OC Community Resources/OC Public Libraries **STRIKETHROUGH VERSION**

SC14-L-B

San Clemente Library Lease

**LEASE AGREEMENT**

THIS IS A LEASE, (hereinafter referred to as “**Lease**”) made , 2011, by and between the CITY OF SAN CLEMENTE, a California municipal corporation (hereinafter referred to as “**CITY**”) and the COUNTY OF ORANGE, a political subdivision of the State of California (hereinafter referred to as “**COUNTY**”) without regard to number and gender. The term “**COUNTY**” shall mean the Board of Supervisors of the political body that executed this agreement or its authorized representative.

1. DEFINITIONS (1.2 S)

“**Board of Supervisors**” means the Board of Supervisors of the County of Orange, a political subdivision of the State of California

“**Corporate Real Estate**” means OC Public Works, OC Facilities and Real Estate, Corporate Real Estate, County of Orange, or upon written notice to CITY, such other entity as shall be designated by the Director of OC Public Works.

“**County Counsel**” means the County Counsel, County of Orange, or designee, or upon written notice to CITY, such other person or entity as shall be designated by the County Executive Officer or the Board of Supervisors.

“**County Librarian**” means the County Librarian of the OC Public Libraries, County of Orange, or designee, or upon written notice to CITY, such other person or entity as shall be designated by the County Executive Officer or the Board of Supervisors.

“**Manager of Corporate Real Estate**” means the Manager, OC Public Works, OC Facilities and Real Estate, Corporate Real Estate, County of Orange, or designee, or upon written notice to CITY, such other person or entity as shall be designated by the Director of OC Public Works.

2. PREMISES (1.3A S)

Commencing upon the Commencement Date (as that term is defined in Section 6), CITY leases to COUNTY that certain property (hereinafter referred to as “**Premises**”) described as the “**Original Area**” in Exhibit “A” and shown on Exhibit “B,” which exhibits are attached hereto and by reference made a part hereof.  The Premises also shall include the property described as the “**Expansion Area**” in Exhibit “A” and shown on Exhibit “B” upon the commencement of construction of the “**Expansion Project**” pursuant to that certain Joint Funding Agreement referred to in Section 13. CITY shall maintain full control and responsibility of the Expansion Area, commonly known as the Senior Center, until commencement of construction of the Expansion Project. If the Joint Funding Agreement is terminated prior to the completion of the Expansion Project, then upon such termination, the Premises shall not include the Expansion Area and City’s use of the Expansion Area shall not be restricted by County or this Lease in any way.

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3. PARKING (1.4 N)

CITY, throughout the term of this Lease, shall provide ten (10) parking spaces for free and exclusive use by COUNTY library employees only during library operating hours. The ten (10) parking spaces shall be located in the parking area that serves the Premises at the specific location shown on Exhibit “B” and shall be clearly marked as COUNTY library employee parking spaces.

In addition to said parking spaces, CITY shall also provide library parking for library patrons and disabled persons in accordance with the requirements of all applicable laws, rules and regulations, including without limitation the Americans with Disabilities Act (“ADA”).

4. TERMINATION OF PRIOR LEASE (1.5 N)

Upon the Commencement Date, as established pursuant to Section 6, below, it is mutually agreed that the Lease by and between the COUNTY and the CITY, dated as of June 17, 1980, as amended by that certain First Amendment to Lease dated April 14, 1981, (collectively, the “**Existing Lease**”) is hereby terminated, subject to the following: (i) the terms relating to continuing obligations for events occurring during the term of the Existing Lease, including but not limited to indemnification obligations, shall survive; and (ii) all personal property and/or equipment (e.g., fixtures, partitions, counters, shelving) attached to and/or placed upon any portion of the Premises by COUNTY pursuant to the terms of the Existing Lease shall remain the personal property of COUNTY, who shall have the right to remove same in accordance with the provisions of Section 10 of this Lease.

5. USE (2.1 N)

COUNTY shall use the Premises for the provision of free public library and related library services on a continual and regular basis and for no other purpose. In connection therewith, COUNTY shall provide an operating staff and a collection of library materials consistent in quality and quantity with other Orange County public library branch facilities of comparable size and activity. COUNTY shall maintain hours of operation consistent with the allocation formula as agreed upon by the member cities of the OC Public Libraries system throughout the term of this Lease. In the event that reductions of staff and materials are ordered by appropriate authority for the Orange County public library system, such reductions may be made by COUNTY in this branch consistent with comparable reductions throughout the system.

6. TERM (2.2 N)

The term of this Lease shall be twenty-five (25) years, commencing on the date of execution of this Lease by COUNTY and CITY, which date shall be inserted in the preamble to this Lease (“**Commencement Date**”). COUNTY shall surrender possession of the Premises to CITY at the expiration or earlier termination of this Lease. The expiration or earlier termination of this Lease shall not release either party then in default for liability for such default.

7. OPTION TO EXTEND TERM (2.3 S)

COUNTY shall have the option to extend the term of this Lease for one, ten-year (10) period on the same terms and conditions. In the event COUNTY elects to exercise such option, COUNTY shall provide written notice to CITY at least sixty (60) days prior to the Lease termination date.

8. OPTION TO TERMINATE LEASE (2.4 S)

Provided COUNTY is not in default or upon curing any defaults, COUNTY shall have the option to terminate this Lease at any time after the first (1st) year of the Lease term upon giving CITY written notice at least ninety (90) days prior to said termination date; provided, however, if the parties have proceeded with the Expansion Project, no such termination under this section shall be permitted until the Expansion Project has been completed or the Funding Agreement has terminated. If the Lease is terminated for any reason, COUNTY shall not be required to make any payments under Section 2.5 of the Funding Agreement that become due after the date of termination. The Parties acknowledge that COUNTY’s obligations to provide ongoing library services, repair and maintenance of the Premises, and utilities and insurance with respect to the Premises under this Lease are subject to and contingent upon applicable budgetary appropriations being approved by the COUNTY Board of Supervisors for each fiscal year in which such obligations arise. The failure of the COUNTY Board of Supervisors to make such appropriations shall not constitute a default of COUNTY, but in such event, COUNTY and CITY each shall have the right to terminate this Lease upon thirty (30) days written notice to the other party.

The Parties acknowledge that CITY’s obligations to provide repair and maintenance of the Premises, as provided for herein, and insurance with respect to the Premises under this Lease are subject to and contingent upon applicable budgetary appropriations being approved by the City Council for each fiscal year in which such obligations arise.  The failure of the City Council to make such appropriations shall not constitute a default of CITY, but in such event, COUNTY and CITY each shall have the right to terminate this Lease upon thirty (30) days written notice to the other party.

9. RENT (3.1 N)

In consideration of the free public library services provided by the COUNTY at the Premises, COUNTY’s use of the Premises shall be rent-free throughout the term of this Lease or any extension thereof.

10. ALTERATIONS (4.4 S)

COUNTY may make improvements and changes within the interior building of the Premises, including but not limited to the installation of fixtures, partitions, counters, shelving, and equipment as deemed necessary or appropriate by the COUNTY in its discretion, subject to obtaining any required permits and approvals. It is agreed that any such fixtures, partitions, counters, shelving, or equipment attached to or placed upon the Premises by COUNTY shall be considered as personal property of COUNTY, who shall have the right to remove same provided it repairs any damage caused by the removal. COUNTY agrees that the Premises shall be left in as good condition as when received on the Commencement Date (or if the Expansion Project is constructed, in as good as condition as received upon the completion of the Expansion Project), reasonable wear and tear excepted.

COUNTY shall pay, when due, all claims for labor or materials furnished to or for COUNTY at or for use on the Premises, which claims are or may be secured by a mechanics' or materialmen's lien against the Premises or any interest therein. If COUNTY shall, in good faith, contest the validity of any such lien, claim or demand, then COUNTY shall, at its sole expense indemnify, defend and protect itself, CITY and the Premises against the same and shall pay and satisfy any such adverse judgment that may be rendered thereon before the enforcement thereof against the CITY or the Premises. COUNTY shall give CITY not less than ten (10) days' notice prior to the commencement of any work in, on or about the Premises, except for minor alterations with a project cost of $25,000 or less (which shall nonetheless be subject to obtaining any required permits and approvals), and CITY shall have the right to post notices of non-responsibility in or on the Premises as provided by law.

11. REPAIR, MAINTENANCE AND JANITORIAL SERVICES (5.1A N)

11.1 COUNTY Maintenance Obligations. COUNTY shall, at its own cost and expense, maintain or cause to be maintained the Premises (except for the improvements that constitute the CITY Maintenance Obligations pursuant to Section 11.2 below) in clean and good condition and repair and shall be responsible for providing janitorial services. If COUNTY fails to comply with the foregoing, CITY may notify COUNTY in writing; and if COUNTY does not instigate measures to provide satisfactory service and/or to remedy the unsatisfactory conditions within four (4) business days after COUNTY has received such notice from CITY in accordance with Section 26 of this Lease, CITY may provide the repair and/or maintenance service necessary to remedy the unsatisfactory condition and assure satisfactory service or have others do so, and bill the cost thereof, including labor and materials to COUNTY.

11.2 CITY Maintenance Obligations. CITY shall provide, at its own cost and expense, all repair and maintenance of the roof of the Premises, the parking lot that serves the Premises, exterior walkways and landscaped areas, and the outdoor patio area that will be developed if the Expansion Project is constructed (but not including any furniture, fixtures or furnishings), at the same level provided to other CITY maintained facilities, and shall repaint the exterior of the Premises every five (5) years after the Commencement Date, or as needed upon mutual agreement by COUNTY and CITY staff (collectively, the “CITY Maintenance Obligations”). If CITY fails to comply with the foregoing, the County Librarian may notify CITY in writing; and if CITY does not instigate measures to provide satisfactory service and/or to remedy the unsatisfactory conditions within four (4) business days after CITY has received such notice from COUNTY in accordance with Section 26 of this Lease, COUNTY may provide the repair and/or maintenance service necessary to remedy the unsatisfactory condition and assure satisfactory service or have others do so, and bill the cost thereof, including labor and materials to CITY.

11.3 COUNTY Reimbursement Obligation for Roof and Exterior Painting. COUNTY shall reimburse CITY for one hundred percent (100%) of the cost of repair and maintenance of the roof and exterior painting of the building, provided that said costs are reasonable. COUNTY shall make payment to the CITY within sixty (60) days after CITY submits a written request for payment to COUNTY which shall include supporting data of the costs incurred. CITY’s request for payment shall itemize the total cost for services. COUNTY shall have the right to audit any request for payment and supporting data used by CITY in preparation of said request. CITY agrees to furnish any supporting data requested by COUNTY.

12. UTILITIES (5.2 N)

COUNTY shall be responsible for and pay all charges for utilities supplied to the Premises.

13. JOINT FUNDING AGREEMENT (N)

Concurrently with the execution of this Lease, COUNTY and CITY shall execute that certain Agreement for the Construction and Funding of the Expansion of the San Clemente Library in the form attached hereto as Exhibit “C” (“Joint Funding Agreement”), which sets forth the terms and conditions for the parties to jointly fund the expansion and remodel of the Expansion Area.

14. INSURANCE (5.3 N)

14.1 Property/Fire Insurance Maintained by CITY. CITY shall obtain and keep in force during the term of this Lease a policy or policies of property and fire insurance with extended coverage, covering the loss or damage to the Premises to the full insurable value of the improvements located on the Premises (including the full value of all improvements and fixtures owned by CITY but not including COUNTY’s fixtures, inventory, personal property or other items used by COUNTY’s in its operation of the use on the Premises) at least in the amount of the full replacement cost thereof, and in no event less than the total amount required by any lender holding a security interest, against all perils included within the classification of fire, extended coverage, vandalism, malicious mischief, special extended perils (“all risk” as such term is used in the insurance industry, excluding earthquake and flood).

14.2 Property/Fire Insurance Maintained by COUNTY. COUNTY shall obtain and keep in force during the term of this Lease a policy or policies of property and fire insurance with extended coverage, covering the loss or damage to the Premises to the full insurable value of COUNTY’S improvements located on the Premises (including the full value of all COUNTY’s fixtures, inventory, personal property or other items used by COUNTY’s in its operation of the use on the Premises) at least in the amount of the full replacement cost thereof, and in no event less than the total amount required by any lender holding a security interest, against all perils included within the classification of fire, extended coverage, vandalism, malicious mischief, special extended perils (“all risk” as such term is used in the insurance industry, excluding earthquake and flood).

14.3 Liability Insurance Maintained by CITY and COUNTY. CITY and COUNTY each shall obtain and keep in force during the term of this Lease a policy or policies of commercial general liability insurance or a self-insurance program, with respect to the Premises, including broad form property damage, blanket contractual liability, independent contractors, and personal injury, with a limit of not less than Two Million Dollars ($2,000,000) combined single limits, per occurrence and aggregate.

14.4 Policy Requirements. *All Policies*. All of the insurance policies required to be carried by a party referred to above (a) shall be in a form satisfactory to the other party to this Lease and carried with a company (or companies) acceptable to the other party and licensed to do business in the state of California, and (b) shall provide that such policies shall not be subject to material alteration or cancellation without at least thirty (30) days prior written notice to the other party. Each party’s policy evidencing the commercial general liability insurance, or self-insurance program referred to above shall (a) name the other party to this Lease as an additional insured, (b) shall be primary, and any insurance maintained by the other party shall be excess and non-contributing, and (c) shall be written on a per occurrence and not claims made basis. Each party’s policy evidencing the property and fire insurance referred to above shall provide for the insurer to waive all rights of subrogation and contribution it may have against the other party. Prior to the Commencement Date of this Lease and upon renewal of such policies, each party shall submit to the other suitable evidence that the foregoing policy or policies are in effect. At CITY’s and COUNTY’s option, each may self-insure the insurance coverage required by this Lease.

15. LIABILITY AND INDEMNITY (5.4 N)

CITY shall defend, indemnify, assume all responsibility for, and hold COUNTY and its officers, officials, employees, agents, and representatives harmless from all claims, demands, damages, defense costs or liability of any kind or nature arising from or relating to the ownership, construction, maintenance, improvement or use of the Premises and/or any default of this Lease by CITY or its officers, officials, employees, agents, representatives, contractors, agents, invitees, and licensees.

COUNTY shall defend, indemnify, assume all responsibility for, and hold CITY and its officers, officials, employees, agents, and representatives harmless from all claims, demands, damages, defense costs or liability of any kind or nature arising from or relating to the occupancy, construction, maintenance, improvement or use of the Premises and/or any default of this Lease by COUNTY or its officers, officials, employees, agents, representatives, contractors, agents, invitees, and licensees.

16. TAXES AND ASSESSMENTS (5.6 N)

Subject to the last sentence of Section 17 of this Lease, all taxes and assessments which become due and payable upon the Premises shall be the full responsibility of CITY, and CITY shall cause said taxes and assessments to be paid prior to the due date.

17. TAX EXEMPTION (5.6A N)

It is mutually understood and agreed that the Premises will be used for a public library and as such will be exempt from real property taxes (but not from special assessments and special assessment district levies) as provided for in Section 202 of the Revenue and Taxation Code. It is also understood and agreed that it is CITY’s responsibility to properly claim said exemption through the Orange County Assessor’s Office. If CITY has properly claimed said tax exemption and the Premises fails to qualify for said tax exemption under the above‑mentioned code section, the CITY agrees to pay the real property taxes prior to delinquency. In the event that COUNTY operates any use on the Premises in connection with the library use that results in the imposition of real property or possessory interest taxes (i.e., a coffee stand incidental to the library use), COUNTY shall be responsible for payment of such taxes or for obtaining an applicable exemption.

18. BUILDING AND SAFETY REQUIREMENTS (5.7 N)

During the full term of this Lease, CITY and COUNTY respectively, at their sole cost, agrees to maintain the Premises in accordance with their respective obligations set forth in Section 11 of this Lease in compliance with all applicable laws, rules, regulations, building codes, statutes, and orders as they are applicable on the date of this Lease, and as they may be subsequently amended.

CITY shall be responsible for compliance with the Americans With Disabilities Act of 1990 (42 U.S.C. §12101 et seq.) and regulations and guidelines promulgated thereunder, and all other federal, state, and local codes, statutes, and orders relating to disabled access as they are applicable on the dates of this Lease, and as they may be subsequently amended from time to time (collectively referred to herein as the “ADA”), in connection with the parking serving the Premises and any exterior improvements to the Premises

COUNTY shall be responsible for compliance with the ADA in connection with any interior improvements to the Premises. In addition, COUNTY shall be solely responsible for all requirements under the ADA relating to COUNTY’s employees and is responsible for ensuring that its programs, services and activities are accessible to persons with disabilities in accordance with any applicable legal requirements.

COUNTY and CITY each agree that with respect to its respective employees that directly or indirectly service the Premises, to maintain the Premises as a “safe place of employment,” as defined in the California Occupational Safety and Health Act (California Labor Code, Division 5, Part 1, Chapter 3, beginning with Section 6400) and the Federal Occupational Safety and Health Act, where the provisions of such Act exceed, or supersede, the California Act, as the provisions of such Act are applicable on the date of this Lease, and as they may be subsequently amended. The foregoing is not intended and shall not be construed to shift any party’s responsibility(ies) under this Agreement to the other party.

In the event COUNTY neglects, fails, or refuses to maintain said Premises as aforesaid, CITY may, notwithstanding any other termination provisions contained herein, and after the expiration of the cure period provided for in Section 23:

A. Terminate this Lease upon written notice to the COUNTY; or

B. At CITY’s sole option, cure any such default by performance of any act, including payment of money, and bill the cost thereof plus reasonable administrative costs to COUNTY.

Likewise, in the event CITY neglects, fails, or refuses to maintain said Premises as aforesaid, COUNTY may, notwithstanding any other termination provisions contained herein, and after the expiration of the cure period provided for in Section 23:

C. Terminate this Lease upon written notice to the CITY; or

D. At COUNTY’s sole option, cure any such default by performance of any act, including payment of money, and bill the cost thereof plus reasonable administrative costs to CITY.

19. CONCESSIONS (5.8 N)

COUNTY may, at COUNTY’s option, contract with and receive fees from outside vendors that provide services either within the Premises or in the parking areas shown on Exhibit “B.” All such services shall be related to the use of the Premises as a library. Notwithstanding the foregoing, any use of the parking areas for purposes other than parking shall require the prior written approval of CITY.

20. TOXIC MATERIALS (5.9 N)

COUNTY hereby warrants and represents and agrees that it shall comply with all laws and regulations relating to the storage, use and disposal of hydrocarbon substances and hazardous, toxic or radioactive matter, including, but not limited to, those materials identified in Title 26 of the California Code of Regulations (collectively “**Toxic Materials**”), on or about the Premises. COUNTY shall be responsible for and shall defend, indemnify and hold CITY, its officers, directors, employees, agents, and representatives, harmless from and against all claims, costs and liabilities, including attorneys’ fees and costs arising out of or in connection with previous, current and future storage, use, and disposal of Toxic Materials on the Premises by COUNTY. If the storage, use, and disposal of Toxic Materials on the Premises by COUNTY results in contamination or deterioration of water or soil resulting in a level of contamination greater than maximum allowable levels established by any governmental agency having jurisdiction over such contamination, COUNTY shall promptly take any and all action necessary to clean up such contamination.

Likewise, CITY hereby warrants and represents and agrees that CITY has in the past and will hereafter comply with all laws and regulations relating to the storage, use and disposal of Toxic Materials on or about the Premises. CITY shall be responsible for and shall defend, indemnify and hold COUNTY, its officers, directors, employees, agents, and representatives, harmless from and against all claims, costs and liabilities, including attorneys’ fees and costs arising out of or in connection with the previous, current and future storage, use and disposal of Toxic Materials on the Premises (or building if the Premises comprises only a portion of said building) by CITY. If the previous, current and future storage, use, and disposal of Toxic Materials on the Premises by CITY results in contamination or deterioration of water or soil resulting in a level of contamination greater than maximum allowable levels established by any governmental agency having jurisdiction over such contamination, CITY shall promptly take any and all action necessary to clean up such contamination.

21. SUBORDINATION, ATTORNMENT AND NON‑DISTURBANCE (6.4 S)

This Lease and all rights of the COUNTY hereunder are subject and subordinate to any mortgage or deed of trust which does now or may hereafter cover the Premises or any interest of CITY therein, and to any and all advances made on the security thereof, and to any and all increases, renewals, modifications, consolidations, replacements and extensions of any such mortgage or deed of trust except, insofar as COUNTY is meeting its obligations under this Lease, any foreclosure of any mortgage or deed of trust shall not result in the termination of this Lease or the displacement of COUNTY.

In the event of transfer of title of the Premises, including any proceedings brought for foreclosure or in the event of the exercise of the power of sale under any mortgage or deed of trust, or by any other transfer of title covering the Premises, COUNTY shall attorn to and recognize any subsequent title holder as the CITY under all terms, covenants and conditions of this Lease. COUNTY’s possession of the Premises shall not be disturbed by the CITY, or its successors in interest, and this Lease shall remain in full force and effect. Said attornment shall be effective and self‑operative immediately upon succession of the current title holder, or its successors in interest, to the interest of CITY under this Lease.

CITY shall require all future lenders on the Premises, upon initiation of their interest in the Premises, to enter into a *Subordination, Attornment and Non‑Disturbance Agreement* with COUNTY, thereby insuring COUNTY of its leasehold interests in the Premises. Said *Subordination, Attornment and Non‑Disturbance Agreement* shall be in the form of COUNTY’s standard form *Subordination, Attornment and Non‑Disturbance Agreement* or in a form approved by COUNTY’s County Librarian, Manager of Corporate Real Estate and County Counsel.

Foreclosure shall not extinguish this Lease, and any lender or any third party purchasing the Premises at foreclosure sale shall do so subject to this Lease and shall thereafter perform all obligations and be responsible for all liabilities of the CITY under the terms of this Lease.

22. ESTOPPEL CERTIFICATE (6.5 S)

COUNTY agrees that its County Librarian, shall furnish from time to time upon receipt of a written request from CITY or the holder of any deed of trust or mortgage covering the Premises or any interest of CITY therein, COUNTY’s standard form *Estoppel* Certificatecontaining information as to the current status of the Lease. The *Estoppel Certificate* shall be approved by COUNTY’s County Librarian, Corporate Real Estate, and County Counsel.

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23. DEFAULTS AND REMEDIES (6.8 N)

23.1 Default. The failure by either party to perform any of its obligations set forth in this Lease shall constitute a default of this Lease. Except as required to protect against further damages, the nondefaulting party may not institute legal proceedings against the party in default until the nondefaulting party has provided the defaulting party notice of the default and the cure period set forth in this Lease has expired, or if no other specific time period is set forth in this Lease, the follow applicable cure period has expired: (i) the cure period for any monetary default shall be fifteen (15) days after the defaulting party’s receipt of written notice from the nondefaulting Party that such obligation was not performed; and (ii) the cure period for any other default shall be thirty (30) days after the defaulting party’s receipt of written notice from the nondefaulting party that such obligation was not performed; provided, however if the failure cannot be corrected within such thirty (30) day period, it shall not constitute a default if the failure is correctable without material adverse affect on the nondefaulting party, and if corrective action is instituted within fifteen (15) days of notice and diligently pursued until the failure is corrected.

23.2 Remedies Upon Default. Upon the occurrence of any default and after the defaulting party has received written notice of default and the time period to cure the default has expired, the nondefaulting party may at its option, (i) pursue damages or specific performance or any other legal and equitable remedies the injured party may have against the defaulting party in accordance with applicable law; and/or (ii) terminate this Lease.

24. LABOR CODE COMPLIANCE (6.10 N)

All improvements or modifications required to be performed under this Lease by either party costing more than $1,000 shall be governed by and performed in accordance with the applicable provisions of Article 2 of Chapter 1, Part 7, Division 2 of the Labor Code of the State of California (Sections 1770, et seq.).

Pursuant to the provisions of Section 1773 of the Labor Code of the State of California, the party performing the improvements (“Performing Party”) shall comply with the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality applicable to this Lease for each craft, classification, or type of workman needed to execute the aforesaid improvements or modifications. The rates are available from the Director of the State Department of Industrial Relations at the following website: <http://www.dir.ca.gov/dlsr/DPreWageDetermination.htm>. The Performing Party shall post a copy of such wage rates at the job site and shall pay the adopted prevailing wage rates. The Performing Party shall comply with the provisions of Sections 1775 and 1813 of the Labor Code.

As required by applicable law, the Performing Party shall maintain certified payroll records for all workers that will be assigned to the improvements or modifications. Said payroll records shall contain, but not be limited to, the complete name, address, telephone number, social security number, job classification, and prevailing wage rate for each worker.

25. RIGHT TO WORK AND MINIMUM WAGE LAWS (6.13 N)

In accordance with the United States Immigration Reform and Control Act of 1986 and to the extent applicable, each party shall require its employees that directly or indirectly service the Premises or terms and conditions of this Lease, in any manner whatsoever, to verify their identity and eligibility for employment in the United States. Each party shall also require and verify that its contractors or any other persons servicing the Premises or terms and conditions of this Lease on behalf of that party, in any manner whatsoever, verify the identity of their employees and their eligibility for employment in the United States.

Pursuant to the United States of America Fair Labor Standard Act of 1938, as amended, and State of California Labor Code, Section 1178.5, to the extent applicable, CITY and COUNTY shall pay no less than the greater of the Federal or California Minimum Wage to all its employees that directly or indirectly service the Premises, in any manner whatsoever. CITY shall require and verify that all its contractors or other persons servicing the Premises on behalf of the CITY also pay their employees no less than the greater of the Federal or California Minimum Wage, and COUNTY shall require and verify that all its contractors or other persons servicing the Premises on behalf of the COUNTY also pay their employees no less than the greater of the Federal or California Minimum Wage.

CITY and COUNTY each shall comply and verify that its respective contractors comply with all other Federal and State of California laws for minimum wage, overtime pay, record keeping, and child labor standards pursuant to the servicing of the Premises or terms and conditions of this Lease.

Notwithstanding the minimum wage requirements provided for in this clause, CITY and COUNTY, where applicable, shall comply with the prevailing wage and related requirements, as provided for in the Clause entitled (LABOR CODE COMPLIANCE) of this Lease.

26. NOTICES (8.1 S)

All written notices pursuant to this Lease shall be addressed as set forth below or as either party may hereafter designate by written notice and shall be deemed delivered upon personal delivery, delivery by facsimile machine with confirmed successful transmission and receipt, or seventy-two (72) hours after deposit in the United States Mail.

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| --- | --- |
| TO: CITY    City of San Clemente  100 Avenida Presidio  San Clemente, CA 92672  Attn: City Manager  Facsimile: (949) 361-8283 | TO: COUNTY    County of Orange  OC Community Resources/OC Public Libraries  1501 E. St. Andrew Place  Santa Ana, CA 92705  Attn: County Librarian  Facsimile: (714) 566-3073 |

27.  COMPLIANCE WITH LAWS; CONDUCT OF OPERATIONS

Each party shall, at that party’s sole cost and expense, fully, diligently and in a timely manner, comply with all applicable laws, rules, and regulations relating in any manner to that party’s use of the Premises and its performance of its obligations under this Lease. Each party shall be solely responsible for monitoring the conduct and ensuring the safety of its employees, agents, and invitees on the Premises.

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28. ASSIGNMENT

COUNTY shall not voluntarily or by operation of law assign, sublease, transfer, mortgage or otherwise transfer or encumber (collectively, "assignment") or sublet all or any part of COUNTY's interest in this Lease or in the Premises without CITY's prior written consent, which CITY may grant or withhold in its sole discretion.

29. TERMINATION.

The termination of this Lease for any reason shall not release any party in default.

30. ATTACHMENTS (8.2 S)

This Lease includes the following, which are attached hereto and made a part hereof:

1. GENERAL CONDITIONS
2. EXHIBITS
   * + 1. Description - Premises
       2. Plot Plan - Premises
       3. Joint Funding Agreement

[signatures on next page]

IN WITNESS WHEREOF, the parties have executed this Lease the day and year first above written.

|  |  |
| --- | --- |
|  | “**CITY**”  CITY OF SAN CLEMENTE, a California municipal corporation  By:  Its: |
| ATTEST:  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  City Clerk |  |
| APPROVED AS TO FORM: RUTAN & TUCKER, LLP  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  City Attorney |  |
| APPROVED AS TO FORM:  OFFICE OF COUNTY COUNSEL  ORANGE COUNTY, CALIFORNIA  By  Deputy  Date  RECOMMENDED FOR APPROVAL:  OC PUBLIC LIBRARIES  By  Signed and certified that a copy of this document has been delivered to the Chair of the Board per G.C. Sec. 25103, Resolution  79-1535  Attest:    \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Darlene J. Bloom  Clerk of the Board of Supervisors  Orange County, California | “**COUNTY**” COUNTY OF ORANGE    Chair, Board of Supervisors  Orange County, California |

GENERAL CONDITION (9.1 S – 9.17 S)

1. LEASE ORGANIZATION (9.1 S)

The various headings in this Lease, the numbers thereof, and the organization of the Lease into separate sections and paragraphs are for purposes of convenience only and shall not be considered otherwise.

1. INSPECTION (9.2 S)

CITY or its authorized representative shall have the right at all reasonable times and upon reasonable advance notice to COUNTY to inspect the Premises to determine if COUNTY is complying with all the provisions of this Lease.

1. SUCCESSORS IN INTEREST (9.3 S)

Unless otherwise provided in this Lease, the terms, covenants, and conditions contained herein shall apply to and bind the heirs, successors, executors, administrators, and assigns of all the parties hereto, of whom all shall be jointly and severally liable hereunder.

1. DESTRUCTION OF OR DAMAGE TO PREMISES (9.4 S)

"**Partial Destruction**" of the Premises shall mean damage or destruction to the Premises, for which the repair cost is less than twenty-five percent (25%) of the then replacement cost of the Premises (including tenant improvements), excluding the value of the land.

"**Total Destruction**" of the Premises shall mean damage or destruction to the Premises, for which the repair cost is twenty-five percent (25%) or more of the then replacement cost of the Premises (including tenant improvements), excluding the value of the land.

"**Insured Loss**" shall mean damage or destruction to improvements on the Premises, which was caused by an event required to be covered by the insurance described in Section 14.1 of the Lease.

In the event of a Partial Destruction of the Premises that is an Insured Loss, CITY shall immediately pursue completion of all repairs necessary to restore the Premises to the condition which existed immediately prior to said Partial Destruction, other than COUNTY’s fixtures, inventory, personal property or other items used by COUNTY’s in its operation of the use on the Premises, for which COUNTY is required to maintain insurance pursuant to Section 14.2 of the Lease and for which COUNTY shall restore (the “County Property”). The restoration work for which CITY is responsible (including any demolition required) shall be completed by the City (except with respect to the County Property), at City’s sole cost, with reasonable diligence following the occurrence of said Partial Destruction. The restoration work for which COUNTY is responsible (including any demolition required) shall be completed by the COUNTY, at COUNTY’S sole cost, with reasonable diligence following the occurrence of said Partial Destruction. The Partial Destruction of the Premises shall in no way render this Lease null and void.

If a Partial Destruction of the Premises occurs that is not an Insured Loss, CITY may either: (i) repair such damage as soon as reasonably possible at CITY's expense, in which event this Lease shall continue in full force and effect, or (ii) terminate this Lease by giving written notice to COUNTY. In the event CITY elects to terminate this Lease, COUNTY shall have the right within 10 days after receipt of the termination notice to give written notice to CITY that COUNTY elects to pay for the repair of such damage without reimbursement from CITY. In such event and provided COUNTY has sufficient funds at hand for the repairs, this Lease shall continue in full force and effect and COUNTY shall complete the repairs as soon as reasonably possible.

In the event of Total Destruction of the Premises or the Premises being legally declared unsafe or unfit for occupancy, CITY shall have the option of terminating this Lease or immediately instigating action to rebuild or make repairs, as necessary, to restore the Premises (but not including repair or replacement of COUNTY’s fixtures, inventory, personal property or other items used by COUNTY’s in its operation of the use on the Premises, for which COUNTY is responsible) to the condition which existed immediately prior to the destruction.

In the event CITY elects to terminate this Lease under either of the two proceeding paragraphs, CITY shall reimburse COUNTY for the reimbursement payments made by COUNTY to CITY, if any, pursuant to Section 2.5 of the Funding Agreement (“County Payment”), in the following amounts: (i) if the termination occurs during the first ten years of the Lease Term, City shall pay to COUNTY 100% of the County Payment, and (ii) commencing on the 10th anniversary of the Commencement Date and on each one year anniversary thereafter, the amount of the County Payment subject to reimbursement by CITY under this paragraph shall be reduced by an amount equal to 1/15 of the County Payment.

1. AMENDMENT (9.5 S)

This Lease sets forth the entire agreement between CITY and COUNTY and any modification must be in the form of a written amendment executed by both CITY and COUNTY.

1. PARTIAL INVALIDITY (9.6 S)

If any term, covenant, condition, or provision of this Lease is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions hereof shall remain in full force and effect and shall in no way be affected, impaired, or invalidated thereby to the extent such remaining provisions are not rendered impractical to perform taking into consideration the purposes of this Lease.

1. CIRCUMSTANCES WHICH EXCUSE PERFORMANCE (9.7 S)

If either party hereto shall be delayed or prevented from the performance of any act required hereunder by reason of acts of God, performance of such act shall be excused for the period of the delay; and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay. Financial inability shall not be considered a circumstance excusing performance under this Lease.

1. STATE AUDIT (9.8 N)

Pursuant to and in accordance with Section 8546.7 of the California Government Code, in the event that this Lease involves expenditures and/or potential expenditures of public funds aggregating in excess of ten thousand dollars ($10,000), CITY and COUNTY shall be subject to the examination and audit of the Auditor General of the State of California for a period of three years after final payment under this Lease. The examination and audit shall be confined to those matters connected with the performance of this Lease, including, but not limited to, the costs of administering this Lease.

1. WAIVER OF RIGHTS (9.9 S)

None of the provisions of this Lease shall be considered waived by either party except when such waiver is delivered in writing by the party waiving the provision. Any failures or delays by either party in asserting any of its rights and remedies as to any default shall not operate as a waiver of any default or of any such rights or remedies, or deprive either such party of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert or enforce any such rights or remedies. No waiver of any provision of this Lease shall be construed as a waiver of any subsequent breach of the same provision or of any right or remedy with respect to such subsequent breach or any other default of the terms, conditions and covenants of this Lease.

1. HOLDING OVER (9.10 S)

In the event COUNTY shall continue in possession of the Premises after the term of this Lease, such possession shall not be considered a renewal of this Lease but a tenancy from month to month and shall be governed by the conditions and covenants contained in this Lease.

1. HAZARDOUS MATERIALS (9.11 N)

CITY warrants that to the best of its knowledge the Premises is free and clear of all hazardous materials or substances other than ordinary and customary materials used in the normal course of the uses occupying the Premises such as office supplies (toner, glue, liquid paper, etc.).

1. EARTHQUAKE SAFETY (9.12 S)

CITY warrants that the Premises is in compliance with all applicable seismic safety regulations and building codes.

1. QUIET ENJOYMENT (9.13 S)

CITY agrees that, subject to the terms, covenants and conditions of this Lease, COUNTY may, upon observing and complying with all terms, covenants and conditions of this Lease, peaceably and quietly occupy the Premises.

1. WAIVER OF JURY TRIAL (9.15 N)

Each party acknowledges that it is aware of and has had the advice of counsel of its choice with respect to its rights to trial by jury, and each party to the extent permitted by applicable law, for itself and its successors and assigns, does hereby expressly and knowingly waive and release all such rights to trial by jury in any action, proceeding or counterclaim brought by any party hereto against the other (and/or against its officers, directors, employees, agents, or subsidiary or affiliated entities) on or with regard to any matters whatsoever arising out of or in any way connected with this Lease including claims for injury or damage.

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1. GOVERNING LAW AND VENUE (9.16 S)

This Lease has been negotiated and executed in the State of California and shall be governed by and construed under the laws of the State of California. In the event of any legal action to enforce or interpret this Lease, the sole and exclusive venue shall be a court of competent jurisdiction located in Orange County, California, and the parties hereto agree to and do hereby submit to the jurisdiction of such court, notwithstanding Code of Civil Procedure section 394.

1. TIME (9.17 S)

Time is of the essence of this Lease.

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**EXHIBIT A**

DESCRIPTION OF PREMISES (11.1 S)

PROJECT NO: SC14-L-B DATE: August 24, 2011

PROJECT: San Clemente Library VERIFIED BY: Heather Condon

**ORIGINAL PREMISES**: All the Premises identified as the “Original Area” on the plot plan on Exhibit B, attached hereto and made a part hereof, being that certain portion of the one (1) story building located at 242 Avenida Del Mar, in the City of San Clemente, County of Orange, State of California, together with exclusive use of ten (10) parking spaces in the parking areas shown on Exhibit B.

**EXPANSION PREMISES**: All the Premises identified as the “Expansion Area” on the plot plan on Exhibit B, attached hereto and made a part hereof, being that certain portion of the one (1) story building located at 242 Avenida Del Mar, in the City of San Clemente, County of Orange, State of California.

**[PLOT PLAN SHOULD DISTINGUISH BETWEEN THE (I) ORIGINAL PREMISES, AND (II) THE EXPANSION PREMISES WHICH WILL BE INCLUDED AS PART OF THE PREMISES IF THE PARTIES MOVE FORWARD WITH THE EXPANSION PROJECT]**

***NOT TO BE RECORDED***

|  |
| --- |
| EXHIBIT B |

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| --- | --- | --- |
|  |  |  |
| SC14-L-B | Prepared By: H.Condon | **COUNTY OF ORANGE** |
| San Clemente Library | Checked By: H.Condon | OC Public Libraries |
| 242 Avenida Del Mar, San Clemente, CA | Date: 8/24/2011 |  |

**EXHIBIT “C”**

**AGREEMENT** **FOR THE** **CONSTRUCTION AND FUNDING**

**OF THE EXPANSION OF THE**

**SAN CLEMENTE LIBRARY**

[Attached]

**STRIKETHROUGH VERSION**

**AGREEMENT FOR THE CONSTRUCTION AND FUNDING**

**OF THE EXPANSION OF THE SAN CLEMENTE LIBRARY**

This AGREEMENT FOR THE CONSTRUCTION AND FUNDING OF THE EXPANSION OF THE SAN CLEMENTE LIBRARY (“**Agreement**”) is made and entered into as of the \_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2011, by and between the COUNTY OF ORANGE, a political subdivision of the State of California (“**COUNTY**”) and the CITY OF SAN CLEMENTE, a California municipal corporation (“**CITY**”). COUNTY and CITY are referred to herein individually as a “**Party**” and collectively as the “**Parties**.”

R E C I T A L S

A. Pursuant to that certain Lease Agreement by and between COUNTY and CITY, dated as of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2011 (the “Lease Agreement”), CITY leases to COUNTY certain premises for the San Clemente Library.

B. The Senior Center, which is located in the same building as the San Clemente Library, will be vacating to a new location. CITY and COUNTY have expressed a desire for the San Clemente Library to expand and occupy the former Senior Center space.

C. The expansion of the San Clemente Library into the former Senior Center space provides an opportunity for the entire space to be remodeled to meet the current and near future needs of the patrons of the San Clemente Library (“**Expansion Project**”).

D. CITY and COUNTY desire to enter into this Agreement to set forth the obligations and responsibilities of the Parties with respect to the design, construction, and financing of the Expansion Project.

A G R E E M E N T

Based upon the foregoing Recitals, which are incorporated herein by this reference, and for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, CITY and COUNTY agree as follows:

1. DEVELOPMENT OF EXPANSION PROJECT.
   1. Architect-Engineer Services Agreement. COUNTY shall solicit through one of the processes described below in this Section 1.1 a qualified and licensed architect-engineer (“**Architect****-Engineer**”) to perform the design, engineering, planning, preparation of plans and specifications, and all other work necessary for COUNTY to obtain permits for, bid the construction of, and construct, the Expansion Project, including construction management and post-construction activities, which shall be pursuant to a written agreement between COUNTY and the Architect-Engineer and subject to the reasonable approval of CITY (“**Architect-Engineer Agreement**”). COUNTY shall negotiate with the Architect-Engineer an amount not to exceed Two Hundred Twenty-Two Thousand Six Hundred Ninety-Nine Dollars ($222,699.00) for the required work under the Architect-Engineer Agreement. The COUNTY may procure the Architect-Engineer through bid solicitation or any other method COUNTY deems appropriate, subject to compliance with all legal requirements. In accordance with applicable laws, COUNTY shall submit the Architect-Engineer Agreement to the Board of Supervisors for approval. COUNTY shall notify CITY of the Board of Supervisors meeting date on which the Architect-Engineer Agreement is placed on the agenda and considered for approval. Any amendments to the Architect-Engineer Agreement shall be submitted to CITY for approval, which shall not be unreasonably withheld. CITY shall have twenty (20) days in which to approve or disapprove of the proposed amendment. If CITY does not provide a written approval or disapproval within twenty (20) days the proposed amendment will be deemed to have been disapproved by CITY. Subject to Section 3 of this Agreement, the source of funds for the payments made to the Architect-Engineer under the Architect-Engineer Agreement shall be the Expansion Project Funds in the order set forth in the last sentence of Section 2.3.
   2. Processing Plans for Expansion Project.

1.2.1 Preparation of Plans. Upon approval of the Architect-Engineer Agreement, by the CITY and by the COUNTY Board of Supervisors, COUNTY shall work with the Architect-Engineer to ensure the timely completion of the plans and specifications for the construction of the Expansion Project (“**Plans**”) in accordance with the schedule set forth in the Architect-Engineer Agreement. The Plans for the Expansion Project shall be in conformance with the design approved by both COUNTY and CITY and the Plans shall include an outdoor patio area.

1.2.2 City Review of Plans. Upon completion of the Plans by the Architect-Engineer, COUNTY shall submit the Plans to CITY for approval. CITY shall exercise reasonable diligence to review the Plans submitted by COUNTY within thirty (30) days of receipt of such submittal. Any disapproval of the Plans shall be in writing and shall state the reasons therefor. Upon receipt of a disapproval, COUNTY and CITY shall confer in an effort to reach agreement regarding any resulting revision or correction to the Plans that is not legally required (with the understanding that all legal requirements must be incorporated). If the Parties cannot reach agreement as to such proposed revisions or corrections within thirty (30) days, then either Party may terminate this Agreement. Upon agreement as to the proposed changes by CITY and COUNTY, COUNTY shall instruct the Architect-Engineer to act promptly to revise or correct the Plans as necessary to conform to the revisions and/or corrections mutually agreed to by COUNTY and CITY. The same procedures and requirements shall apply to subsequent reviews and submittals until the Plans are finally approved by COUNTY and CITY. The procedures and time periods herein for City’s review of the Plans relate to City’s review in its capacity as a landlord and not as a regulatory agency. COUNTY acknowledges and agrees that in addition the Plans will be subject to CITY’s normal plan review process and that COUNTY will cause the plans to be submitted and processed with the CITY Planning Department.

1.2.3 Board of Supervisors Approval. Upon completion of the Plans, including incorporating any changes agreed to between COUNTY and CITY and incorporating all legal requirements, COUNTY shall return to the Board of Supervisors for approval of the Plans and authorization to obtain a bid for construction of the Expansion Project in accordance with the provisions of Section 1.3 below. COUNTY shall notify CITY in advance of the date of the Board of Supervisor’s meeting on which such approval and authorization is scheduled for consideration. Once approved by the Board of Supervisors, no changes to the Plans shall be permitted without prior written approval of CITY, unless otherwise provided herein.

* 1. Bids; Project Budget; and Project and Funding Approvals.

1.3.1 Bid Procurement. Upon approval of the Plans by the Parties and authorization by the Board of Supervisors to obtain a bid for the construction of the Expansion Project, COUNTY shall procure said bid through public bidding procedures and in compliance with all applicable legal requirements. Upon receipt of bids, COUNTY staff shall promptly review the bids (and provide copies to CITY) and determine which bid is the lowest responsible and responsive bid. COUNTY shall provide to CITY the bid determined to be the lowest responsible and responsive bid (the “**Proposed Bid**”). All bids including the Proposed Bid shall include a fifteen percent (15%) contingency.

1.3.2 Preparation of Project Budget. Upon COUNTY’s selection of the Proposed Bid, CITY and COUNTY shall prepare, for submission to the City Council for approval pursuant to Section 1.3.3, a line item budget of the costs to develop the Expansion Project, including the costs under the Architect-Engineer Agreement, City fees including building permit and processing fees, construction costs which shall be based on the amounts set forth in the Proposed Bid, and a 15% contingency (“**Project Budget**”).

1.3.3 City Council Approval of Project Budget. Within thirty (30) days after the completion of the Project Budget, CITY shall submit the Project Budget to the City Council for a decision on whether to approve the Project Budget, including the Proposed Bid, and to proceed with the Expansion Project and provide the funding for which CITY would be responsible under Section 2.1 of this Agreement. The total amount set forth in the Project Budget as approved by the City Council is referred to herein as the “**Project Budget Amount**.” If CITY does not approve the Project Budget and determines it will not proceed with its portion of the funding of the Expansion Project, this Agreement shall terminate and the provisions of Section 3 of this Agreement shall apply. CITY shall notify COUNTY in advance of the date of the City Council meeting on which such matter will be scheduled for consideration.

1.3.4 Board of Supervisors Approval. Provided the City Council of CITY approves the Project Budget and elects to proceed with the Expansion Project pursuant to Section 1.3.3 and CITY approves the form of the Construction Contract pursuant to Section 1.4, COUNTY shall prepare the necessary documentation to return to the Board of Supervisors for authorization to award the contract for the construction of the Expansion Project to the bidder of the Proposed Bid as determined by COUNTY in accordance with Section 1.3.1 and approved by CITY in accordance with Section 1.3.3 (“**Construction Contract**”). COUNTY shall notify CITY in advance of the date of the Board of Supervisor’s meeting on which such authorization is scheduled for consideration, which shall be as promptly as reasonably practicable after the date of the City Council meeting referred to in Section 1.3.3 or after the date the CITY provides written approval of the Construction Contract in accordance with Section 1.4, whichever is later.

1.4 Construction Contract and Amendment. COUNTY shall submit the form of the Construction Contract to CITY for approval as to compliance with this Agreement and other CITY requirements, including without limitation, indemnities from the contractor in favor of CITY, insurance to be maintained by the contractor and approved by CITY naming CITY as an additional insured, thirty party beneficiary rights, self-help remedies exercisable by CITY in the event of defaults of the contractor, bond requirements, applicable fair labor standards, and a schedule of performance. CITY shall have twenty (20) days in which to approve or disapprove of the Construction Contract. If CITY disapproves of any portion of the Construction Contract, CITY and COUNTY shall endeavor to reach agreement as to amending the form of the Construction Contract. If the Parties do not reach agreement within sixty (60) days after COUNTY first submitted the Construction Contract to CITY for approval, either Party may terminate this Agreement. COUNTY shall enforce the Construction Contract. Any amendments to the Construction Contract shall be submitted to CITY for approval, which shall not be unreasonably withheld. CITY shall have twenty (20) days in which to approve or disapprove of the proposed amendment. If CITY does not provide a written approval or disapproval within twenty (20) days, the proposed amendment will be deemed to have been disapproved by CITY.

* 1. Scope of Development. COUNTY shall exercise diligent efforts to cause the contractor to cause the Expansion Project to be developed in strict accordance with this Agreement, the Construction Contract, and the applications, permits, plans and drawings approved by CITY and COUNTY, and in compliance with all applicable laws, regulations, and rules of all governmental agencies having jurisdiction, including without limitation all applicable labor laws, the payment of prevailing wages and compliance with the applicable provisions of Labor Code Section 1720 et seq. in connection with public projects.
  2. Commencement and Completion of Construction. COUNTY shall use diligent efforts to cause the contractor to cause the construction of the Expansion Project to be commenced and completed within the times set forth in the schedule of performance that is to be included in the Construction Contract and approved by the Parties, and to be continuously and diligently pursued to completion once commenced. Each of the Parties shall exercise diligent efforts to complete all tasks for which it is responsible under Sections 1.1-1.3 of this Agreement in a manner and within such times that will allow construction of the Expansion Project to commence no later than the date that is one hundred eighty (180) days after the date the Senior Center vacates the expansion space. During the course of construction and at such times as requested by CITY, COUNTY shall keep CITY informed of the progress of construction.

1. PROJECT FUNDING.
   1. Sources of Funding. The sources of funding for the Expansion Project are as follows (collectively, the “**Expansion Project Funds**”):

(i) Funds received and held by COUNTY in connection with the Talega development project in the amount of Six Hundred Forty-Six Thousand Six Hundred Five Dollars ($646,605.00)(“**Talega Funds**”). A portion of the Talega Funds are funds previously collected by COUNTY and are referred to herein as the “**COUNTY Talega Funds**” and a portion are funds previously collected by CITY and are referred to herein as the “**CITY Talega Funds**.”

(ii) Funds raised by the Friends of the Library in the amount of Two Hundred Thousand Dollars ($200,000.00) (“**Friends of the Library** **Funds**”).

(iii) Funds received by CITY in connection with the Marblehead development project in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00) (“**Marblehead Funds**”).

(iv) The funds set forth in Section 2.1(i), (ii), and (iii) total $1,096,605 and are collectively referred to herein as the “**Existing Funds**.” In the event that the amount of the Existing Funds is less than the Project Budget Amount, then the City Council’s approval of the Project Budget Amount pursuant to Section 1.3.3 shall constitute City’s agreement to provide additional funding to the Expansion Project in an amount equal to the difference between the Project Budget Amount and the sum of $1,096,605 (“**Additional City Funds**”).

(v) ~~Additional funds contributed by COUNTY for the cost of the Reimbursable Improvements (“~~**~~Additional County Funds~~**~~”). Due to COUNTY’s financial constraints, it is not economically feasible for COUNTY to provide the Additional County Funds at this time. Pursuant to Section 2.5 COUNTY will provide the Additional County Funds to CITY as a reimbursement to CITY for funds advanced by CITY from any source, with such reimbursement made in three payments beginning in Fiscal Year 2014-15~~. Notwithstanding subdivision (iv) of this Section 2.1, or Section 2.3, or any other section related to payment for the Expansion Project, County shall contribute an amount not to exceed Two Hundred Fifty-Five Thousand Dollars ($255,000), to pay for ADA accommodations to the exterior of the building and surrounding areas within the lease premises required to complete the Expansion Project as detailed in this Construction and Funding Agreement. Funding for change orders relating to said ADA accommodations shall be provided pursuant to the terms of Section 2.4.

(vi) Funds contributed by CITY pursuant to the terms of Section 2.4 for Cost Overruns in Excess of Project Budget Amount.

* 1. County Expansion Project Account; Deposit of Funds. Upon the execution of this Agreement, COUNTY shall establish a separate capital project fund account for the Expansion Project Funds (“**Expansion Project Account**”) and shall not commingle any other funds in said account. COUNTY shall deposit the Talega Funds into the Expansion Project Account upon the execution of this Agreement. Provided CITY approves the Project Budget and elects to proceed with the Expansion Project pursuant to Section 1.3.3, prior to the date that COUNTY submits the award of the Construction Contract to the Board of Supervisors for approval in accordance with Section 1.3.4, City shall deliver to COUNTY, and COUNTY shall deposit in the Project Expansion Account, the Marblehead Funds and, if needed, the Additional City Funds. COUNTY shall cause the Friends of the Library Funds to be deposited into the Expansion Project Account concurrently with the Marblehead Funds and the Additional City Funds.
  2. Expenditure of Funds. COUNTY shall be permitted to use the Project Expansion Funds only for the costs of the Expansion Project as set forth in the approved Project Budget; provided, however, that the City Manager of CITY or his designee and the County Librarian, or designee of COUNTY shall have the authority, upon mutual agreement of both, to reallocate the amounts that may be used for each Expansion Project cost if it is determined that the actual amounts incurred by COUNTY will be different than the cost estimates set forth in the Project Budget. Upon request by CITY, COUNTY shall submit to CITY itemized statements, with such supporting information as CITY may reasonably require, documenting COUNTY’s expenditure of Expansion Project Funds. The order in which the Expansion Project Funds ~~(other than the Additional County Funds which shall be contributed as set forth in Section 2.5)~~ shall be spent shall be as follows: Marblehead Funds, COUNTY Talega Funds, CITY Talega Funds, Friends of Library Funds, Additional City Funds if needed, and any City approved funds for Cost Overruns in Excess of Project Budget as provided pursuant to the terms of Section 2.4.
  3. Contract Change Orders; Overrun Costs. The Parties acknowledge and agree there may be instances in which change orders are requested by either the Architect-Engineer or the contractor under the Construction Contract. Accordingly, the Project Budget Amount will include a 15% contingency for cost overruns. COUNTY shall have the authority to unilaterally approve change orders that are not material. A material change order is one that causes a modification to the Plans or that causes the total Project Budget Amount (which total includes the contingency referred to above) to increase, or that causes any of the line items in the Project Budget (the amount before any contingency is applied) to increase by more than 10%. Any other change order shall require the prior written approval of CITY. Nothing herein shall be construed to excuse COUNTY from obtaining any CITY approval that may be required from CITY in CITY’s capacity as a regulatory agency. CITY shall exercise reasonable diligence to respond to any change order request within fifteen (15) calendar days, with the understanding that CITY shall have the right to submit to the City Council for approval any proposed change order that causes an increase in the total Project Budget Amount and for which additional City funding is requested (“**Cost Overruns in Excess of Project Budget Amount**”) and COUNTY acknowledges that such approval cannot be obtained within fifteen days. Because the Project Budget Amount will include a 15% contingency, it is not anticipated that there will be any Cost Overruns in Excess of Project Budget Amount. The cost of any Cost Overruns in Excess of Project Budget Amount approved by CITY shall be paid by CITY. If CITY does not agree to fund in its sole discretion any Cost Overruns in Excess of Project Budget Amount and COUNTY does not agree to fund in its sole discretion any Cost Overruns in Excess of Project Budget Amount, then either party shall have the right to terminate this Agreement. COUNTY shall not incur any Cost Overruns in Excess of Project Budget unless either CITY or COUNTY agrees in writing prior to COUNTY incurring the expenditure to pay for the costs.
  4. ~~County Reimbursement.~~  ~~COUNTY shall reimburse~~ ~~CITY the actual cost of the following items~~ ~~(“~~**~~Reimbursable Improvements~~**~~”)~~~~. The Reimbursable Improvements shall be initially funded by~~ ~~CITY and reimbursed by~~ ~~COUNTY at the beginning of the identified fiscal year~~ ~~(no later than August 15 of each such fiscal year)~~~~:~~

~~Item Description Fiscal Year of Reimbursement~~

~~Automated storefront doors~~ ~~FY 2014/15~~

~~Carpet replacement in existing library FY 2015/16~~

~~Replacement of existing library book shelving~~

~~with new shelving FY 2015/16~~

~~The foregoing reimbursement obligation of COUNTY is in addition to the COUNTY’s contribution of the Talega Funds to the Expansion Project. The Parties acknowledge that the reimbursements provided for herein are subject to and contingent upon applicable budgetary appropriations being approved by the COUNTY Board of Supervisors for each fiscal year in which such reimbursement is scheduled to occur. The failure of the COUNTY Board of Supervisors to make such appropriations shall not constitute a default of COUNTY, but in such event, COUNTY shall have no further obligation to reimburse the Reimbursable Improvements and COUNTY and CITY each shall have the right to terminate the Lease Agreement in accordance with the terms of Section 8 thereof.~~

* 1. Return of Funds. Upon final completion of the Expansion Project as evidenced by CITY’s issuance of a certificate of occupancy, and payment of all invoices for the goods and services received under both the Architect-Engineer Agreement and the Construction Contract, any unused funds received from CITY which are remaining in the designated Expansion Project Account shall be returned by COUNTY to CITY within ninety (90) days of filing the Notice of Completion for the Expansion Project. Provided the Expansion Project is completed, COUNTY shall retain any COUNTY Talega Funds and Friends of the Library Funds that are not used for the Expansion Project, for use by COUNTY as legally permitted at COUNTY’s discretion.

If this Agreement terminates prior to the completion of the Expansion Project as may be permitted hereunder, then COUNTY shall, to the extent legally permitted, immediately apply the Expansion Project Funds to the amounts owing to the Architect-Engineer and the construction contractor under the Architect-Engineer Agreement and the Construction Contract as of the date of the termination and COUNTY and CITY shall immediately pay any additional amounts that may be owing by each of them in accordance with the terms of Section 3.1 or 3.2, as applicable. Upon such application of the legally available Expansion Project Funds and receipt of any additional funds owed by CITY in accordance with the preceding sentence, COUNTY shall, within fifteen (15) days of written request from CITY, distribute to CITY any remaining Marblehead Funds, Additional City Funds, CITY Talega Funds and any other CITY funds on deposit to CITY and such funds shall not be restricted by COUNTY in any way. Upon the application of the legally available Expansion Project Funds and COUNTY’s payment of any additional funds owed by COUNTY as set forth herein, any remaining COUNTY Talega Funds and Friends of the Library Funds shall be retained by COUNTY, for use by COUNTY as legally permitted at COUNTY’s discretion.

The provisions of this Section 2.6 shall survive the termination of this Agreement.

1. TERMINATION PRIOR TO COMPLETION OF EXPANSION PROJECT .

3.1 Termination Prior to Commencement of Construction. In the event any of the CITY or COUNTY approvals required under this Agreement as conditions to the development of the Expansion Project, are not obtained, including without limitation the approval of the City Council under Section 1.3.3 or the approval of the Board of Supervisors under Section 1.3.4, by the date that is one hundred eighty (180) days after the date the Senior Center vacates the expansion space, then either party not then in default shall have the right to terminate this Agreement by delivery of written notice to the other party and CITY and COUNTY each shall be responsible for fifty percent (50%) of the amounts paid or owing to the Architect-Engineer under the Architect-Engineer Agreement as of the date of the termination. CITY shall, within thirty (30) days of delivery by either Party of such termination notice, reimburse COUNTY for CITY’S portion of any amounts paid by COUNTY to the Architect-Engineer prior to the delivery of the termination notice. The source of the reimbursement payments shall be the Existing Funds unless the use of such funds for this purpose is legally prohibited.

3.2 Termination After Commencement of Construction. In the event that this Agreement is terminated after construction of the Expansion Project has commenced but prior to completion of construction and such termination is permitted under this Agreement, then prior to the distribution of any funds under Section 2.6 above, all amounts owing to the Architect-Engineer or the construction contractor under the Architect-Engineer Agreement or the Construction Contract as of the date of the termination shall be paid from Expansion Project Funds in accordance with Section 2.3 above unless the use of such funds for this purpose is legally prohibited. If the use of any Expansion Project Funds for this purpose is legally prohibited, then each party shall, in the event of a termination under this Section 3.2, be responsible for fifty percent (50%) of the amounts paid or owing to the Architect-Engineer and the construction contractor under the Architect-Engineer Agreement and the Construction Contract as of the date of the termination for which the Expansion Project Funds cannot be used, and CITY shall, within thirty (30) days of said date, provide funds to COUNTY to cover CITY’s portion thereof. Notwithstanding the foregoing, in the event the termination of this Agreement is a result of a default of a party hereunder, nothing herein shall preclude the non-defaulting party from obtaining from the defaulting party damages for such amounts paid by the non-defaulting party hereunder.

1. STATUS OF COUNTY AS INDEPENDENT CONTRACTOR.

COUNTY is, and shall at all times be deemed to be, an independent contractor. Nothing herein contained shall be construed as creating the relationship of employer and employee, or principal and agent, between CITY and COUNTY or any of COUNTY’s agents or employees. COUNTY and its County Librarian shall retain all authority for rendition of services, standards or performance, control of personnel, and other matters incident to the performance of services by COUNTY pursuant to this Agreement. COUNTY, its agents and employees shall not be considered to be CITY employees.

1. INDEMNIFICATION.

COUNTY shall indemnify and hold CITY, its officers, directors, agents, and employees free and harmless from any claim or liability whatsoever, based or asserted upon any act or omission (where there was a duty or obligation to act) of COUNTY, or any of its officers, agents, and employees related to this Agreement, for property damage, bodily injury or death, or any other element of damage of any kind or nature, and COUNTY shall defend it at its expense, including attorney fees, CITY, its officers, agents, directors, and employees in any legal action or claim of any kind based upon such alleged acts or omissions.

CITY shall indemnify and hold COUNTY, its officers, directors, agents, and employees free and harmless from any claim or liability whatsoever, based or asserted upon any act or omission (where there was a duty or obligation to act) of CITY, or any of its officers, agents, and employees related to this Agreement, for property damage, bodily injury or death, or any other element of damage of any kind or nature, and CITY shall defend it at its expense, including attorney fees, COUNTY, its officers, agents, directors, and employees in any legal action or claim of any kind based upon such alleged acts or omissions.

The terms of this Section 5 shall survive the termination of this Agreement.

1. DEFAULTS AND REMEDIES.
   1. Defaults. The failure by either Party to perform any of its obligations set forth in this Agreement shall constitute a default of this Agreement. Except as required to protect against further damages, the nondefaulting Party may not institute legal proceedings against the Party in default until the nondefaulting Party has provided the defaulting Party notice of the default and the follow applicable cure period has expired: (i) the cure period for any monetary default shall be fifteen (15) calendar days after the defaulting Party’s receipt of written notice from the nondefaulting Party that such obligation was not performed; and (ii) the cure period for any other default shall be thirty (30) days after the defaulting Party’s receipt of written notice from the nondefaulting Party that such obligation was not performed.
   2. Remedies Upon Default. Upon the occurrence of any default and after the defaulting Party has received written notice of default and the time period to cure the default has expired, the nondefaulting Party may at its option, pursue damages or specific performance or other legal and equitable remedies the injured party may have against the defaulting party in accordance with applicable law, or terminate this Agreement.
2. MISCELLANEOUS.
   1. Notices. All formal notices required to be delivered under this Agreement to the other Party must be in writing and shall be effective (i) when personally delivered by the other Party or messenger or courier thereof; (ii) three (3) business days after deposit in the United States mail, registered or certified; (iii) twenty-four (24) hours after deposit before the daily deadline time with a reputable overnight courier or service; or (iv) upon receipt of a facsimile transmission, in each case postage fully prepaid and addressed to the respective Party as set forth below or to such other address and to such other persons as the Party may hereafter designate by written notice to the other Party hereto:

To County: OC Public Libraries  
1501 E. St. Andrew Place  
Santa Ana, CA 92705  
Attn: County Librarian   
Facsimile: (714) 566-3073

To City: City of San Clemente  
100 Avenida Presidio  
San Clemente, CA 92672  
Attn: City Manager   
Facsimile: (949) 361-8283

Copy to: Rutan & Tucker, LLP  
611 Anton Boulevard, Suite 1400  
Costa Mesa, CA 92626  
Attn: Jeff Oderman, Esq., City Attorney  
Facsimile: (714) 546-9035

* 1. Assignment. Neither Party shall assign this Agreement or any interest in it or any money due or to become due under it voluntarily without the non-assigning Party’s prior written consent. In the event of any such purported assignment by a Party without the other Party’s prior written consent, the non-assigning Party shall have the right, in addition to all other rights provided by law, to terminate this Agreement by giving written notice to the assigning Party.
  2. Compliance with Laws. Each Party shall perform its obligations under this Agreement in conformity with all applicable laws, regulations and rules of any governmental agency having jurisdiction, and shall direct any contractors or subcontractors retained by such Party to not engage in discrimination in employment of persons because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex of such persons, or any other protected class.
  3. Governing Law and Venue. This Agreement has been negotiated and executed in the State of California and shall be governed by and construed under the laws of the State of California. In the event of any legal action to enforce or interpret this Agreement, the sole and exclusive venue shall be a court of competent jurisdiction, located in Orange County, California, and the Parties hereto agree to and hereby submit to the jurisdiction of such court, notwithstanding Code of Civil Procedure Section 394. Furthermore, the Parties specifically agree to waive any and all rights to request that an action be transferred for trial to another county.
  4. Entire Agreement. This Agreement comprises the entire agreement between CITY and COUNTY related to the subject matter addressed herein. All previous proposals, offers, discussions, preliminary understandings, and other communications relative to this Agreement, oral or written, are hereby superseded, except to the extent that they have been incorporated into this contract.
  5. Amendments. No alteration or variation of the terms of this Agreement shall be valid unless made in writing and signed by the Parties; no oral understanding or agreement not incorporated herein shall be binding on either of the Parties; and no exceptions, alternatives, substitutes or revisions are valid or binding on a Party unless authorized by the Party in writing.
  6. Severability. If any term, covenant, condition or provision of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions hereof shall remain in full force and effect and shall in no way be affected, impaired or invalidated thereby to the extent such remaining provisions are not rendered impractical to perform taking into consideration the purposes of this Agreement.
  7. Attorney’s Fees.  In any action or proceeding to enforce or interpret any provision of this Agreement, or where any provision hereof is validly asserted as a defense, each Party shall bear its own attorney’s fees, costs and expenses.
  8. Interpretation. This Agreement has been negotiated at arm’s length and between persons sophisticated and knowledgeable in the matters dealt with in this Agreement. In addition, each Party has been represented by experienced and knowledgeable independent legal counsel of its own choosing or has knowingly declined to seek such counsel despite being encouraged and given the opportunity to do so. Each Party further acknowledges that is has not been influenced to any extent whatsoever in executing this Agreement by the other Party hereto or by any person representing the other Party, or both. Accordingly, any rule or law (including California Civil Code Section 1654) or legal decision that would require interpretation of any ambiguities in this Agreement against the Party that has drafted it is not applicable and is waived. The provisions of this Agreement shall be interpreted in a reasonable manner to affect the purpose of the Parties and this Agreement.
  9. Consent to Breach Not Waiver. No term or provision of this Agreement shall be deemed waived and no breach excused, unless such waiver or consent shall be in writing and signed by the Party claimed to have waived or consented. Any consent by any Party to, or waiver of, a breach by the other, whether express or implied, shall not constitute consent to, waiver of, or excuse for any other different or subsequent breach.
  10. Authority.  The Parties to this Agreement represent and warrant that this Agreement has been duly authorized and executed and constitutes the legally binding obligation of their respective organization or entity, enforceable in accordance with its terms.
  11. Confidentiality. To the extent permitted by applicable law, including but not limited to the California Public Records Act, CITY agrees to maintain the confidentiality of all COUNTY and COUNTY-related records and information pursuant to all statutory laws relating to privacy and confidentiality that currently exist or exist at any time during the term of this Agreement. All such records and information shall be considered confidential and kept confidential by CITY and CITY staff, agents and employees. To the extent permitted by applicable law, including but not limited to the California Public Records Act, COUNTY agrees to maintain the confidentiality of all CITY and CITY-related records and information pursuant to all statutory laws relating to privacy and confidentiality that currently exist or exist at any time during the term of this Agreement. All such records and information shall be considered confidential and kept confidential by COUNTY and COUNTY staff, agents and employees.
  12. Termination. The termination of this Agreement for any reason shall not release any party in default. If this Agreement is terminated for any reason, at the request of CITY, COUNTY shall assign the Construction Contract to CITY. If the library Lease between COUNTY and CITY dated on or about the date hereof terminates, then this Agreement shall terminate.
  13. Execution in Counterpart. This Agreement may be executed in counterparts, each of which, when both the Parties hereto have signed this Agreement, shall be deemed to be an original, and such counterparts shall constitute one and the same instrument.

[signatures on next page]

IN WITNESS WHEREOF, CITY and COUNTY have entered into this Agreement to be effective as of the date set forth above.

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|  | “CITY”  CITY OF SAN CLEMENTE, a California municipal corporation  By:  Its: |
| ATTEST:  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  City Clerk |  |
| APPROVED AS TO FORM: RUTAN & TUCKER, LLP  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  City Attorney |  |
| APPROVED AS TO FORM:  OFFICE OF COUNTY COUNSEL  By  Deputy County Counsel  Date  RECOMMENDED FOR APPROVAL:  OC PUBLIC LIBRARIES  By  Helen Fried, County Librarian  Signed and certified that a copy of this document has been delivered to the Chair of the Board per G.C. Sec. 25103, Resolution  79-1535  Attest:    \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Darlene J. Bloom  Clerk of the Board of Supervisors  Orange County, California | “COUNTY”  COUNTY OF ORANGE, a political subdivision  of the State of California    Chair, Board of Supervisors  Orange County, California |