

MEMORANDUM OF UNDERSTANDING

THIS MEMORANDUM OF UNDERSTANDING (“MOU”) is entered into as of _____ between _____ (“Contractor”) and _____ (“Developer”) for the purpose of providing preconstruction services for rehabilitation of two housing properties in San Francisco: Alemany and Holly Courts (“Project”).

1. INTENT

This MOU sets forth the terms on which the Contractor will provide Developer with value engineering (active involvement of Contractor during design phase using his/ her experience, skills, and knowledge to add value to the Project), construction cost estimating, scheduling, and related services (“Preconstruction Services”) for the Project prior to the execution of a construction contract (“the Agreement”). The execution of this MOU is not a representation that Developer will award the Agreement to Contractor.

2. PRECONSTRUCTION SERVICES PERIOD

Preconstruction Services for the Project will begin upon the execution of this MOU and will continue until the earlier of (i) the date the Agreement is executed, (ii) the Developer publishes a request for competitive General Contractor bidding, or (iii) this MOU is terminated pursuant to Section I.D of this MOU (the “Preconstruction Services Period”). The selected Contractor will provide preconstruction services during the Schematic Design, Design Development, and Construction Document phases of the Project. Contractor’s preconstruction duties prior to construction will include, but not be limited to:

- a. Attending and participating in design meetings as directed by Developer Team (estimated at two to four 2-hour meetings per month) in addition to other meetings as required by the Developer Team;
- b. Providing complete project cost estimates with unit prices, square footage, and quantity take-offs organized by trade in a pre-approved format at the conclusion of the Schematic Design and Design Development, at 85% Construction Documents, and as may otherwise be required by Developer Team, including as needed during concept/schematic phase;
- c. Reviewing plans and specifications for constructability, coordination, and potential cost impact as they are developed throughout design;
- d. Working with Architect, Developer Team, and Developer Team’s consultants to refine preconstruction and construction schedule; produce Critical Path Method schedule for construction, delineating predecessors and successors, and analysis of any delays that might occur during construction;
- e. Suggesting design and construction alternatives for the Project;
- f. Researching and presenting the cost implications of design alternatives throughout the Value Engineering period;
- g. Doing life-cycle cost analyses as requested by Developer Team to aid Developer Team’s evaluation of design alternatives;
- h. Working with Architect, Developer Team, and Developer Team’s consultant to clarify and eliminate qualifications and exclusions to the Contractor’s cost estimates and Guaranteed Maximum Price, as modified by Developer;
- i. Researching materials and methods pertaining to the Project, including “green building goals”;
- j. Drawing on recent experience to make recommendations that may be incorporated into the plans and specifications for the Project; and
- k. At the end of the pre-construction phase, securing multiple bids from subContractors for 100% of the elements of the proposed scope of work (the general Contractor may perform a portion of the work if its cost is competitive to qualified subContractors as demonstrated by multiple alternative bids).

3. SUBCONTRACTS

The Project is governed by the San Francisco Contracts Monitoring Division ("CMD") goals for contracting with Local Business Enterprises; Chapters 12B and 12C (Nondiscrimination in Contracts) of the San Francisco Administrative Code; SFHA Section 3 Requirements and the the First Source Hiring Program under Chapter 83 of the San Francisco Administrative Code; and Federal Davis-Bacon prevailing wage requirements. Prior to executing the Agreement and as part of Preconstruction Services, all items of work for the Project will be subject to an open competitive bid process for the selection of subContractors. Contractor will be responsible for soliciting subcontract bids at the end of Construction Documents at the request of Developer.

- i. Developer reserves the right to review subContractor bids and qualifications and to reject any subContractor. Factors to be considered in the selection of Contractors will include compliance with HRC goals, price, work experience, and the financial condition of the subContractors.
- ii. Developer reserves the right to use the services of subContractors who submitted bids even if the Developer does not enter into the Agreement with Contractor.
- iii. Contractor will present the results of the subContractor bidding as a contract proposal with a complete schedule of values, lists of qualifications and exclusions, and a project schedule.

4. COST PROPOSAL

At the end of the Construction Documents phase of design, Contractor will advertise and seek subContractor bids for the construction work and submit a construction cost proposal to Developer (the "Proposal"). The Proposal will incorporate all of the work identified in the Construction Documents necessary to construct and legally occupy the Project. The Contractor's General Conditions will not exceed \$_____ based on the scope and assumptions submitted in the Contractor's proposal dated _____. Upon receipt of the Proposal, Developer will have the option either to:

- i. Sign the Agreement with Contractor for the amount of the Proposal, with no compensation for Preconstruction Services, or
- ii. Put the Project out for competitive bidding and compensate Contractor for Preconstruction Services as determined in Section I.E of this MOU.
- iii. Terminate the development of the project altogether, and compensate Contractor for Preconstruction Services as determined in Section I.E of this MOU.

5. TERM

- i. Unless earlier terminated as stated below in this Section, this MOU shall continue in effect until Preconstruction Services are complete or until the Agreement is executed by both parties, whichever event occurs later in time. If Developer and Contractor have neither actively terminated this MOU nor reached Agreement by June, 2011, this MOU will expire without need for further action by either party.
- ii. Developer shall have the right to terminate this MOU with 30 days written notice without cause. In the event that Developer terminates this MOU without cause, Contractor will be entitled to compensation per Section I.E below.
- iii. Developer shall also have the right to terminate this MOU with 10 days written notice, with no compensation for Contractor for Preconstruction Services, in the event that:

- (1) Contractor shall have engaged in any intentional misconduct with regard to a material matter or failed in a substantial manner to exercise reasonable care in the discharge of its duties and obligations thereunder; or
 - (2) Contractor shall have failed to meet its material obligations or covenants under this MOU or shall have materially violated any other provisions of this MOU or of applicable laws relating to the Project.
- iv. Contractor shall have the right to terminate this MOU with 10 days written notice without cause. In the event that Contractor terminates this MOU without cause, Contractor will not be entitled to any compensation whatsoever.
 - v. Contractor shall have the right to terminate this MOU with 10 days written notice, with compensation to be paid pursuant to Section I.E, below, in the event that:
 - (1) Developer shall have engaged in any intentional misconduct with regard to a material matter or failed in a substantial manner to exercise reasonable care in the discharge of its duties and obligations thereunder; or
 - (2) Developer shall have failed to meet its material obligations or covenants under this MOU or shall have materially violated any other provisions of this MOU or of applicable laws relating to the Project.
 - vi. In the event of termination, Contractor shall return to Developer all materials and documents provided by Developer.

6. COMPENSATION

In the event that Contractor agrees to enter into the Agreement for a Guaranteed Maximum Price agreed to by both parties, and Developer and Contractor then fail to execute the Agreement for reasons other than those specified in Sections I.D.3-4 hereinabove, Developer will pay compensation to Contractor, in an amount based on Contractor's costs as outline in Contractor's proposal dated _____, but not to exceed the maximum amount of \$_____ for Preconstruction Services provided by Contractor throughout the elapsed Preconstruction Services Period.

In the event that Contractor does not agree to enter into the Agreement for Guaranteed Maximum Price agreed to by both parties, Developer shall not be obligated to compensate Contractor for any Preconstruction Services provided to Developer.

In the event that this MOU is terminated in accordance with Section I.D.2 or I.D.5 prior to completion of the Preconstruction Services Period and execution by both parties of the Agreement, the Contractor's compensation shall be determined by multiplying the total compensation established in Section I.E.1 by a fraction of which the numerator is the elapsed Preconstruction Services Period in months and the denominator is the scheduled Preconstruction Services Period of eighteen (18) months. In no event shall Contractor receive compensation exceeding the maximum amount specified in Section I.E.1.

Any exploratory excavation or demolition work or repair requested by the Developer and preauthorized in writing will be compensated separately on a time and materials basis with a _____% mark-up. Printing costs of plans and specifications will be paid directly by the Developer.

7. MEDIATION

Claims, disputes or other matters in question between the parties to this MOU arising out of or relating to this MOU, or breach thereof, shall be subject to mediation under the auspices of Judicial Arbitration and Mediations Services

(JAMS), a recognized, neutral third-party professional mediation service, or other mediation method acceptable to the parties, prior to the filing of any lawsuit or undertaking any other dispute resolution action. The cost of the mediation shall be borne equally by the parties. Any demand for mediation shall be made within a reasonable time after the claim, dispute, or matter in question has arisen.

8. ARBITRATION

If the parties are still unsuccessful at resolving the dispute, the dispute or claim shall be submitted to, and be conclusively determined by, binding arbitration in accordance with this paragraph, provided, however, that the provisions of this paragraph shall not preclude any party from seeking injunctive or other provisional or equitable relief in order to preserve the status quo of the parties pending resolution of the dispute, and the filing of an action seeking injunctive or other provisional relief shall not be construed as a waiver of that party's arbitration rights.

A single arbitrator shall be selected by the parties from individuals affiliated with the Judicial Arbitration and Mediation Service, Inc. or from the list of arbitrators maintained by the Bar Association of San Francisco.

The parties shall submit to arbitrator all written, documentary, or other evidence and oral testimony as is reasonably necessary for a proper resolution of the dispute. Copies of all written submittals shall be provided to the arbitrator and both parties. The arbitrator shall conduct such hearings as s(he) considers necessary, may require the submission of briefs or points, and may submit written questions to the parties. The parties shall respond to such questions in writing. If a question is addressed to less than all of the parties, copies of the question and the answer thereto shall be served on the other parties.

At the hearing, any relevant evidence may be presented by any party and the formal rules of evidence applicable to judicial proceedings shall not govern. Evidence shall be admitted or excluded in the sole discretion of the arbitrator.

Except as provided above, the arbitration procedures set forth in the California Arbitration Act statutes (California Code of Civil Procedure Sections 1282-1294.4) shall apply to the arbitration.

The arbitration shall proceed with due dispatch and a decision shall be rendered within 30 days after appointment of the arbitrator. The arbitrator's decision shall be in writing and in a form sufficient for entry of a judgment in any court of competent jurisdiction in the state of California.

Costs of the arbitration proceeding shall be borne as determined by the arbitrator.

9. OPEN BOOK

Under the terms of this MOU, Developer reserves the right to review and audit Contractor's documents, both in written and electronic form, for the Project.

10. THE AGREEMENT

The Agreement will be the AIA A102-2007 (Standard Form of Agreement Between Developer Team and Contractor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price, as modified by Developer) and AIA Document A201 (General Conditions of the Contract for Construction, as modified by Developer) The parties will pursue agreement on non-financial contract terms of the Agreement following execution of this MOU.

11. CONTRACTOR FEE

The Agreement will include a Contractor fee of no more than ____% of the sum total of the schedule of values (the "Fee"), as submitted in the Contractor's proposal dated _____.

12. DEVELOPERSHIP OF DOCUMENTS

All Construction Documents and any other work product prepared pursuant to this Agreement (also referred to herein as "Contract Documents"), whether finished or unfinished, or prepared by Contractor or others, shall be treated by Contractor as confidential, shall not be released to any third party without the permission of Developer and shall at all times be the property of Developer. Developer shall be (a) entitled to use any and all Contract Documents, whether finished or unfinished, for any purpose, and (b) Contractor hereby grants and assigns to Developer all of Contractor's right, title and interest in and to all copy rights and other proprietary rights in the Contract Documents, including without limitation the rights to use, copy reproduce, display, modify and make deviations to the Contract Documents, together with the right to secure renewals and extensions of such copyrights throughout the Work and the full term of said copyrights, and any renewal extensions; provided that Developer shall indemnify and defend Contractor from any claims of losses by third parties (a) arising out of any use of the documents on another Project or (b) arising from any modifications and/or deviations to such documents made or performed by someone other than Contractor or authorized third parties on the Project. All drawings, plans, specifications, reports and other documents, instruments, and work product prepared by Contractor in connection with the Project ("Work Product") are prepared as "work made for hire," as that phrase is defined in Section 101 of Title 17 of the United States Code (Public Law 94-553). All title, Developership, and copyright privileges are, and shall at all times be vested, in DEVELOPER. CONTRACTOR shall, when requested by Developer, immediately execute any reasonable documents to evidence and acknowledge the Developership of Work Product in Developer..

If this Agreement is terminated for any reason, Contractor shall immediately, promptly return to Developer, upon Developer's written request, all drawings, sketches, computations, calculations, plans, specifications and other documents prepared by Contractor.

13. INSURANCE AND INDEMNITY

Contractor shall comply with the insurance requirements set forth on Exhibit A. To the fullest extent permitted by law, Contractor shall indemnify, defend and hold Developer, its officers, directors, agents, and employees ("Indemnitees") harmless from and against any and all liabilities, demands, actions, losses, costs or expense (including without limitation reasonable attorneys' fees), arising from any claim for personal injury, bodily injury, death, property damage arising out of the performance of the Services by Contractor pursuant to this Agreement. This indemnity includes any costs, expenses, fees and liabilities incurred by any Indemnitee in defending against such claims, whether the same proceed to judgment, and Contractor, at its own expense, agrees upon request by an Indemnitee, to defend any such suit or action brought against the Indemnitee. This indemnity shall survive the expiration or termination of this Agreement and shall remain in effect until such time as an action on account of any matter covered by such indemnity is barred by applicable statute of limitations

14. ADDITIONAL PROVISIONS

- i. This MOU is not assignable by Contractor. Developer may assign this MOU to any subsidiary, affiliate, or related enterprise with prior written notice to Contractor.
- ii. This MOU may only be amended with written approval of Developer and Contractor. This MOU supersedes any prior agreement, whether written or oral, between Developer and Contractor regarding the Project.
- iii. Nothing contained in this MOU shall be construed as creating the relationship of employer and employee or principal and agent between Developer and Contractor or Contractor's agents and employees, and Contractor shall at all times be deemed an independent Contractor and shall be wholly responsible for the manner in which it or its agents, or both, perform the services required of it by the terms of this MOU.

- iv. Time is of the essence in this MOU and each and every provision thereof. Developer and Contractor agree to pursue with their best efforts the purpose of this MOU in an effective and continuous manner.
- v. If an arbitration proceeding or a lawsuit is commenced to enforce any of the terms of this MOU, the prevailing party shall have the right to recover its reasonable attorneys' fees and costs of suit from the other party.
- vi. This MOU shall be governed by California law.
- vii. The invalidity or unenforceability of any one or more provisions of this MOU shall in no way affect any other provision. The waiver of either party of any breach of this MOU shall not operate or be construed to be a waiver of any subsequent breach.

APPROVED AND ACCEPTED:

CO-DEVELOPERS

CONTRACTOR

By: _____

By: _____

Name: _____

Name: _____

Title: Executive Director

Title: _____

EXHIBIT A**INSURANCE REQUIREMENTS**

Contractor shall maintain the following insurance coverages at all times during the term of this Agreement and thereafter, as specified herein.

1. Workers' compensation insurance as required by law in California (statutory limits) and employer's liability insurance with limits of liability of not less than One Million Dollars (\$1,000,000) bodily injury by accident (each accident), One Million Dollars (\$1,000,000) bodily injury by disease (policy limit) and One Million Dollars (\$1,000,000) bodily injury by disease (each employee), or limits carried, whichever are higher, with a waiver of subrogation endorsement by the insurance carrier(s) with respect to Developer and the other parties listed in Section 2, below. Contractor shall require each of its consultants, subconsultants and subcontractors to purchase and maintain insurance coverage as provided in this Section 1, with the same waiver of subrogation with respect to Developer and the other parties listed in Section 2, below.

2. Commercial general liability insurance, on an occurrence policy form, with limits of liability of not less than Two Million Dollars (\$2,000,000) per occurrence, Two Million Dollars (\$2,000,000) general aggregate, and Two Million Dollars (\$2,000,000) products-completed operations aggregate, or limits carried, whichever are higher, with a deductible or self-insured retention reasonably acceptable to Developer, providing, without limitation, premises-operations coverage, products-completed operations coverage, contractual liability coverage and full separation of insureds (severability of interests; no insured versus insured exclusion). The policy shall not contain any exclusions or limitations applicable to multi-unit, multi-family and/or attached projects, residential development or construction, or similar exclusions or limitations. Contractor waives all rights against Developer and the other parties listed in Section 2, below, for recovery of loss, injury and/or damages to the extent such loss, injury and/or damages are covered by the commercial general liability insurance maintained by Contractor. Contractor shall require each consultant, subconsultant and subcontractor to purchase and maintain insurance coverage, and provide the same waiver of rights, as provided in this Section 2.

3. Commercial auto liability insurance including, without limitation, coverage for liability arising out of all owned, non-owned, leased and hired automobiles, trucks, trailers and semi-trailers, including, without limitation, any machinery or apparatus attached thereto, with limits of liability of not less than Two Million Dollars (\$2,000,000) each accident, or limits carried, whichever are higher, with deductibles or self-insured retentions reasonably acceptable to Developer. The commercial auto liability insurance shall include, without limitation, contractual liability coverage and insured status for Developer and the other parties listed in Section 2, below. Contractor waives all rights against Developer and the other parties listed in Section 2, below, for recovery of loss, injury and/or damages to the extent such loss, injury and/or damages are covered by the commercial auto liability insurance maintained by Contractor. Contractor shall require each consultant, subconsultant and subcontractor to purchase and maintain insurance coverage, and provide the same waiver of rights, as provided in this Section 3.

4. Developer, and such other parties as Developer may reasonably specify, shall be named as additional insureds, including, without limitation, with respect to liabilities arising out of or in connection with the Services, on the insurance required under Sections 2 and 3, above, by endorsement reasonably acceptable to Developer. Each additional insured endorsement (or each policy, by endorsement reasonably acceptable to Developer) shall contain a primary insurance clause providing that the coverage afforded to the additional insureds is primary and that any other insurance available to any of the additional insureds is excess. The coverage provided to the additional insureds must be at least as broad as that provided to Contractor and may not contain any additional exclusionary language or limitations applicable to the additional insureds.

3. All insurance described in this section to be carried by Contractor will be maintained by Contractor at its sole expense with insurance carriers having a Best's rating of not less than A:X and qualified to do business in the State of California. In no event may such insurance be cancelled, non-renewed, terminated, otherwise allowed to

lapse or materially changed prior to termination of this Agreement, or such longer period as specified herein. Upon execution of this Agreement, or prior to commencing the services, whichever is earlier, Contractor shall provide Developer with certificates of insurance and endorsements reasonably acceptable to Developer, evidencing the insurance coverages required herein. Contractor shall perform no services, pursuant to this Agreement or otherwise, prior to providing Developer with acceptable proof of the insurance coverages required above. Each certificate and additional insured endorsement shall provide for not less than thirty (30) days advance written notice to Developer of cancellation, termination, non-renewal or material change in coverage (ten (10) days in the event of cancellation for non-payment of premium). The originals of all certificates and endorsements required herein shall be delivered to and retained by Developer, unless Developer agrees otherwise in writing. Contractor shall immediately provide Developer with a copy of any notice of cancellation, non-renewal or rescission received from any insurer providing coverage required herein. Contractor shall deliver renewal or replacement policies, certificates and endorsements to Developer not less than thirty (30) days prior to the expiration of existing coverages. All policies of insurance, certificates and endorsements required to be maintained and provided hereunder shall be in form and substance reasonably acceptable to Developer. Contractor shall provide Developer with a certified copy of such policies promptly upon request. The "endeavor to" and "failure to mail such notice shall impose no obligation or liability of any kind upon the Company" language and any similar language shall be stricken from all certificates furnished hereunder.

4. If Contractor fails to maintain the insurance coverage required hereunder, Developer may, but shall have no obligation to, obtain such insurance, in which event Contractor shall pay the premiums and all other costs and charges thereof and furnish upon demand all information that may be required in connection therewith.

5. To the fullest extent permitted by law and without voiding or impairing the coverage afforded by the insurance required hereunder, Contractor, on its own behalf and on behalf of its consultants, subconsultants and subcontractors, hereby waives against Developer and the other parties listed in Section 2, above, as well as any and all other professionals, consultants, subcontractors, sub-subcontractors, suppliers and other individuals and entities performing work or rendering services in connection with the Project, all rights of recovery, whether under subrogation or otherwise, for loss, damage and/or liability to the extent covered by the insurance policies required to be maintained by Contractor hereunder. Contractor shall require that all such insurance policies shall contain an express written waiver of all rights of recovery, whether under subrogation or otherwise, against Developer and the other parties listed in Section 2, above, and shall require similar express written waivers and insurance clauses from each of its consultants, subconsultants and subcontractors. A waiver of subrogation shall be effective as to any individual or entity even if such individual or entity (a) would otherwise have a duty of indemnification, contractual or otherwise, (b) did not pay the insurance premium directly or indirectly, and (c) whether or not such individual or entity has an insurable interest in the property damaged.

6. Contractor shall not allow any consultant, subconsultant or subcontractor to perform any portion of the Services or enter onto the Project site until Contractor obtains from the consultant, subconsultant or subcontractor, and provides to Developer, proof of insurance in form and substance identical to that required to be carried by the Contractor pursuant to this Agreement, and reasonably acceptable to Developer. Contractor shall in writing bind each such consultant, subconsultant and subcontractor to all of the insurance requirements of this Exhibit. Contractor shall also obtain from all such consultants, subconsultants and subcontractors an indemnification in form and substance identical to the indemnity set forth in the Agreement, with the modification that such indemnity from the consultant, subconsultant or subcontractor shall also be for the benefit of the Developer and other indemnified parties identified in the Agreement.

7. Neither receipt nor acceptance of policies, endorsements or certificates, whether or not indicating reduced or different coverages than required herein, nor any other forbearance or omission by Developer with regard to these insurance requirements, shall be deemed a waiver of, or estoppel to assert, any right on the part of Developer regarding these insurance requirements. The insurance requirements set forth herein are independent of Contractor's indemnification obligations and other obligations hereunder. Nothing herein shall be construed to limit or alter any of other obligations of Contractor, under this Agreement or otherwise, including, without limitation, Contractor's indemnification obligations pursuant to the Agreement