City, and Contractor shall comply with any such amendment.

13.4 Contractor's Liability Not Limited To Insurance Coverage

Contractor's, or Subcontractor's, liability, including, but not limited to, Contractor's indemnity obligations under this Agreement, shall not be deemed limited in any way to the insurance coverage required in this Article.

13.6 Expiration Of Policies

At least thirty calendar days prior to the expiration of each insurance policy required herein, Contractor shall provide the City an insurance certificate, showing that a new or extended policy has been obtained which meets the requirements of this Agreement.

**ARTICLE XIV
CONFLICT OF INTEREST AND ACCOUNTABILITY**

14.1 In addition to this Article XIV, Contractor shall comply with all requirements identified in Exhibit H, Accountability Provisions and Article X of Exhibit G, General Terms and Provisions.

- 14.2** Contractor shall make known to its board members, employees, and agents be aware of and are subject to all federal, state, and local conflict of interest laws, regulations, and policies applicable to public contracts and procurement practices, including but not limited to California Government Code sections 1090, *et. seq.*, and 81000, *et. seq.*, and the City of San Diego Ethics Ordinance, codified in the Municipal Code at sections 27.3501 to 27.3595.
- 14.3** Contractor shall establish and make known to its board members, employees, and agents appropriate safeguards to prohibit employees from using their positions for a purpose that is, or that gives the appearance of being, motivated by the desire for private gain for themselves or others, particularly those with whom they have family, business, or other relationships.
- 14.4** Contractor's personnel, employed in performing the obligations and duties under this Agreement, shall not accept gratuities, or any other favors, from any subcontractor or potential subcontractor. Contractor shall not recommend or specify any product, supplier, or contractor with whom Contractor has a direct or indirect financial or organizational interest or relationship that would violate conflict of interest laws, regulations, or policies.
- 14.5** Contractor's personnel, employed in performing the obligations and duties under this Agreement, shall not accept gratuities, or any other favors, from any subcontractor or potential subcontractor. Contractor shall not recommend or specify any product, supplier, or contractor with whom Contractor has a direct or indirect financial or organizational interest or relationship that would violate conflict of interest laws, regulations, or policies.
- 14.6** If Contractor violates any conflict of interest law, any of the provisions of this Article XIV, or any provisions of Exhibit H, the violation shall be grounds for immediate termination of this Agreement, and/or the imposition of other remedies set forth in Exhibit G and Exhibit H. Further, any such violation shall subject Contractor to liability to the City for attorney's fees and all damages sustained as a result of the violation. It is hereby understood and agreed that the parties to this Agreement have read and are aware of the provisions of sections 1090 *et seq.* 87100 *et seq.* of the California Government Code relating to conflicts of interest for public officers and employees, as well as the conflict of interest codes of the City. All parties hereto agree that they are unaware of any financial or economic interest of any public officer or employee of the City relating to this Agreement. It is further understood and agreed that if such a financial interest does exist at the inception of this Agreement, the City shall immediately terminate this Agreement by giving written notice thereof. Contractor agrees to abide by section 87100 *et. seq.* of the California Government Code during the term of this Agreement. The City may determine that Contractor is subject to a conflict of interest code and is required to complete one or more statements of economic interest disclosing relevant financial interests. Upon the City's request, Contractor shall submit the necessary documentation.

**ARTICLE XV
NOTICE**

Unless otherwise provided in this Agreement, in all cases where written notice is required under this Agreement, service shall be deemed sufficient if said notice is personally delivered or deposited in the United States mail, with first class postage paid, attention to the Economic Development Department. Proper notice is effective on the date of personal delivery or five (5) days after the deposit in a United States postal mailbox unless provided otherwise in the Agreement. writing from the respective parties, notice shall be addressed as follows:

Notice to the City shall be addressed:

City of San Diego
Economic Development Department
1200 3rd Ave, 14th Floor, MS-56D
San Diego, California 92101

Notice to Contractor shall be addressed:

Ocean Beach Merchants Association, Inc.
1868 Bacon St. #A
San Diego, California 92107

**ARTICLE XVI
WAGE REQUIREMENTS**

- 16.1** Contractor is subject to all wage requirements identified in Exhibit D, Wage Requirements. Contractor shall comply with all wage requirements described in Exhibit F, Wage Requirements, attached to this Agreement.

**ARTICLE XVII
MISCELLANEOUS PROVISIONS**

17.1 Integrated Agreement

This Agreement including Attachments and/or Exhibits contains all of the agreements of the parties and all prior negotiations and agreements are merged herein. This Agreement cannot be amended or modified except by written agreement, and mutually agreed upon by the City and Contractor.

17.2 Political Activities

Contractor shall not use, and require its subcontractors not to use, any of the funds, personnel, or materials received in connection with this Agreement, to influence, or attempt to influence, any governmental decision or election in any manner, whatsoever. This prohibition shall apply to any decision of any kind to be made by any electorate, legislative

body, agency, bureau, board, commission, district, or any other instrument of federal, state, or local government. The term, “influence or attempt to influence,” shall mean the making, with the intent to influence, any communication to, or appearance before, any officer, employee, or appointee of any governmental entity, as well as any communication made to any electorate, regarding any ballot measure or candidate election.

17.3 Counterparts


This Agreement may be executed in counterparts, which when taken together shall constitute a single signed original as though all parties had executed the same page.

[remainder of page intentionally left blank]

IN WITNESS WHEREOF, this Agreement executed by City of San Diego acting by and through the Mayor or designee and by Contractor pursuant to Resolution No. R-313646.

THE CITY OF SAN DIEGO

NAME OF CONTRACTOR

By: 
Name: Christina Bibler
Title: Economic Development Director

By: 
Name: Barbara Iacometti
Title: Board of Directors President

I HEREBY APPROVE the form and legality of the foregoing Agreement this Nov 3, 2021 day of Nov 3, 2021, 2022.

MARA W. ELLIOTT, City Attorney

By: 
Name: Daphne Skogen
Title: Deputy City Attorney












Newport Avenue MAD Agreement

Final Audit Report

2021-11-03

Created:	2021-11-02
By:	Michelle Munoz (MichelleM@sandiego.gov)
Status:	Signed
Transaction ID:	CBJCHBCAABAANKnNSbWzpGsrePxev107-Xznq9M-LKI

"Newport Avenue MAD Agreement" History

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