



Office of the City Manager

CONSENT CALENDAR  
July 16, 2013

To: Honorable Mayor and Members of the City Council  
From:  Christine Daniel, City Manager  
Submitted by: Scott Ferris, Acting Director, Parks, Recreation and Waterfront  
Subject: License Agreement: Bay Area Air Quality Management District – Air Monitoring Station Under the Pedestrian Bridge at Aquatic Park

RECOMMENDATION

Adopt a Resolution authorizing the City Manager to execute a license agreement with the Bay Area Air Quality Management District to install and operate an air monitoring station under the pedestrian bridge at Aquatic Park for five years with two five-year options to extend.

FISCAL IMPACTS OF RECOMMENDATION

The Bay Area Air Quality Management District (“Air District”) will pay the City a license fee starting at a base level of \$600 per month in the first year, (plus an administrative fee of \$56 per month), with a yearly increase to the base of 2% for each year of the term. The City will receive \$40,829 in the first five year term, \$44,728 in the second five year term, and \$49,034 in the third five year term, for a total of \$134,591 over fifteen years. The revenues collected from the license fee will be deposited into General Fund budget code 010-5972-347-3902. The license agreement has been entered into the City’s Contract Management System (CMS) and assigned CMS Number STSFT.

CURRENT SITUATION AND ITS EFFECTS

The U.S. Environmental Protection Agency (EPA) has recently implemented a new nationwide air quality monitoring program regarding the presence of nitric oxides (NO) and heavy particulate matter (PM) along major transportation corridors. The new program requires that local air districts begin receiving data from new monitoring stations at key locations in urban areas by January 1, 2014. Pursuant to the guidelines and deadlines from EPA’s new monitoring program, the Bay Area Air Quality Management District (“Air District”) conducted a study and determined that Aquatic Park in Berkeley would be the best location to monitor air quality adjacent to Interstate 80. Per EPA guidelines, the monitoring station must be located less than 20 meters from a major transportation corridor and must have access to uninterrupted electrical power to operate the monitoring equipment. The data that is gathered at the station will be transmitted via a wireless connection to the Air District data center and will be available to the general public through an on-line website. The Air District will cover all

installation and operating costs for the project. This will involve the construction of a concrete pad for the air monitoring trailer under the pedestrian bridge at Aquatic Park (11 feet by 24 feet), installation of chain-link fencing (eight feet in height), around the licensed area for security purposes, and the installation of approximately 700 feet of electrical conduit from Bolivar Drive at Addison Street to the trailer. The Air District will enter into a license agreement for five years, with two five-year options to extend.

#### BACKGROUND

In 2012, the Air District contacted the City to review possible sites for their new monitoring station at Aquatic Park adjacent to Interstate 80. After reviewing several locations at Aquatic Park, evaluating the availability of electrical power, and working with City staff, the Air District determined that a location underneath the pedestrian bridge at the north end of Aquatic Park would be the best location for the proposed monitoring station.

On April 23, 2012, the Parks and Waterfront Commission took action to support the proposed Air District monitoring station at Aquatic Park with the understanding that the Air District will work with City staff, park users, and other parks constituencies to finalize the location. (M/S/C: Schemmerling/ Veneziano/unanimous). Aye's : Boland, Gray, Schemmerling, Thornton, Veneziano; No's : None; Abstain: None.

#### CONTACT PERSON

Scott Ferris, Director, Parks Recreation & Waterfront, 981-6700

#### Attachments:

1: Resolution

Exhibit A: License Agreement

RESOLUTION NO. -N.S.

LICENSE AGREEMENT: BAY AREA AIR QUALITY MANAGEMENT DISTRICT TO INSTALL AND OPERATE AN AIR MONITORING STATION UNDER THE PEDESTRIAN BRIDGE AT AQUATIC PARK

WHEREAS, the U.S. Environmental Protection Agency (EPA) has recently implemented a new nationwide air quality monitoring program regarding the presence of nitric oxides (NO) and heavy particulate matter (PM) along major transportation corridors; and

WHEREAS, the new program requires that local air districts begin receiving data from new monitoring stations at key locations in urban areas by January 1, 2014; and

WHEREAS, pursuant to the guidelines and deadlines from EPA's new monitoring program, the Bay Area Air Quality Management District ("Air District") conducted a study and determined that Aquatic Park in Berkeley would be the best location to monitor air quality adjacent to Interstate 80; and

WHEREAS, per EPA guidelines, the monitoring station must be located less than 20 meters from a major transportation corridor and must have access to uninterrupted electrical power to operate the monitoring equipment; and

WHEREAS, the data that is gathered at the station will be transmitted via a wireless connection to the Air District data center and will be available to the general public through an on-line website; and

WHEREAS, the Air District will cover all installation and operating costs for the project, which will involve the construction of a concrete pad for the air monitoring trailer under the pedestrian bridge at Aquatic Park (11' by 25'), installation of chain-link fencing (eight feet in height) for security purposes around the licensed area, and the installation of approximately 700 feet of electrical conduit from Bolivar Drive at Addison Street to the trailer; and

WHEREAS, the Air District will pay the City a license fee starting at a base level of \$600 per month in the first year, (plus an administrative fee of \$56 per month), with a yearly increase to the base of 2% for each year of the term. The City will receive \$40,829 in the first five year term, \$44,728 in the second five year term, and \$49,034 in the third five year term, for a total of \$134,592 over fifteen years. The revenues collected from the license fee will be deposited into General Fund budget code 010-5972-347-3902. CMS Number STSFT.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that the City Manager is authorized to execute a license agreement and any amendments with The Bay Area Air Quality Management District ("Air District") to install and operate an air monitoring station at Aquatic Park for five years with two five-year options to extend.

Exhibits

A: License Agreement

**BAY AREA AIR QUALITY MANAGEMENT DISTRICT****LICENSE AGREEMENT****CONTRACT NO. 2013 - XXX**

1. **PARTIES** – The parties to this Agreement are the Bay Area Air Quality Management District (referred to herein as “DISTRICT”) whose address is 939 Ellis Street, San Francisco, CA 94109, and City of Berkeley (referred to herein as “LICENSOR”) whose address is 2180 Milvia Street, Berkeley, CA 94704.
2. **RECITALS**
  - A. DISTRICT is the local agency with primary responsibility for regulating stationary source air pollution in the Bay Area Air Quality Management District in the State of California. DISTRICT is authorized to enter into this Agreement under California Health and Safety Code Section 40701.
  - B. LICENSOR owns certain real property located on West Bolivar Drive, adjacent to the property at 1 Bolivar Drive, Berkeley, CA, 94710, as more accurately shown on Exhibit A (referred to herein as “the site”), and DISTRICT desires to operate air quality monitoring equipment at the site, which will include site improvements and upgraded electrical utilities, and the installation of fencing, an air monitoring trailer, and monitoring poles.
  - C. LICENSOR desires to grant to DISTRICT a license to perform all improvements and installations necessary for the project on the terms and conditions contained in this agreement.
  - D. All parties to this agreement have had the opportunity to have this agreement reviewed by their attorney.
3. **GRANT OF LICENSE** – LICENSOR hereby grants to DISTRICT the right and privilege to install, operate, maintain, and upgrade air quality monitoring equipment at the site. DISTRICT may modify or improve the site and related areas as may be necessary to accommodate the project, including a concrete pad, fencing, electrical equipment and facilities, and additional security measures, all at DISTRICT's expense, and all with prior written approval of LICENSOR.
4. **DURATION OF LICENSE** – This Agreement shall become effective upon execution by both parties, once duly approved by the Berkeley City Council, and shall continue in full force and effect thereafter for an initial term of FIVE (5) years (“the initial term”), with two options to renew, each for an additional term of FIVE (5) years, subject to the requirements of Paragraph 5, below. If DISTRICT wishes to renew beyond the initial term, DISTRICT shall give written notice of such intent to LICENSOR at least ninety (90) days prior to expiration of the initial term, and LICENSOR shall determine, in its sole discretion, if renewal is in LICENSOR’S best interests, and if so, upon what terms and conditions. Either

party may terminate for convenience upon 60 days written notice from either party to the other.

**5. PAYMENT**

- a. DISTRICT shall pay LICENSOR \$600 plus \$56 administrative fee per month for use of the property, payable annually on the effective date of the agreement and each year thereafter on the anniversary date of the effective date. At the beginning of each year after Year One, for each of the three terms, the monthly rent shall be increased by 2% per the following payment schedule.

<b>Air District License Fee Per Month @ Aq Park</b>				
	<b>Year</b>	<b>Base Amnt</b>	<b>+ Admin Fee =</b>	<b>Tot Fee per Month</b>
<b>Initial Term</b>	1	\$600.00	\$56	\$656.00
	2	\$612.00	\$56	\$668.00
	3	\$624.24	\$56	\$680.24
	4	\$636.72	\$56	\$692.72
	5	\$649.46	\$56	\$705.46
<b>Option 1</b>	6	\$662.45	\$56	\$718.45
	7	\$675.70	\$56	\$731.70
	8	\$689.21	\$56	\$745.21
	9	\$703.00	\$56	\$759.00
	10	\$717.06	\$56	\$773.06
<b>Option 2</b>	11	\$731.40	\$56	\$787.40
	12	\$746.02	\$56	\$802.02
	13	\$760.95	\$56	\$816.95
	14	\$776.16	\$56	\$832.16
	15	\$791.69	\$56	\$847.69

- b. DISTRICT will be solely responsible for the cost to install, operate, maintain, and upgrade all equipment and facilities necessary for the project, including any electrical service needed at the site. If the agreement is terminated pursuant to section 4, LICENSOR shall refund any advance payment of the license fee made by DISTRICT for months after the date of termination.

**6. MAINTENANCE** – DISTRICT shall maintain the site in a clean and orderly manner.

7. PERMITS AND INSPECTION – DISTRICT will obtain all necessary approvals, permits, and inspections that may be required by local, State and/or Federal agencies for the installation, operation, maintenance, and upgrading of all equipment and facilities needed for the project.

8. INDEMNIFICATION

A. To the fullest extent permitted by law, DISTRICT shall (1) immediately defend and (2) indemnify LICENSOR, and its directors, officers, and employees from and against all liabilities regardless of nature, type, or cause, arising out of or resulting from or in connection with the Agreement. Liabilities subject to the duties to defend and indemnify include, without limitation, all claims, losses, damages, penalties, fines, and judgments; associated investigation and administrative expenses; defense costs, including but not limited to reasonable attorneys' fees; court costs; and costs of alternative dispute resolution. The DISTRICT's obligation to indemnify applies regardless of whether a liability is a result of the negligence of any other person, unless it is adjudicated that the liability is caused by the sole active negligence or sole willful misconduct of an indemnified party.

B. The duty to defend is a separate and distinct obligation from the DISTRICT's duty to indemnify. The DISTRICT shall be obligated to defend, in all legal, equitable, administrative, or special proceedings, with counsel approved by the LICENSOR, the LICENSOR and its directors, officers, and employees, immediately upon submittal to the DISTRICT of the claim in any form or at any stage of an action or proceeding, whether or not liability is established. A determination of comparative active negligence or willful misconduct by an indemnified party does not relieve the DISTRICT from its separate and distinct obligation to defend LICENSOR. The obligation to defend extends through final judgment, including exhaustion of any appeals. The defense obligation includes an obligation to provide independent defense counsel if DISTRICT asserts that liability is caused in whole or in part by the negligence or willful misconduct of the indemnified party. If it is finally adjudicated that liability was caused by the sole active negligence or sole willful misconduct of an indemnified party, DISTRICT may submit a claim to the LICENSOR for reimbursement of reasonable attorneys' fees and defense costs.

C. The review, acceptance or approval of any of DISTRICT's work or work product by any indemnified party shall not affect, relieve or reduce the DISTRICT's indemnification or defense obligations. This Section survives the termination of this Agreement. The provisions of this Section are not limited by and do not affect the provisions of this Agreement relating to insurance.

D. Liabilities subject to this Section include any claim of discrimination or harassment, including but not limited to sexual harassment, arising from the conduct of the DISTRICT or any of the DISTRICT's officers, employees, agents,

licensees, or subcontractors. In the event of a discrimination or harassment complaint against any employee, agent, licensee or subcontractor of the DISTRICT or its subcontractors, the DISTRICT shall take immediate and appropriate action in response to such complaint, including, but not limited to termination or appropriate discipline of any responsible employee, agent, licensee or subcontractor.

9. INSURANCE – DISTRICT carries comprehensive general liability insurance with a combined single limit of liability for personal injury and property damage of not less than One Million Dollars (\$1,000,000) for each occurrence. DISTRICT will name City (LICENSOR) as an additional insured and furnish LICENSOR with a certificate of insurance showing coverage for this site prior to the effective date of this agreement and thereafter on an annual basis on the anniversary date of the execution of this agreement.
  
10. OWNERSHIP OF EQUIPMENT – This agreement authorizes the DISTRICT to install, operate, maintain, modify, and upgrade any equipment and facilities necessary for the project, including City-owned land and infrastructure, subject to prior City approval. DISTRICT shall own all equipment and facilities that it installs for this project. On termination of this Agreement by any means, DISTRICT shall remove any and all DISTRICT property from the site to the satisfaction of the City.
  
11. RISK OF DAMAGE TO EQUIPMENT – DISTRICT assumes the full risk and responsibility for any loss, destruction, or damage occurring to all equipment and facilities installed by the DISTRICT for this project, including infrastructure, except to the extent that such loss, destruction, or damage may be attributable to the gross negligence or willful misconduct of LICENSOR.
  
12. NOTICES – All notices that are required under this Agreement shall be provided in the manner set forth herein, unless specified otherwise. Notice to a party shall be delivered to the attention of the person listed below, or to such other person or persons as may hereafter be designated by that party in writing. Notice shall be in writing sent by e-mail, facsimile, or regular first class mail. In the case of e-mail and facsimile communications, valid notice shall be deemed to have been delivered upon sending, provided the sender obtained an electronic confirmation of delivery. E-mail and facsimile communications shall be deemed to have been received on the date of such transmission, provided such date was a business day and delivered prior to 4:00 p.m. PST. Otherwise, receipt of e-mail and facsimile communications shall be deemed to have occurred on the following business day. In the case of regular mail notice, notice shall be deemed to have been delivered on the mailing date and received five (5) business days after the date of mailing.

DISTRICT: Bay Area Air Quality Management District  
939 Ellis Street

San Francisco, CA 94109  
Attn: Satnam Hundel

LICENSOR: City of Berkeley  
Parks, Recreation & Waterfront Department  
2180 Milvia Street, Third Floor  
Berkeley, CA 94704  
Attn: Scott Ferris, PR&W Director

13. ACCESS – DISTRICT is authorized to have unlimited access to the site at all times in order to operate, maintain, inspect, repair, and upgrade the equipment through the use of its designated personnel and vehicles. Access shall include parking on the shoulder of West Bolivar Drive, and entering Aquatic Park from either the north or south entrance.
14. RESTORATION OF PROPERTY - Within ninety days (90) days of vacating the property, DISTRICT agrees to restore the property to as good a condition as existed at the commencement of this agreement or to the satisfaction of LICENSOR, whichever is least costly.
15. ASSIGNMENT – The rights granted hereby may not be assigned, sold, licensed, or otherwise transferred by either party without the prior written consent of the other, and any attempt by either party to do so shall be void upon inception.
16. ATTORNEYS' FEES – In the event any action is filed in connection with the enforcement or interpretation of this Agreement, each party shall bear its own attorneys' fees and costs.
17. DUPLICATE EXECUTION – This Agreement is executed in duplicate. Each signed copy shall have the force and effect of an original.
18. GOVERNING LAW - Any dispute that arises under or relates to this Agreement shall be governed by California law, excluding any laws that direct the application to another jurisdiction's laws.
19. ENTIRE AGREEMENT AND MODIFICATION - This Agreement represents the final, complete, and exclusive statement of the agreement between the parties and supersedes all prior and contemporaneous understandings and agreements of the parties. No party has been induced to enter into this Agreement by, nor is any party relying upon, any representation or warranty outside those expressly set forth herein. This Agreement may only be amended by mutual agreement of the parties in writing and signed by both parties.
20. USE OF AQUATIC PARK PROPERTY; PUBLIC TRUST
  - A. DISTRICT acknowledges that LICENSOR holds the Site and Aquatic Park in trust pursuant to Chapter 347 of the California Statutes of 1913, as amended

("the Grant"), subject to the conditions, restrictions, limitations, rights, powers, duties, reversionary rights and other rights created or reserved in the Grant. DISTRICT agrees that, notwithstanding anything in this Agreement to the contrary, DISTRICT shall use the site consistently with and in a manner that shall not result in a violation of the Grant or of provisions of the Berkeley City Charter, California law or the California Constitution. DISTRICT's failure to comply with the requirements of the Grant or this Paragraph shall constitute a default of the Agreement, upon which the LICENSOR may terminate this Agreement.

- B. LICENSOR at all times shall have the right and privilege of making such changes in and to Aquatic Park from time to time which in its sole opinion are deemed to be desirable or appropriate, including the location and relocation of stairways, sidewalks, pathways, driveways, streets, entrances, exits, automobile parking spaces, the direction and flow of traffic, designation of prohibited areas, landscaped areas, recreation areas, utilities and all other facilities; provided, however, that the foregoing is not intended to entitle LICENSOR to unreasonably effect changes that would materially and adversely affect access to or visibility of the site, or that would affect functioning of the air quality monitoring equipment or suitability of the site for monitoring, except temporarily during periods of construction. DISTRICT shall be given reasonable notice before commencement of any work on the site. LICENSOR shall have the right to establish, promulgate, and enforce such reasonable rules and regulations concerning Aquatic Park, as it may deem necessary or advisable for the proper and efficient management, operation, maintenance and use thereof, and DISTRICT shall comply with the same. If any such improvements named above affect the equipment, facilities, and infrastructure installed and operated by the DISTRICT, the DISTRICT shall cover any necessary costs needed to continue the operation of their project under this license.
- C. LICENSOR reserves to itself and the right to grant to others in the future nonexclusive utility easements over, under, through, across or on the site in locations that will not unreasonably interfere with District's access to or use of the site. Any interference shall be temporary, and all work on the site shall proceed expeditiously. DISTRICT shall be given reasonable notice before commencement of any work on the site. In the event the installation or maintenance of such future utilities in such easements causes any damage to the site, or any portion thereof, or other facilities located upon the site, including but not limited to pavement, curbs and sidewalks, the same shall be repaired by LICENSOR at its expense, if not so repaired by the party installing and maintaining the line. LICENSOR shall hold harmless and indemnify DISTRICT from all claims arising out of the grant or use of such a utility easement, except to the extent they result from the negligence or willful misconduct of DISTRICT.

## **21. ENVIRONMENTAL OBLIGATIONS**

- A. DISTRICT shall not, without LICENSOR's prior written consent (which consent may be granted or denied in LICENSOR's sole discretion), install, bring into or release or discharge in, on, under, around, or from the site any (i) asbestos-containing materials, (ii) electrical transformers, fluorescent light fixtures with ballasts or other equipment containing PCB's or (iii) materials which constitute hazardous, extremely hazardous or toxic materials under the Resource Conservation and Recovery Act, the California Hazardous Waste Control Act, the Comprehensive Environmental Response Compensation and Liability Act, the California Safe Drinking Water and Toxic Enforcement Act of 1986 or any other applicable law or regulation concerning hazardous or toxic materials, (collectively "Hazardous Substances") and has not done so prior to the effective date of this Agreement. Any Hazardous Substances which are used, stored, treated, disposed of or released from the Site by DISTRICT or its representatives, agents, employees or invitees, shall be used, stored, treated, released and disposed of in accordance with all applicable laws and regulations.
- B. If DISTRICT knows or has reasonable cause to believe that any Hazardous Substance has been released on or beneath the site, DISTRICT shall immediately notify the Berkeley Fire Department and the City of Berkeley Toxic Management Office and promptly give written notice of same to LICENSOR. If DISTRICT knows or has reasonable cause to believe that such substance is an imminent and material danger to public health or safety, DISTRICT shall take all actions necessary to alleviate such danger.
- C. If the presence of any Hazardous Substance in, on, under or about the site, caused or permitted by DISTRICT results in any contamination of the site or Aquatic Park, DISTRICT, at its sole expense, promptly shall take all action that is necessary to return the site to the condition existing prior to the introduction of such Hazardous Substance in, on, under or about the site; provided that LICENSOR's approval of such actions shall first be obtained, which approval shall not be unreasonably withheld so long as such actions could not potentially have any material adverse effect upon the site. DISTRICT's obligations under this paragraph shall survive the expiration or termination of this Agreement.

## **22. CITY NON-DISCRIMINATION ORDINANCE**

- A. DISTRICT hereby agrees to comply with the provisions of the Berkeley Municipal Code ("B.M.C."), including without limitation Chapter 13.26, as amended from time to time. In the performance of its obligations under this Agreement, DISTRICT agrees as follows:
1. DISTRICT shall not discriminate against any employee or applicant for employment because of race, color, religion, ancestry, national origin, age

(over 40), sex, pregnancy, marital status, disability, sexual orientation or AIDS.

2. DISTRICT shall permit LICENSOR access to records of employment, employment advertisements, application forms, EEO-1 forms, affirmative action plans and any other documents which, in the reasonable opinion of LICENSOR, are necessary to monitor compliance with this non-discrimination provision. In addition, DISTRICT shall fill out, in a timely fashion, forms supplied by LICENSOR to monitor this non-discrimination provision.

B. DISTRICT understands that this Agreement is governed by City Council Resolution No. 58,664 -N.S. This resolution, as may be amended from time, stipulates that DISTRICT's policies may be reviewed by the City for compliance therewith at any time, and that unsatisfactory policies may result in non-renewal of this Agreement or termination by the City.

### **23. NON-DISCRIMINATION AGAINST PERSONS WITH DISABILITIES**

A. If DISTRICT provides any aid, service or benefit to others on the LICENSOR's behalf, DISTRICT shall, in the provision of such aid, service or benefit, observe and comply with all applicable provisions of Title II of the Americans with Disabilities Act of 1990 and any amendments thereto. DISTRICT shall further observe and comply with all applicable federal, state, municipal and local laws, ordinances, codes and regulations prohibiting discrimination against individuals with disabilities or ensuring that individuals with disabilities are not excluded from participating in or receiving benefits, services or activities of the LICENSOR.

B. If DISTRICT is or becomes a "public accommodation" as defined in Title III of the Americans with Disabilities Act of 1990, DISTRICT shall observe and comply with all applicable provisions of the Act and any amendments thereto, and all applicable federal, state, municipal and local laws, ordinances, codes and regulations prohibiting discrimination on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations offered by the DISTRICT. All of DISTRICT's activities must be in accordance with these laws, ordinances, codes, and regulations, and DISTRICT shall be solely responsible for complying therewith.

### **24. CONFLICT OF INTEREST PROHIBITED**

A. In accordance with California Government Code Section 1090, Berkeley City Charter Section 36 and B.M.C. Chapter 3.64, neither DISTRICT nor any employee, officer, director, partner or member of DISTRICT, or immediate family member of any of the preceding, shall have served as an elected officer, an employee, or a committee or commission member of LICENSOR, who has directly or indirectly influenced the making of this Agreement.

- B. In accordance with California Government Code Section 1090 and the Political Reform Act, (Government Code Section 87100 *et seq.*) no person who is a director, officer, partner, trustee, employee or consultant of DISTRICT, or immediate family member of any of the preceding, shall make or participate in a decision made by LICENSOR or any of its boards, commissions or committees, if it is reasonable foreseeable that the decision will have a material effect on any source of income, investment or interest in real Site of that person or DISTRICT, except to the extent permitted by 2 California Code of Regulations, Section 18700(c)(2).
- C. Interpretation of this paragraph shall be governed by the definitions and provisions use in the Political Reform Act, Government Code section 87100 *et seq.*, its implementing regulations, manuals and codes, Government Code section 1090, Berkeley City Charter section 36 and B.M.C. Chapter 3.64, as amended from time to time.

## **25. NUCLEAR FREE BERKELEY**

DISTRICT agrees to comply with B.M.C. Chapter 12.90, the Nuclear Free Berkeley Act, as amended from time to time.

## **26. OPPRESSIVE STATES**

- A. In accordance with Resolution No. 59,853-N.S., DISTRICT certifies that it has no contractual relations with, and agrees during the term of this Agreement to forego contractual relations to provide personal services to, the following entities:
- (1) The governing regime in any Oppressive State.
  - (2) Any business or corporation organized under the authority of the governing regime of any Oppressive State.
  - (3) Any individual, firm, partnership, corporation, association, or any other commercial organization, and including parent-entities and wholly-owned subsidiaries (to the extent that their operations are related to the purpose of this Agreement) for the express purpose of assisting in business operations or trading with any public or private entity located in any Oppressive State.
- B. For purposes of this Agreement, the Tibet Autonomous Region and the provinces of Adu, Kham, and U-Tsang shall be deemed oppressive states.
- C. DISTRICT's failure to comply with this paragraph shall constitute a default of this Agreement and LICENSOR may terminate this Agreement pursuant to Paragraph 18. In the event that LICENSOR terminates this Agreement due to a default under this provision, LICENSOR may deem DISTRICT a non-responsible bidder for five (5) years from the date this Agreement is terminated.

## **27. BERKELEY LIVING WAGE ORDINANCE (LWO)**

- A. DISTRICT agrees to comply with Berkeley Municipal Code Chapter 13.27, the Berkeley Living Wage Ordinance. If DISTRICT employs six (6) or more part-time, full-time, and generates \$350,000 or more in annual gross receipts, DISTRICT will be required to provide all eligible employees with City mandated minimum compensation during the term of this Agreement, as defined in B.M.C. Chapter 13.27, and well as comply with the terms enumerated herein.
- B. DISTRICT shall be required to maintain all reasonable records and documents that would establish whether DISTRICT is subject to Berkeley's Living Wage Ordinance (LWO). If DISTRICT is subject to the LWO, as defined therein, DISTRICT shall be further required to maintain monthly records of those employees located on the site. These records shall include the total number of hours worked, the number of hours spent providing service on the Site, the hourly rate paid, and the amount paid by DISTRICT for health benefits, if any, for each of its employees providing services under the Agreement. The records described in this Paragraph shall be made available upon the City's request. The failure to produce these records upon demand shall be considered a default under this Agreement.
- C. If DISTRICT fails to comply with the requirements of this the LWO and this Agreement, the City shall have the rights and remedies described in this Section, in addition to any rights and remedies provided by law or equity. DISTRICT's failure to comply with this Section shall constitute default of the Agreement, upon which City may terminate this Agreement. In addition, at City's sole discretion, DISTRICT may be responsible for liquidated damages in the amount of \$50 per employee per day for each and every instance of an underpayment to an employee. It is mutually understood and agreed that DISTRICT's failure to pay any of its eligible employees at least the applicable living wage rate will result in damages being sustained by the City; that the nature and amount of the damages will be extremely difficult and impractical to fix; that the liquidated damages set forth herein is the nearest and most exact measure of damage for such breach that can be fixed at this time; and that the liquidated damage amount is not intended as a penalty of forfeiture for DISTRICT's breach.

## **28. BERKELEY EQUAL BENEFITS ORDINANCE (EBO)**

- A. DISTRICT hereby agrees to comply with the provisions of the Berkeley Equal Benefits Ordinance, B.M.C. Chapter 13.29. If DISTRICT is currently subject to the Berkeley Equal Benefits Ordinance, DISTRICT will be required to provide all eligible employees with City mandated equal benefits during the term of this Agreement, as defined in B.M.C. Chapter 13.29, as well as comply with the terms enumerated herein.

- B. If DISTRICT is currently or becomes subject to the Berkeley Equal Benefits Ordinance, DISTRICT agrees to supply the City with any records the City deems necessary to determine compliance with this provision. Failure to do so shall be considered a default of this Agreement.
  
- C. If DISTRICT fails to comply with the requirements of this Section, City shall have the rights and remedies described in this Section, in addition to any rights and remedies provided by law or equity. In addition, at City's sole discretion, DISTRICT may be responsible for liquidated damages in the amount of \$50.00 per employee per day for each and every instance of violation of this Section. It is mutually understood and agreed that DISTRICT's failure to provide its employees with equal benefits will result in damages being sustained by City; that the nature and amount of these damages will be extremely difficult and impractical to fix; that the liquidated damages set forth herein is the nearest and most exact measure of damages for such breach that can be fixed at this time; and that the liquidated damage amount is not intended as a penalty or forfeiture for DISTRICT's breach.

## **29. AUDIT**

The City Auditor's Office, or its designee, may conduct an audit of DISTRICT's financial and compliance records maintained in connection with the operations and services performed under this Agreement, and with the payments made under this Agreement. In the event of such audit, DISTRICT agrees to make all such financial and compliance records available to the Auditor's Office, or to its designee. City agrees to provide DISTRICT an opportunity to discuss and respond to any findings before a final audit report is filed.

IN WITNESS WHEREOF, the parties to this Agreement have caused this Agreement to be duly executed on their behalf by their authorized representatives.

BAY AREA AIR QUALITY  
MANAGEMENT DISTRICT

CITY OF BERKELEY

By: \_\_\_\_\_  
Jack P. Broadbent  
Executive Officer/APCO

By: \_\_\_\_\_  
Christine Daniel  
City Manager

Date: \_\_\_\_\_

Date: \_\_\_\_\_

Approved as to form:  
District Counsel

Approved as to form:

By: \_\_\_\_\_  
Brian C. Bungler  
District Counsel

By: \_\_\_\_\_  
City Attorney

## Exhibit A



