

CITY OF OAKLAND
AGENDA REPORT

FILED
OFFICE OF THE CITY CLERK
OAKLAND

2007 NOV 29 PM 7:52

TO: Office of the City Administrator
ATTN: Deborah Edgerly
FROM: Audree V. Jones Taylor
DATE: December 11, 2007

RE: Report on the Current Status of the Lake Chabot Golf Course and a Resolution Waiving the Request for Proposal Requirements for the Operation and Management of Lake Chabot Golf Course and Authorizing the City Administrator to Extend the Existing Operation and Management Agreement with Touchstone Golf, LLC for an Additional Year with Two One-Year Options for Extension in an Amount Not To Exceed \$288,000.

SUMMARY

At the April 3rd City Council Meeting, Council directed staff to return in the fall with a report on the status of the operation of Lake Chabot Golf Course (LCGC) under the management of Touchstone Golf, LLC, ("Touchstone") and a recommendation for the future operation and management of LCGC. Staff is pleased to report that the past nine months have been very successful, and that the Course has generated substantial net earnings from operations to date. Based on the success of the current Operation and Management Agreement, an analysis of the current golf market, and the insufficient responses received from last year's Request for Qualifications (RFQ), staff recommends that the Request for Proposals (RFP) process be waived and the current agreement with Touchstone Golf, LLC be extended for an additional year with two one-year options to renew, in an amount not to exceed \$288,000.

FISCAL IMPACT

The proposed agreement with Touchstone includes payment of a management fee in the amount of \$8,000 per month for 36 months (if both extensions are exercised), for a total amount not to exceed \$288,000. This amount will be paid from the revenues generated by the golf course. All revenues will accrue to and expenditures will be paid from the Golf Course Improvement Fund (3200), Lake Chabot Golf Course (Org. 502362).

Based on current budgeted revenue and expenditure expectations of LCGC, OPR anticipates that the proposed continued management by Touchstone will generate enough revenue to continue to make the course fully self-supporting (including management fees) and generate additional revenue of approximately \$100,000 annually. Revenues will accrue to the Golf Course Improvement Fund (3200), Lake Chabot Golf Course Org (502362). The City's General Fund is not anticipated to be negatively impacted.

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BACKGROUND

Historically, LCGC was operated under a hybrid concessionaire/ management agreement. The original master concession agreement in 1991 called for the concessionaire to operate only the pro shop and food and beverage cost centers. Eventually the cost of maintaining the facility became prohibitively expensive for the City, and in 1998 the City amended the agreement and required the concessionaire to hire a golf superintendent and equipment mechanic. The first amendment allowed the concessionaire to deduct the new costs from green fees that the concessionaire collected on the City's behalf. In 1999 the master agreement was amended a second time to transfer the complete operations and course maintenance to the concessionaire including the hiring of all course maintenance personnel. In addition, the amendment allowed the concessionaire to pay for all golf-related expenses from greens fees revenue. Finally in 2000, a third amendment provided compensation to the concessionaire for the increased costs incurred by the requirements of the second amendment and established a reserve fund for capital improvements. The third amendment also provided that if maintenance costs exceeded revenues, or the concessionaire incurred losses during a wet winter or other loss period, the City would pay for this difference from an agreed-upon reserve of \$75,000 in the Golf Course Improvement Fund (3200).

During the last several years of the concessionaire agreement before Touchstone, a number of factors contributed to a drop off in revenue at LCGC including a downturn in the golf economy and increased competition (including the reopening of Metropolitan Golf Links and the addition of 108 new holes in the East Bay). At the same time, important maintenance activities that had been delayed became critical infrastructure problems. As the course fell into greater disrepair, many golfers went elsewhere or golfed less frequently, resulting in more lost revenue.

At the end of the prior concessionaire's agreement, OPR determined that the appropriate course of action was to close the course temporarily so that attention could be given to improving the golf course and facility. OPR then oversaw maintenance and improvement activities at the course that culminated in a grand reopening celebration event in 2007, that drew more than 2000 participants.

KEY ISSUES AND IMPACTS

Current Management of Lake Chabot Golf Course

On April 7th, 2007 LCGC reopened under a nine-month interim Operation and Management Agreement with Touchstone that included two options to extend the Agreement for three months at a time. If both options are exercised, the current Agreement will expire on July 31, 2008. Since re-opening the course, and after having implemented a number of facility improvements, there has also been an increase in the number of rounds played. To date the Course has generated

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more than \$200,000 in new revenue over and above operating costs – thereby exceeding OPR’s original estimates by more than \$160,000 in the first six months of operations. The additional revenue has been reinvested into the course’s ongoing capital improvements (see Exhibit A – List of Capital Improvements). Given the success under the current management, OPR is confident that LCGC will continue to be self-supporting.

2007 May - September (5 Months) Financial Summary	YTD CUR YEAR ACTUAL	YTD CUR YEAR BUDGET	Dollar Variance	% Variance
TOTAL INCOME	880,002	810,250	69,752	9%
TOTAL COST OF SALES	59,216	52,491	6,725	13%
GROSS PROFIT	820,785	757,759	63,026	8%
TOTAL PAYROLL	300,777	350,084	(49,307)	-14%
TOTAL EXPENSES (includes mgt fee)	310,547	361,891	(51,344)	-14%
NET EARNINGS FROM OPERATIONS	209,463	45,784	163,679	358%
TOTAL ROUNDS OF GOLF	31,001	26,843	4,158	15%

Over the past year, with OPR oversight, Touchstone has undertaken many renovations to the course to significantly improve turf conditioning and playability. Improvements have included irrigation repair and augmentation as well as comprehensive re-seeding and fertilization of fairways, roughs and tees. Cart path improvements, landscaping enhancements and overall course beautification efforts were also completed throughout the property. Green and cart fees have remained low in comparison to other local courses, making LCGC one of the best golf values in the Bay Area. The improvements together with new management and reasonable fees provide the community with an affordable, accessible, and available high-quality golf experience.

Other aspects of the golf course revitalization project included remodeling LCGC’s historic Spanish-style clubhouse with new carpeting, furnishings, paint and interior design. Food and beverage service has been enhanced through renovations to the snack bar (renamed the Chabot Café), featuring a new menu, comfortable seating and expanded banquet and catering capabilities. The concessionaire has been working on securing a liquor license for the course, and this will further enhance the golfer and community enjoyment of the property.

Plans are also underway to expand and improve the driving range, which currently includes a limited length landing area with only 12 hitting stations. In addition to lengthening the driving range, a practice green including a bunker is being considered. Improvements will also continue to be made to the irrigation and drainage systems on the 18-hole course to ensure consistently

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good conditions throughout the year. Development of a plan detailing drainage improvements for holes 1-6 and the lower part of 18 is in progress. The 9-hole course will benefit from several new tees and general improvements to the condition of the course. A new cart barn, which has been designed to accommodate electric golf carts, is scheduled for completion by the summer of 2008.

Community Impact

Since the renovation and under the current management, research by the National Golf Foundation Survey Program indicates a marked increase in guest satisfaction rates as compared with results of the same survey taken prior to the renovation. Customers noted significant improvements in the areas of Pace of Play, Overall Course Value, Overall Experience, Condition of the Greens, and Overall Course Conditions. See Exhibit B for details on the results of the National Golf Foundation surveys.

In addition, Touchstone has assembled a group of staff at LCGC that reflects the diversity of the community served by the golf course. Forty-two percent of staff are African-American, 36 percent are Latino, 18 percent are Caucasian, and 3 percent are Asian-American. More than 50 percent of the staff are Oakland residents.

A variety of family-oriented special events are held at LCGC throughout the year aimed at enhancing the value of the golf course to the local community and helping the City of Oakland achieve its goal to provide enriching recreational experiences for diverse audiences:

- April 7, 2007 - Grand Re-Opening Celebration: organized by OPR. The event included complimentary golf clinics for children and adults, a four-person scramble golf tournament, and an Alice in Wonderland themed Easter Egg Hunt. Over 2,000 people participated including over 600 children.
- June 29, 2007 – Oakland City Junior Open: 195 youths participated in this popular event and were very appreciative of the improved facility and course conditions.
- August 26, 2007 – 2007 Annual Lake Chabot Golf Club Family Day and Golf Tournament: 70 golfers participated.
- October 13, 2007 – Oakland Tech Field Trip: A special event for at-risk youths with learning disabilities. Three students participated and a second field trip is in the planning stages.
- October 28, 2007 – Halloween “Monster Ball” Golf Tournament: 67 golfers participated, 12 of which were youths.
- December 15, 2007 – Holiday party and open house planned for local neighbors, golf club members and the community.
- March 21, 2008 – Fundraiser hosted by OPR to benefit the 2008 U.S. Youth Games in Oakland.

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- March 29, 2008 – 2nd Annual Easter Egg Hunt and Community Golf Clinics hosted by OPR.
- Spring 2008 – “Jazz on the Green,” a community jazz concert.
- May 17 and 18, 2008 – Oakland City Amateur Championship
- June 20, 2008 – National Youth Game Golf Competition hosted by OPR.
- June 2008 – Women and Golf Day to be hosted by the course and scheduled in concert with the national event.

Youth Programs

LCGC serves as home to the Lake Chabot Junior Golf Academy and East Bay Junior Golf Club, offering hands-on instruction and on-course playing and competitive opportunities for youth age 7 to 17 – while stressing the many positive life skills the game of golf teaches. The course also serves as the home to the Ace Kids junior golf program operated by OPR which focuses on serving inner-city kids. This program is funded through the Ace Kids Foundation with contributions from The United States Golf Association, The Olympic Foundation, Northern California Golf Association, Masi Hancock Foundation, and Friends of Oakland Parks and Recreation. Nearly 75 percent of the youth served by these programs are Oakland residents.

Rationale for Extending the Existing Agreement

Based on the success of the current Operation and Management Agreement as described above, an analysis of the current golf market, and the insufficient responses received to the RFQ issued by OPR last year, staff recommends that the RFP process be waived and that the current Agreement with Touchstone be extended for an additional year with two additional one-year options to renew.

A management agreement involves some financial risk for the City because expenses are only covered if revenue is adequate. However, OPR expects that management of the facility and operations will continue to be successful under Touchstone, in which case the City benefits because increased revenue provides a return on capital improvement investments. An advantage of a management agreement is that staffing and operations are managed by the contracted manager; facility maintenance and improvements expenses are offset by golf revenue.

Also, a continuation of the existing Operation and Management Agreement with Touchstone provides the necessary consistency that will allow for the expedient completion of several key renovations, drainage and driving range improvements that are now underway (Exhibit A). It would also give the City an opportunity to undertake a process to develop a Master Plan for the golf course. When the City is ready to pursue a long-term concessionaire, it will have established

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the City's goals for the site and be better prepared to make the best use of the land and facilities that might include the possibility of development.

Lastly, staff's recommendation is based on current golfing trends. According to the National Golf Foundation (NGF), in the next few years the golf market will have improved. NGF predicts that the golf market is in the process of rebalancing itself; Baby Boomers are retiring and there will soon be a resurgence of interest in golf. If these predictions are borne out, in three years there is likely to be greater interest from the golfing industry in investing in LCGC with a long-term concession agreement. Within the same timeframe that NGF is predicting an upsurge in golf participation, under the proposed management agreement, a number of improvements will have been completed at LCGC and an increase in the rounds played will already have been achieved through strong, consistent management of the course. OPR expects to increase the rounds played at LCGC over the next three years and to sustain an average of at least 60,000 rounds annually.

The current Operation and Management Agreement for LCGC will terminate in July 2008. Therefore, if both options to renew are exercised, the proposed extension would then terminate in July 2011. The terms and conditions of the proposed contract extension with Touchstone would be similar to those in the existing Agreement (with the deletion of the "incentive fee."). The existing Operation and Management Agreement is attached for reference as Exhibit C.

Possible Development on Part of the Site

In recent years developers have expressed considerable interest in the LCGC site. OPR is committed to keeping the site a 27-hole golf course. It may be that partnering with a developer to build adjacent housing or recreational amenities, or expansion of existing facilities could be a way of supporting some major capital improvements. Such improvements might include redesigning and rerouting the first five fairways and other enhancements to the course's infrastructure.

In three years, it seems likely that a long-term concession agreement could be a viable option. At that time it may be Council's desire to consider development projects as part of a long-term management or concessionaire proposal for the site.

SUSTAINABLE OPPORTUNITIES

Economic: Lake Chabot Golf Course provides employment opportunities and creates sales tax revenue through green fees, cart rental, food, beverage and merchandise sales.

Environmental: Lake Chabot Golf Course is a spectacularly beautiful property and all of OPR's maintenance and improvement efforts are aimed at preserving its beauty as well as its capacity to serve as a golf course. Additionally, OPR is working toward establishing LCGC as a fully-certified Audubon International Cooperative Sanctuary.

Social Equity: Lake Chabot Golf Course provides an important recreational resource for Oakland residents. OPR also intends to continue building its existing Ace Junior Golf program at LCGC, a program which introduces Oakland inner-city youth to the sport of golf. OPR is also considering implementing a First Tee program at Lake Chabot.

DISABILITY AND SENIOR CITIZEN ACCESS

Any improvements to the golf course would conform to the requirements of the Americans with Disabilities Act, the Older American Act, and other applicable laws.

RECOMMENDATION AND RATIONALE

Staff recommends that Council accept this recommendation to waive the RFP process and extend the existing Operation and Management Agreement with Touchstone for the operation of the LCGC for an additional year with two one-year options to renew, for a total possible term of three years.


ALTERNATIVE RECOMMENDATION AND RATIONALE

Alternatively, Council could decide not to waive the RFP process. Under this scenario, staff would issue an RFP for a five-year management agreement as soon as possible, in order to ensure that a new operator is in place when Touchstone's existing Agreement terminates in July, 2008.

ACTION REQUESTED OF THE CITY COUNCIL

Staff requests that Council accept staff's recommendation to waive the RFP process and extend the existing Operation and Management Agreement with Touchstone for the operation of the Lake Chabot Golf Course for an additional year with two additional one-year options to renew.

Respectfully submitted,


Audree V. Jones-Taylor
Director, Office of Parks & Recreation

Prepared by:
Deborah Spaulding, Administrative & Fiscal Manager

APPROVED AND FORWARDED TO THE
LIFE ENRICHMENT COMMITTEE:


OFFICE OF THE CITY ADMINISTRATOR

Attachments:

- Exhibit A: List of Capital Improvement Projects in Progress
- Exhibit B: National Golf Foundation Ratings Pre- and Post-Touchstone Management
- Exhibit C: Current Touchstone Golf, LLC Agreement

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Capital Improvements FY 2007-2008

Lake Chabot Golf Course, City of Oakland

ACTIVE PROJECTS	Details	Status
New Maintenance Eqpt	Purchase of Rough Mower, Greens Mower, Greens Aerifier, Range Vehicle and Picker, Pro Gator Utility Vehicles	Completed
Plumbing Repair	Repair plumbing at course restrooms and clubhouse	Completed
Course Signage	Additional signs for entry and safety	Completed
New PA System	New amplifier and wiring for PA system	Completed
Tree Work	Removal of eucalyptus trees and all stumps (30-40)	Complete. Additional tree work to be done by the City.
Drainage Improvement	Must drain fairways, tees and some greens for winter playability. Phase 1 which would address holes 1-6 & Bottom of 18. Consider sand channel system test for green #10.	In progress. Reviewing first draft of Engineering Plans on 11-19-07.
Irrigation Improvement	Addition of irrigation on hole 5 and select holes, new sprinkler heads, valves, pipe and other parts to improve dependability and water coverage.	In progress. Continue improvements (replace bad valves, heads, sprinklers) and commission a complete irrigation plan so that additions and repairs will be made in light of the long-term plan.
Tree Work	Need to grind stumps and remove debris	In progress. Getting bids
Maintenance Building Restroom	Replacement of restroom. Crew can not use in current condition.	In progress. Building was torn down. A small "prefab" building with fixtures on hold.
Artwork for Clubhouse	Install framed art and/or photos to enhance clubhouse	In progress. Additional historic photos being framed
Rebuild Tees on 9-Hole Course	Rebuild 3-4 tees. Trim trees, level, drain, irrigate, sod	In progress. Moving forward with Prof. Turf Management
Fence Replacement and Repairs	Repair and replace fencing on the golf course.	In progress. Addressing 16 and 17
5th Fairway Improvement.	Convert center of newly irrigated area to fairway. Reseed and top-dress with sand	In progress. First of two applications of sand and seed complete.
Safety Netting for Hill House	Need to add safety net or barrier to protect people stopping to get something to eat.	In progress. Tanner will review the project on 11-19
Parking Lot and Path Lighting	Add lights to parking lot and paths	In progress. Working on options and bids
Driving Range Improvement	Level and push range back, install drainage and irrigation, add fencing. Consider adding tees below existing tee. Minimum plan calls for installation of irrigation \$75,000	On hold until drainage project is in construction process.
Shutter Security Windows	Install steel security windows for golf shop	Research in progress
Electricity for 12-18 more Carts	Add electricity in maintenance or near cart barn	Research in progress
Cart Path Overlay	Address asphalt eroding paths in key areas or overlay all paths.	Research in progress
Cart Barn	Construction of Cart Barn to house new electric carts	CEDA Project Management estimates completion in Summer 2008

Lake Chabot Golf Course
Responses from 7/25/2007 thru 8/30/2007
 (163 Responses)

Satisfaction

Factor	Previous Average Score (Scale 1-5)	Previous Standard Benchmark Grade	Current Average Score (Scale 1-5)	Current Standard Benchmark Grade
Tee Time Availability	4.2	A-	4.3	A-
Affordability	3.9	A-	4.3	A+
Scenery and Aesthetics of Course	4.2	B+	4.5	A
Convenience of Course Location	4.1	B	4.1	B
Pace of Play	3.5	C	3.9	A-
Overall Course Value	3.4	D	4.2	A
Friendliness/Service of Staff	3.6	F	4.2	B
Overall Experience	3.4	F	4.1	B
Condition of Greens	2.8	F	3.9	B
Overall Course Conditions	2.2	F	3.8	B-
Amenities (clubhouse, pro shop, locker room)	2.5	F	3.5	C
Food and Beverage Service*	2.9	F	3.3	D
On-course Services (restrooms, drinking water)	2.5	F	3.2	D+
Conditions of Golf Carts**	2.8	F	2.9	F

*Low ratings in "Food and Beverage" and "Amenities" are attributable to the fact that the golf course has not had a liquor license since it opened. The Liquor license should be in place by the end of the year.

** The Cart Barn will be replaced in the next year and the addition of electric golf carts should address this item.

Note: The current management is working to address other low ratings.

**PROFESSIONAL OR SPECIALIZED SERVICE AGREEMENT
BETWEEN THE CITY OF OAKLAND
AND TOUCHSTONE GOLF, LLC – INTERIM OPERATION AND MANAGEMENT OF
THE LAKE CHABOT GOLF COURSE**

Whereas, the City Council has authorized the City Administrator to enter into contracts for professional or specialized services if the mandates of Oakland City Charter Section 902(e) have been met.

Now therefore the parties to this Agreement covenant as follows:

1. Parties and Effective Date

This Agreement is made and entered into as of May 1, 2007 between the City of Oakland, a municipal corporation, ("City"), One Frank H. Ogawa Plaza, Oakland, California 94612, and Touchstone Golf, LLC, a Delaware limited liability company, based in Berkeley, California ("Contractor") for the interim operation and management of the Lake Chabot Golf Course ("LCGC").

2. Scope of Services

Contractor agrees to perform the services specified in **Schedule A** attached to this Agreement and incorporated herein by reference. Contractor shall designate an individual who shall be responsible for communications with the City for the duration of this Agreement. **Schedule A** includes the manner of payment. The Project Manager for the City shall be Deb Spaulding.

3. Time of Performance

Contractor's services shall begin on May 1, 2007, and shall be completed by February 1, 2008. This Agreement may be extended by two separate three-month extensions (total of a possible six-month extension). These two extensions shall happen automatically, unless City gives Contractor ten days' written notice of intent not to extend. The first notice of extension to Contractor must occur before January 22, 2008. The second and separate notice of extension to Contractor, if exercised, must occur before April 21, 2008.

4. Compensation and Method of Payment

Contractor will be paid for performance of the entire scope of work set forth in **Schedule A** in an amount not to exceed \$130,000, which includes an incentive fee as set forth on Schedule A. Payment at the rates stated in Schedule A, shall be due upon completion and acceptance of the services, at which time Contractor shall submit an invoice. Invoices shall state a description of the services completed and the amount due.

In the aggregate, progress payments will not exceed ninety percent (90%) of the total amount of the contract, with the balance to be paid upon satisfactory completion of the contract. Progress, or other payments, will be based on at least equivalent services rendered, and will not be made in advance of services rendered.

In computing the amount of any progress payment (this includes any partial payment of the contract price during the progress of the work, even though the work is broken down into clearly identifiable stages, or separate tasks), the City will determine the amount that the contractor has earned during the period for which payment is being made, on the basis of the contract terms. The City will retain out of such earnings an amount at least equal to ten percent (10%), pending satisfactory completion of the entire contract.

5. Independent Contractor

a. Rights and Responsibilities

It is expressly agreed that in the performance of the services necessary to carry out this Agreement, Contractor shall be, and is, an independent contractor, and is not an employee of the City. Contractor has and shall retain the right to exercise full control and supervision of the services, and full control over the employment, direction, compensation and discharge of all persons assisting Contractor in the performance of Contractor's services hereunder. Contractor shall be solely responsible for all matters relating to the payment of his/her employees, including compliance with social security, withholding and all other regulations governing such matters, and shall be solely responsible for Contractor's own acts and those of Contractor's subordinates and employees. Contractor will determine the method, details and means of performing the services described in Schedule A.

b. Contractor's Qualifications

Contractor represents that Contractor has the qualifications and skills necessary to perform the services under this Agreement in a competent and professional manner without the advice or direction of The City. This means Contractor is able to fulfill the requirements of this Agreement. Failure to perform all of the services required under this Agreement will constitute a material breach of the Agreement and may be cause for termination of the Agreement. Contractor has complete and sole discretion for the manner in which the work under this Agreement is performed. Prior to execution of this agreement, Contractor shall complete **Schedule M** ("Independent Contractor Questionnaire"), attached hereto.

c. Payment of Income Taxes

Contractor is responsible for paying, when due, all income taxes, including estimated taxes, incurred as a result of the compensation paid by the City to Contractor for services under this Agreement. On request, Contractor will provide the City with proof of timely payment. Contractor agrees to indemnify the City for any claims, costs, losses, fees, penalties, interest or damages suffered by the City resulting from Contractor's failure to comply with this provision.

d. Non-Exclusive Relationship

Contractor may perform services for, and contract with, as many additional clients, persons or companies as Contractor, in his or her sole discretion, sees fit.

e. Cooperation of the City

The City agrees to comply with all reasonable requests of Contractor necessary to the performance of Contractor's duties under this Agreement.

f. Extra Work

Contractor will do no extra work under this Agreement without first receiving prior written authorization from the City.

6. Proprietary of Confidential Information of the City

Contractor understands and agrees that, in the performance of the work or services under this Agreement or in contemplation thereof, Contractor may have access to private or confidential information which may be owned or controlled by the City and that such information may contain proprietary or confidential details, the disclosure of which to third parties may be damaging to the City. Contractor agrees that all information disclosed by the City to Contractor shall be held in confidence and used only in performance of the Agreement. Contractor shall exercise the same standard of care to protect such information as a reasonably prudent contractor would use to protect its own proprietary data.

7. Ownership of Results

Any interest of Contractor or its Subcontractors, in specifications, studies, reports, memoranda, computation documents prepared by Contractor or its Subcontractors in drawings, plans, sheets or other connection with services to be performed under this Agreement shall be assigned and transmitted to the City. However, Contractor may retain and use copies for reference and as documentation of its experience and capabilities.

8. Copyright

Contractor shall execute appropriate documents to assign to the City the copyright to works created pursuant to this Agreement, when needed.

9. Audit

Contractor shall maintain (a) a full set of accounting records in accordance with generally accepted accounting principles and procedures for all funds received under this Agreement; and (b) full and complete documentation of performance related matters such as benchmarks and deliverables associated with this Agreement.

Contractor shall (a) permit the City to have access to those records for the purpose of making an audit, examination or review of financial and performance data pertaining to this

Agreement; and (b) maintain such records for a period of four years following the last fiscal year during which the City paid an invoice to Contractor under this Agreement.

In addition to the above, Contractor agrees to comply with all audit, inspection, record-keeping and fiscal reporting requirements set forth in **Schedule S, *Audit Inspection and Fiscal Reporting Requirements***, which is attached hereto and incorporated by reference.

10. Agents/Brokers

Contractor warrants that Contractor has not employed or retained any subcontractor, agent, company or person other than bona fide, full-time employees of Contractor working solely for Contractor, to solicit or secure this Agreement, and that Contractor has not paid or agreed to pay any subcontractor, agent, company or persons other than bona fide employees any fee, commission, percentage, gifts or any other consideration, contingent upon or resulting from the award of this Agreement. For breach or violation of this warranty, the City shall have the right to rescind this Agreement without liability or, in its discretion, to deduct from the Agreement price or consideration, or otherwise recover, the full amount of such fee, commission, percentage or gift.

11. Assignment

Contractor shall not assign or otherwise transfer any rights, duties, obligations or interest in this Agreement or arising hereunder to any person, persons, entity or entities whatsoever without the prior written consent of the City and any attempt to assign or transfer without such prior written consent shall be void. Consent to any single assignment or transfer shall not constitute consent to any further assignment or transfer.

12. Publicity

Any publicity generated by Contractor for the project funded pursuant to this Agreement, during the term of this Agreement or for one year thereafter, will make reference to the contribution of the City of Oakland in making the project possible. The words "City of Oakland" will be explicitly stated in all pieces of publicity, including but not limited to flyers, press releases, posters, brochures, public service announcements, interviews and newspaper articles.

City staff will be available whenever possible at the request of Contractor to assist Contractor in generating publicity for the project funded pursuant to this Agreement. Contractor further agrees to cooperate with authorized City officials and staff in any City-generated publicity or promotional activities undertaken with respect to this project.

13. Title of Property

Title to all property, real and personal, acquired by the Contractor from City funds shall vest in the name of the City of Oakland and shall be accounted for by means of a formal set of property records. Contractor acknowledges it is responsible for the protection, maintenance and preservation of all such property held in custody for the City during the term of the Agreement. The Contractor shall, upon expiration of termination of this Agreement, deliver to the City all of said property and documents evidencing title to same. In the case of lost or

stolen items or equipment, the Contractor shall immediately notify the Police Department, obtain a written police report and notify the City in accordance with "Notice" section of this Agreement.

Contractor shall provide to the City Auditor all property-related audit and other reports required in **Schedule S** and under this Agreement. In the case of lost or stolen items or equipment, the Contractor shall immediately notify the Police Department, obtain a written police report and notify the City in accordance with the "Notice" section of this Agreement.

Prior to the disposition or sale of any real or personal property acquired with City funds, Contractor shall obtain approval by the City Council and City Administrator in accord with the requirements for disposal or sale of real or personal surplus property set forth in the Oakland City Charter and/or Oakland Municipal Code Title 2.04, Chapter 2.04.120. *Surplus supplies and equipment – Disposal or Destruction.*

14. Insurance

Unless a written waiver is obtained from the City's Risk Manager, Contractor must provide the insurance listed in **Schedule Q**. **Schedule Q** is attached and incorporated herein by reference. The costs of insurance set out in Schedule Q are chargeable as an operating expense of the Golf Course, subject to the City's review of the reasonableness of the expenses. Any insurance costs where Contractor obtains insurance in excess of those required in Schedule Q will be borne solely by Contractor, unless otherwise approved in advance by City.

15. Indemnification

a. Notwithstanding any other provision of this Agreement, Contractor shall indemnify and hold harmless (and at City's request, defend) City, and each of their respective Councilmembers, officers, partners, agents, and employees (each of which persons and organizations are referred to collectively herein as "Indemnitees" or individually as "Indemnitee") from and against any and all liabilities, claims, lawsuits, losses, damages, demands, debts, liens, costs, judgments, obligations, administrative or regulatory fines or penalties, actions or causes of action, and expenses (including reasonable attorneys' fees) caused by or arising out of any:

- (i) Breach of Contractor's obligations, representations or warranties under this Agreement;
- (ii) Act or failure to act in the course of performance by Contractor under this Agreement;
- (iii) Negligent or willful acts or omissions in the course of performance by Contractor under this Agreement;
- (iv) Claim for personal injury (including death) or property damage to the extent based on the strict liability or caused by any negligent act, error or omission of Contractor;
- (v) Unauthorized use or disclosure by Contractor of Confidential Information as provided in Section 6 above; and

- (vi) Claim of infringement or alleged violation of any United States patent right or copyright, trade secret, trade mark, or service mark or other proprietary or intellectual property rights of any third party.
- b. For purposes of the preceding Subsections (i) through (vi), the term "Contractor" includes Contractor, its officers, directors, employees, representatives, agents, servants, sub-consultants and subcontractors.
- c. City shall give Contractor prompt written notice of any such claim of loss or damage and shall cooperate with Contractor, in the defense and all related settlement negotiations to the extent that cooperation does not conflict with City's interests.
- d. Notwithstanding the foregoing, City shall have the right if Contractor fails or refuses to defend City with Counsel acceptable to City to engage its own counsel for the purposes of participating in the defense. In addition, City shall have the right to withhold any payments due Contractor in the amount of anticipated defense costs plus additional reasonable amounts as security for Contractor's obligations under this Section 15. In no event shall Contractor agree to the settlement of any claim described herein without the prior written consent of City.
- e. Contractor acknowledges and agrees that it has an immediate and independent obligation to indemnify and defend Indemnitees from any action or claim which potentially falls within this indemnification provision, which obligation shall arise at the time any action or claim is tendered to Contractor by City and continues at all times thereafter, without regard to any alleged or actual contributory negligence of any Indemnitee. Notwithstanding anything to the contrary contained herein, Contractor's liability under this Agreement shall not apply to any action or claim arising from the sole negligence, active negligence or willful misconduct of an Indemnitee.
- f. All of Contractor's obligations under this Section 15 are intended to apply to the fullest extent permitted by law (including, without limitation, California Civil Code Section 2782) and shall survive the expiration or sooner termination of this Agreement.
- g. The indemnity set forth in this Section 15 shall not be limited by the City's insurance requirements contained in Schedule C hereof, or by any other provision of this Agreement. City's liability under this Agreement shall be limited to the payment of the grant to Contractor in accord to the terms and conditions under this Agreement and shall exclude any liability whatsoever for consequential or indirect damages even if such damages are foreseeable.

16. Right to Offset Claims for Money

All claims for money due or to become due from City shall be subject to deduction or offset by City from any monies due Contractor by reason of any claim or counterclaim arising out of: i) this Agreement, or ii) any purchase order, or iii) any other transaction with Contractor.

17. Termination on Notice

The City may terminate this Agreement immediately for cause or without cause upon giving (30) calendar days written notice to Contractor, pursuant to the terms set forth in Schedule A.

18. Conflict of Interest

a. Contractor

The following protections against conflict of interest will be upheld:

- i. Contractor certifies that no member of, or delegate to the Congress of the United States shall be permitted to share or take part in this Agreement or in any benefit arising therefrom.
- ii. Contractor certifies that no member, officer, or employee of the City or its designees or agents, and no other public official of the City who exercises any functions or responsibilities with respect to the programs or projects covered by this Agreement, shall have any interest, direct or indirect in this Agreement, or in its proceeds during his/her tenure or for one year thereafter.
- iii. Contractor shall immediately notify the City of any real or possible conflict of interest between work performed for the City and for other clients served by Contractor.
- iv. Contractor warrants and represents, to the best of its present knowledge, that no public official or employee of City who has been involved in the making of this Agreement, or who is a member of a City board or commission which has been involved in the making of this Agreement whether in an advisory or decision-making capacity, has or will receive a direct or indirect financial interest in this Agreement in violation of the rules contained in California Government Code Section 1090 *et seq.*, pertaining to conflicts of interest in public contracting. Contractor shall exercise due diligence to ensure that no such official will receive such an interest.
- v. Contractor further warrants and represents, to the best of its present knowledge and excepting any written disclosures as to these matters already made by Contractor to City, that (1) no public official of City who has participated in decision-making concerning this Agreement or has used his or her official position to influence decisions regarding this Agreement, has an economic interest in Contractor or this Agreement, and (2) this Agreement will not have a direct or indirect financial effect on said official, the official's spouse or dependent children, or any of the official's economic interests. For purposes of this paragraph, an official is deemed to have an "economic interest" in any (a) for-profit business entity in which the official has a direct or indirect investment worth \$2,000 or

more, (b) any real property in which the official has a direct or indirect interest worth \$2,000 or more, (c) any for-profit business entity in which the official is a director, officer, partner, trustee, employee or manager, or (d) any source of income or donors of gifts to the official (including nonprofit entities) if the income or value of the gift totaled more than \$500 the previous year. Contractor agrees to promptly disclose to City in writing any information it may receive concerning any such potential conflict of interest. Contractor's attention is directed to the conflict of interest rules applicable to governmental decision-making contained in the Political Reform Act (California Government Code Section 87100 et seq.) and its implementing regulations (California Code of Regulations, Title 2, Section 18700 et seq.).

- vi. Contractor understands that in some cases Contractor or persons associated with Contractor may be deemed a "city officer" or "public official" for purposes of the conflict of interest provisions of Government Code Section 1090 and/or the Political Reform Act. Contractor further understands that, as a public officer or official, Contractor or persons associated with Contractor may be disqualified from future City contracts to the extent that Contractor is involved in any aspect of the making of that future contract (including preparing plans and specifications or performing design work or feasibility studies for that contract) through its work under this Agreement.
- vii. Contractor shall incorporate or cause to be incorporated into all subcontracts for work to be performed under this Agreement a provision governing conflict of interest in substantially the same form set forth herein.

b. No Waiver

Nothing herein is intended to waive any applicable federal, state or local conflict of interest law or regulation

c. Remedies and Sanctions

In addition to the rights and remedies otherwise available to the City under this Agreement and under federal, state and local law, Contractor understands and agrees that, if the City reasonably determines that Contractor has failed to make a good faith effort to avoid an improper conflict of interest situation or is responsible for the conflict situation, the City may (1) suspend payments under this Agreement, (2) terminate this Agreement, (3) require reimbursement by Contractor to the City of any amounts disbursed under this Agreement. In addition, the City may suspend payments or terminate this Agreement whether or not Contractor is responsible for the conflict of interest situation.

19. Non-Discrimination/Equal Employment Practices

Contractor shall not discriminate or permit discrimination against any person or group of persons in any manner prohibited by federal, state or local laws. During the performance of this Agreement, Contractor agrees as follows:

- a. Contractor and Contractor's subcontractors, if any, shall not discriminate against any employee or applicant for employment because of age, marital status, religion, gender, sexual preference, race, creed, color, national origin, Acquired-Immune Deficiency Syndrome (AIDS), AIDS-Related Complex (ARC) or disability. This nondiscrimination policy shall include, but not be limited to, the following: employment, upgrading, failure to promote, demotion or transfer, recruitment advertising, layoffs, termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.
- b. Contractor and Contractor's Subcontractors shall state in all solicitations or advertisements for employees placed by or on behalf of Contractor that all qualified applicants will receive consideration for employment without regard to age, marital status, religion, gender, sexual preference, race, creed, color, national origin, Acquired-Immune Deficiency Syndrome (AIDS), AIDS-Related Complex (ARC) or disability.
- c. Contractor shall make its goods, services, and facilities accessible to people with disabilities and shall verify compliance with the Americans with Disabilities Act by executing **Schedule C-1** ("Declaration of Compliance with the Americans with Disabilities Act,") attached hereto and incorporated herein.
- d. If applicable, Contractor will send to each labor union or representative of workers with whom Contractor has a collective bargaining agreement or contract or understanding, a notice advising the labor union or workers' representative of Contractor's commitments under this nondiscrimination clause and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

20. Local and Small Local Business Enterprise Program (L/SLBE)

- a. *Requirement* - There is a twenty percent (20%) minimum participation requirement for all professional services contracts \$50,000 or more. Contractors shall comply with the twenty percent (20%) local business participation requirement at a rate of ten percent (10%) local and 10% small local business participation. The requirement may be satisfied by a certified prime consultant and/or sub-consultant (s) or a small local certified firm may meet the twenty percent requirement. A business must be certified by the City of Oakland in order to earn credit toward meeting the twenty percent requirement.
- b. *Good Faith Effort*-In light of the twenty percent requirement, good faith effort documentation is not necessary.
- c. *Incentives* - Upon satisfying the twenty percent requirement, a consultant will earn two (2) preference points. Three additional preference points may be earned at a rate of one point for every additional ten percent participation up to fifty percent participation of the total contract dollars attributable to local certified firms.

- d. *Banking* – The City will allow banking of credits for L/SLBE participation that exceeds fifty percent (50%) on a City funded project and will allow consultants to accumulate credits for hiring certified local businesses and certified small local businesses on non-city funded projects within a year of the City funded project. Banked credits will count toward achieving a bid discount or preference points (up to 2%) on a City contract. The ability of firms to bank credits or hours on non-City projects will not be retroactive. Consultants will have one year to apply credits. A certificate validating banked credits must be issued by the City prior to the submittal or bid date.
- e. *The Exit Report and Affidavit (ERA)* – This report declares the level of participation achieved and will be used to calculate banked credits. The prime consultant must complete the Exit Report and Affidavit for, and have it executed by, each L/SLBE sub consultant and submitted to the City Administrator’s Office of Contract Compliance & Employment Services along with a *copy* of the final progress payment application.
- f. *Joint Venture and Mentor Protégé Agreements*. If a prime contractor or prime consultant is able to develop a Joint Venture or “Mentor-Protégé” relationship with a certified LBE or SLBE, the mentor or Joint Venture partners will enjoy the benefit of credits against the participation requirement. In order to earn credit for Joint Venture or Mentor-Protégé relationships, the Agreement must be submitted for approval to Contract Compliance and Employment Services prior to the project bid date for construction, and by proposal due date for professional services contracts. Joint Venture Applications and elements of City approved Mentor Protégé relation are available upon request.
- g. Contractor shall submit information concerning the ownership and workforce composition of Contractor’s firm as well as its subcontractors and suppliers, by completing **Schedule D** (“Ownership, Ethnicity, Gender and Employment Questionnaire”), **Schedule E** (“Project Consultant Team”), attached and incorporated herein and made a part of this Agreement
- h. All affirmative action efforts of Contractor are subject to tracking by the City. This information or data shall be used for statistical purposes only. All contractors are required to provide data regarding the make-up of their subcontractors and agents who will perform City contracts, including the race and gender of each employee and/or contractor and his or her job title or function and the methodology used by Contractor to hire and/or contract with the individual or entity in question.
- i. In the recruitment of subcontractors, the City of Oakland requires all contractors to undertake nondiscriminatory and equal outreach efforts, which include outreach to minorities and women-owned businesses as well as other segments of Oakland’s business community. The City Administrator will track the City’s MBE/WBE utilization to ensure the absence of unlawful discrimination on the basis of age, marital status, religion, gender, sexual preference, race, creed, color, national origin, Acquired-Immune Deficiency Syndrome (AIDS), AIDS-Related Complex (ARC) or disability.

- j. In the use of such recruitment, hiring and retention of employees or subcontractors, the City of Oakland requires all contractors to undertake nondiscriminatory and equal outreach efforts which include outreach to minorities and women as well as other segments of Oakland's business community.

21. Living Wage Ordinance

If the contract amount of this Agreement is equal to or greater than \$25,000 annually, then Contractor must comply with the Oakland Living Wage Ordinance. The Living Wage Ordinance requires that nothing less than a prescribed minimum level of compensation (a living wage) be paid to employees of service contractors (consultants) of the City and employees of CFARs (Ord. 12050 § 1, 1998). The Ordinance also requires submission of the Declaration of Compliance attached and incorporated herein as **Schedule N** and made part of this Agreement, and, unless specific exemptions apply or a waiver is granted, the consultant must provide the following to its employees who perform services under or related to this Agreement:

- a. Minimum compensation – Said employees shall be paid an initial **hourly wage rate of \$9.90 with health benefits or \$11.39 without health benefits**. These initial rates shall be upwardly adjusted each year no later than April 1 in proportion to the increase at the immediately preceding December 31 over the year earlier level of the Bay Region Consumer Price Index as published by the Bureau of Labor Statistics, U.S. Department of Labor. **Effective July 1st of each year, Contractor shall pay adjusted wage rates.**
- b. Health benefits – Said full-time and part-time employees paid at the lower living wage rate shall be provided health benefits of at least \$1.49 per hour. Contractor shall provide proof that health benefits are in effect for those employees no later than 30 days after execution of the contract or receipt of City financial assistance.
- c. Compensated days off – Said employees shall be entitled to twelve compensated days off per year for sick leave, vacation or personal necessity at the employee's request, and ten uncompensated days off per year for sick leave. Employees shall accrue one compensated day off per month of full time employment. Part-time employees shall accrue compensated days off in increments proportional to that accrued by full-time employees. The employees shall be eligible to use accrued days off after the first six months of employment or consistent with company policy, whichever is sooner. Paid holidays, consistent with established employer policy, may be counted toward provision of the required 12 compensated days off. Ten uncompensated days off shall be made available, as needed, for personal or immediate family illness after the employee has exhausted his or her accrued compensated days off for that year.
- d. Federal Earned Income Credit (EIC) – Contractors shall inform said employees that he or she may be eligible for EIC and shall provide forms to apply for advance EIC payments to eligible employees. There are several web sites and other sources available to assist you. Web sites include but are not limited to: (1) <http://www.irs.gov> for current guidelines as prescribed by the Internal Revenue

- e. Contractor shall provide to all employees and to the Office of Contract Compliance, written notice of its obligation to eligible employees under the City's Living Wage requirements. Said notice shall be posted prominently in communal areas of the work site(s) and shall include the above-referenced information.
- f. Contractor shall provide all written notices and forms required above in English, Spanish or other languages spoken by a significant number of employees within 30 days of employment under this Agreement.
- g. Reporting – Contractor shall maintain a listing of the name, address, hire date, occupation classification, rate of pay and benefits for each of its employees. Contractor shall provide a copy of said list to the Office of Contract Compliance, on a quarterly basis, by March 31, June 30, September 30 and December 31 for the applicable compliance period. Failure to provide said list within five days of the due date will result in liquidated damages of five hundred dollars (\$500.00) for each day that the list remains outstanding. Contractor shall maintain employee payroll and related records for a period of four (4) years after expiration of the compliance period.
- h. Contractor shall require subcontractors that provide services under or related to this Agreement to comply with the above Living Wage provisions. Contractor shall include the above-referenced sections in its subcontracts. Copies of said subcontracts shall be submitted to the Office of the City Administrator, Contract Compliance & Employment Services Division.

22. Equal Benefits Ordinance

This Agreement is subject to the Equal Benefits Ordinance of Chapter 2.232.010 of the Oakland Municipal Code and its implementing regulations. The purpose of this Ordinance is to protect and further the public, health, safety, convenience, comfort, property and general welfare by requiring that public funds be expended in a manner so as to prohibit discrimination in the provision of employee benefits by City contractors (consultants) between employees with spouses and employees with domestic partners, and/or between domestic partners and spouses of such employees. (Ord. 12394 (part), 2001)

The following contractors are subject to the Equal Benefits Ordinance: Entities which enter into a "contract" with the City for an amount of twenty-five thousand dollars (\$25,000.00) or more for public works or improvements to be performed, or for goods or services to be purchased or grants to be provided at the expense of the City or to be paid out of moneys deposited in the treasury or out of trust moneys under the control of or collected by the city; and Entities which enter into a "property contract" pursuant to Section 2.32.020(D) with the City in an amount of twenty-five thousand dollars (\$25,000.00) or more for the exclusive use of or occupancy (1) of real property owned or controlled by the city or (2) of real property owned by others for the city's use or occupancy, for a term exceeding twenty-nine (29) days in any calendar year.

The Ordinance shall only apply to those portions of a contractor's operations that occur (1) within the city; (2) on real property outside the city if the property is owned by the city or if the city has a right to occupy the property, and if the contract's presence at that location is connected to a contract with the city; and (3) elsewhere in the United States where work related to a city contract is being performed. The requirements of this chapter shall not apply to subcontracts or subcontractors of any contract or contractor

The Equal Benefits Ordinance requires among other things, submission of the attached and incorporated herein as **Schedule N-1** – Equal Benefits-Declaration of Nondiscrimination.

23. City of Oakland Campaign Contribution Limits

This Agreement is subject to the City of Oakland Campaign Reform Act of Chapter 3.12 of the Oakland Municipal Code and its implementing regulations if it requires Council approval. The City of Oakland Campaign Reform Act prohibits contractors that are doing business or seeking to do business with the City of Oakland from making campaign contributions to Oakland candidates between commencement of negotiations and either 180 days after completion of, or termination of, contract negotiations.

If this Agreement requires Council approval, Contractor must sign and date an Acknowledgment of Campaign Contribution Limits Form attached hereto and incorporated herein as **Schedule O**.

24. Nuclear Free Zone Disclosure

Contractor represents, pursuant to **Schedule P** ("Nuclear Free Zone Disclosure Form"), that Contractor is in compliance with the City of Oakland's restrictions on doing business with service providers considered nuclear weapons makers. Prior to execution of this agreement, Contractor shall complete **Schedule P**, attached hereto.

25. Political Prohibition

Subject to applicable State and Federal laws, moneys paid pursuant to this Agreement shall not be used for political purposes, sponsoring or conducting candidate's meetings, engaging in voter registration activity, nor for publicity or propaganda purposes designed to support or defeat legislation pending before federal, state or local government.

26. Religious Prohibition

There shall be no religious worship, instruction, or proselytization as part of, or in connection with the performance of the Agreement.

27. Business Tax Certificate

Contractor shall obtain and provide proof of a valid City business tax certificate. Said certificate must remain valid during the duration of this Agreement.

28. Abandonment of Project

The City may abandon or indefinitely postpone the project or the services for any or all of the project at any time. In such event, the City shall give thirty (30) days written notice of such abandonment. In the event of abandonment prior to completion of the final drawings, if applicable, and cost estimates, Contractor shall have the right to expend a reasonable amount of additional time to assemble work in progress for the purpose of proper filing and closing the job. Prior to expending said time, Contractor shall present to the City a complete report of said proposed job closure and its costs, and the City may approve all or any part of said expense. Such additional time shall not exceed ten percent (10%) of the total time expended to the date of notice of termination. All charges thus incurred and approved by the City, together with any other charges outstanding at the time of termination, shall be payable by the City within thirty (30) days following submission of a final statement by Contractor.

Should the project or any portion thereof be abandoned, the City shall pay the Contractor for all services performed thereto in accordance with the terms of this Agreement.

29. Validity of Contracts

This Agreement shall not be binding or of any force or effect until it is: i) approved by resolution of the City Council as required by the Oakland City Charter, Oakland Municipal Code Title 2.04 and Oakland City Council Rules of Procedure, ii) approved for form and legality by the Office of the City Attorney, and iii) signed by the City Administrator or his or her designee.

30. Governing Law

This Agreement shall be governed by the laws of the State of California.

31. Notice

If either party shall desire or be required to give notice to the other, such notice shall be given in writing, via facsimile and concurrently by prepaid U.S. certified or registered postage, addressed to recipient as follows:

City of Oakland

Director of Parks and Recreation
City of Oakland
250 Frank Ogawa Plaza - Suite 3330
Oakland, CA 94612-2033

Contractor

Touchstone Golf, LLC
Stephen Harker, President/CEO, Touchstone Golf, LLC
1052 Overlook Drive

Any party to this Agreement may change the name or address of representatives for purpose of this Notice paragraph by providing written notice to all other parties ten (10) business days before the change is effective.

32. Entire Agreement of the Parties

This Agreement supersedes any and all agreements, either oral or written, between the parties with respect to the rendering of services by Contractor for the City and contains all of the representations, covenants and agreements between the parties with respect to the rendering of those services. Each party to this Agreement acknowledges that no representations, inducements, promises or agreements, orally or otherwise, have been made by any party, or anyone acting on behalf of any party, which are not contained in this Agreement, and that no other agreement, statement or promise not contained in this Agreement will be valid or binding.

33. Modification

Any modification of this Agreement will be effective only if it is in a writing signed by all parties to this Agreement.

34. Severability/Partial Invalidity

If any term or provision of this Agreement, or the application of any term or provision of this Agreement to a particular situation, shall be finally found to be void, invalid, illegal or unenforceable by a court of competent jurisdiction, then notwithstanding such determination, such term or provision shall remain in force and effect to the extent allowed by such ruling and all other terms and provisions of this Agreement or the application of this Agreement to other situation shall remain in full force and effect.

Notwithstanding the foregoing, if any material term or provision of this Agreement or the application of such material term or condition to a particular situation is finally found to be void, invalid, illegal or unenforceable by a court of competent jurisdiction, then the Parties hereto agree to work in good faith and fully cooperate with each other to amend this Agreement to carry out its intent.

35. Time of the Essence

Time is of the essence in the performance of this Agreement.

36. Commencement, Completion and Close out

It shall be the responsibility of the Contractor to coordinate and schedule the work to be performed as set forth in Schedule A, so that the work is performed in accordance with the provisions of this Agreement.

Any time extension granted to Contractor to enable Contractor to complete the work must be in writing and shall not constitute a waiver of rights the City may have under this Agreement.

Should the Contractor not complete the work by the scheduled date or by an extended date, the City shall be released from all of its obligations under this Agreement.

Within thirty (30) days of completion of the performance under this Agreement, the Contractor shall make a determination of any and all final costs due under this Agreement and shall submit a requisition for such final and complete payment (including without limitations any and all claims relating to or arising from this Agreement) to the City. Failure of the Contractor to timely submit a complete and accurate requisition for final payment shall relieve the City of any further obligations under this Agreement, including without limitation any obligation for payment of work performed or payment of claims by Contractor.

37. Approval

If the terms of this Agreement are acceptable to Contractor and the City, sign and date below.

38. Inconsistency

If there is any inconsistency between the main agreement and the attachments/exhibits, the text of the main agreement shall prevail.

TOUCHSTONE GOLF, LLC
(Contractor)

CITY OF OAKLAND
(City)

Date: _____

Date: _____

By: _____
Stephen T. Harker
CEO/ President

By: _____
Deborah A. Edgerly
City Administrator

OFFICE OF PARKS AND RECREATION

**APPROVED AS TO FORM AND
LEGALITY:**

Date: _____

Date: _____

By: _____
Audree V. Jones-Taylor, Director

By: _____
Office of the City Attorney

SCHEDULE A

LAKE CHABOT GOLF COURSE

Scope of Work And Method of Compensation

City, as the fee simple owner and the City Office of Parks and Recreation (OPR) as the custodial agent of real property that includes a 27-hole golf course, clubhouse, food and beverage operations, and all improvements and business operations, commonly known as Lake Chabot Golf Course, ("LCGC"), grants to Contractor the right, authority and power to manage, promote, maintain, restore, develop, improve and operate the LCGC and all its facilities (Golf Course Facility) pursuant to the terms, conditions and limitations as expressed herein. Pursuant to this grant of authority, Contractor expressly covenants and agrees during the term herein to perform or cause to be performed all of the following services:

1. Management

1.1 Manage, promote, maintain, restore, develop, improve, administer all receipts and disbursement, supervise all employees and operate the Golf Course Facility, the expenses of which shall be paid from the Operating Account;

1.2 Collect all Gross Revenues. Gross Revenues means all cash or cash equivalents derived directly or indirectly from or in connection with the management and operation of the Golf Course Facility, including but not limited to payments from greens fees, driving range, golf lessons, pro shop, all food and beverage licensees and vending machines. Gross Revenues shall be deposited into the Operating Account no later than the next business day.

1.3 Contractor will employ and discharge all management who are trained in the necessary facets of golf course facility management, and who have sufficient experience in the golf course facility industry to oversee its management. Contractor will also employ a competent staff and deploy that staff and other resources to insure proper care, management and operation of the Golf Course Facility; including but not limited to all vendors, concessionaires, tenants and subtenants and construction contractors in accordance with the provisions set forth in this Agreement.

1.4 Contractor will manage all hiring, training and termination of all Golf Course Facility management and personnel, including administering all labor relations. All existing Temporary Contract Service Employee and Exempt Limited Duration Employees of the Golf Course Facility will be transferred to Contractor, including but not limited to an employee leasing entity no later than May 1, 2007. The costs of such agents, employees, etc. plus any employer payroll taxes and other related payroll costs relating to the performance of this Agreement are the responsibility of Contractor and paid for out of the operating revenue. Contractor shall keep and maintain all necessary payroll and employment records for any and all employees, withhold appropriate payroll taxes, and file all tax returns as required by law.

1.5 Contractor will make every effort to hire qualified Oakland residents first.

1.6 Contractor will oversee the planning and implementation of all

advertising and marketing of golf activities and special events and increase the use of the Golf Course Facility by Oakland residents and visitors. It will oversee all other matters reasonably necessary for the efficient performance of the operation of the Golf Course Facility.

1.7 Contractor shall have no other use of Golf Course Facility except for the restricted use of operating and maintaining a golf course and related activities, however, the use of the Facility shall at all times be subject to the approval of the Director of the Office of Parks and Recreation and such approval shall not be reasonably withheld. Use of the Golf Course Facility shall be subject to all limitations of the Charter of the City of Oakland. Notwithstanding anything to the contrary, City reserves the right to use the Golf Course Facility to the exclusion of Contractor on those occasions when City requires such use in the event of an emergency or disaster; or as set otherwise forth herein. For the purpose of this Agreement, the term "emergency" is defined as a sudden and unforeseen event that calls for immediate measures to minimize its adverse consequences and occurs after a disaster when an immediate response is required and local capacity is insufficient to address and manage traumatic events such as, but not limited to deaths, injuries, displacement of people, disease, disability, food insecurity, damage or loss of infrastructure, weakened or destroyed public administration and reduced public safety and security.

1.8 Contractor shall offer the LCGC clubhouse for private party rentals; and shall set, subject to prior City approval, charge and collect golf fees for use and services related to activities at Golf Course Facility.

1.9 City shall have access to the Golf Course Facility as a enterprise facility for weddings, rentals, community meetings and other profitable opportunities. City will coordinate all events with the contractor 10 days in advance before booking any events to eliminate double bookings. City may utilize its own caterer.

1.10 Contractor agrees that City will approve of the hiring of a General Manager, which approval shall not be unreasonably withheld.

1.11 Contractor has authority to negotiate and enter into agreements to improve the Golf Course Facility.

1.12 Contractor has authority to apply for, obtain and maintain all governmental approvals, licenses, and permits necessary for a successful operation of the Golf Course and Contractor's performance under this Agreement. Expenses incurred for said approvals, licenses, consultants and permits shall be paid from the Operating Account, after review and approval by OPR, and unless specified otherwise in this Agreement.

1.13 Contractor has the authority to enter into contracts on behalf of City to modify, remodel and provide upgrades to the Golf Course Facility if the expenditures are less than \$5,000. Any expenditures greater than \$5,000, whether remodeling, or equipment or supplies can only be made with written approval from City. Any contracts executed by Contractor must be entered into in name of City. No contract or agreement may be executed without City approval, unless in accordance with the budget and terminable on 30-days notice. Contractor will provide City, within ten (10) business days of execution, copies of all such contracts and agreements that are binding on or obligate City.

1.14 Contractor shall establish written policies, rules and procedures as may be necessary or prudent for the operation of the Golf Course Facility and the use of the Golf Course Facility by members and guests. City must review and approve of such policies, rules and procedures prior to their taking effect;

1.15 Contractor shall enter into agreements with food & beverage, and pro shop operators, ensure that the operators apply for, obtain and maintain all necessary governmental approvals, licenses and permits, including City of Oakland Business License, and

shall monitor food & beverage and pro shop operations and analyze financial reports submitted by the operators.

1.16 Contractor shall provide an inventory of furniture, fixtures and equipment located on the premises, with the estimated value of each item within five (5) working days of the effective beginning date of this Agreement and maintain this inventory on a monthly basis.

1.17 Contractor shall comply with the maintenance requirements described in the attached Exhibit 1, incorporated herein by reference.

1.18 City shall retain all rights and duties with respect to the granting and issuance of any and all easements at Golf Course Facility to third parties, provided such easements do not interfere with Contractor's operations of Golf Course Facility. City shall retain all monies, profits, and fees collected pursuant to the granting of such easement rights to any and all third parties. As a courtesy to Contractor, City shall notify Contractor of the granting of any such easements prior to the effective date of said easement.

1.19 The CEO/President of Touchstone shall be responsible for communications with City for the duration of this agreement.

1.20 Any and all matters with respect to this Agreement that require policy approval by the City Council, not including administrative decisions by the City Administrator that need no such approval, shall be first submitted to Park And Recreation Advisory Commission which shall, in turn, submit same to the City Council in conformance with applicable procedures.

1.21 Contractor shall collect green fees, provide starter and tournament scheduling and administration services, schedule tee times, sell golf merchandise, rent golf carts and other golf equipment and all other functions and services normally provided by a golf course Pro Shop manager.

Contractor will have a minimum of one staff member who is a PGA or LPGA class A professional at the golf course to teach lessons, answer golf related questions and assure that the golf course is current with industry standards.

Contractor shall be solely responsible for security and storage of items in the Pro Shop and facility.

1.22 Contractor shall maintain customer service as a top priority. Contractor's employees shall be professional, friendly, well dressed and courteous to the golfer and general public; maintain a neat appearance, exercise good public relations skills; respond to customer complaints and questions; have excellent telephone manners; and conduct themselves in a high standard that is acceptable to OPR. Contractor must also maintain a good working relationship with the other City staff. Contractor must maintain at a minimum two incoming telephone lines, one fax line and may elect to install automated tee time reservation systems.

1.23 Contractor shall provide a high quality, appetizing and appealing menu for customers with reasonable and competitive prices and maintain a high level of staff and visitor satisfaction.

Contractor shall obtain and keep current all licenses and permits necessary to run a food service facility at Lake Chabot Golf Course.

Contractor must provide all necessary staff to prepare and provide the menu listed. All merchandise and supplies necessary for the production of the menu must be kept stocked at all times.

Contractor must adhere to all Federal, State and Local laws, including current Health Department regulations and standards.

1.24 Contractor nor its directors or officers will have any interest in any concession at the Golf Course Facility.

2. Budget And Accounts

2.1 Within 30 days of the date of this Agreement, the parties will have prepared and received City's approval of a final annual operating budget for the remaining months of the fiscal year. The budget for the subsequent fiscal year shall be completed no later than May 30. Until the budget is complete and approved, Contractor will use its best commercially reasonable efforts to operate the Golf Course Facility under the existing budget framework provided to Contractor by City, or in a manner consistent with the current market position of the Golf Course Facility.

2.2 Contractor must maintain a system that accounts for all moneys received at time of sale and be prepared to submit accurate records of all transactions. Contractor shall provide receipts to customers for all goods and services sold in the Pro Shop, including all golf play. Contractor will keep and maintain all required financial and activity reports (i.e. rounds of play, discount or pass play, league play etc.) in accordance with City policy and procedures while utilizing accounting procedures compatible with City's accounting and financial system.

2.3 City shall maintain a Depository (Revenue) Account in the name of "City of Oakland dba Lake Chabot Golf Course". This shall be an interest bearing account at the Bank of America. City shall be sole authorized signatory. Contractor shall deposit all revenues received by Contractor for and on behalf of City in connection with the management and operation of Golf Course Facility.

2.4 City shall maintain an Operating Account in the name of "City of Oakland dba Lake Chabot Golf Course" at the Bank of America, on which Contractor shall be the sole authorized signatory, except for checks in excess of \$2,500 which shall require a counter signature by a City designated representative.

2.5 The City shall fund the Operating Account from the Depository Account, for all eligible costs of operating the Lake Chabot Golf Course.

2.6 City shall transfer funds to the Operating Account bi-weekly for such operating expenses as have been approved in advance by City's designated representative.

2.7 City shall periodically request documentation such as invoices and cancelled checks supporting such expenditures.

2.8 Contractor shall ensure that all amounts due to vendors or contractors shall be paid within thirty days of receipt or such lesser time as may be required or as will benefit City such as when vendors give discounts for early payments. Any late charges or lost discounts shall be paid by Contractor unless such failure to make timely payment is due solely to the fault of City,

3. Compensation

3.1 Contractor's monthly management fee is \$8,000 per month, equaling a maximum total (including the two extensions) of \$120,000.

3.2 In addition to the fixed management fee, Contractor may receive an additional incentive fee, if earned, of 10% of the net cash flow in excess of the budget established by City. The incentive fee, when earned, will be paid on a quarterly basis and will be payable within 30 days of the calculation thereof. The incentive fee is estimated to be \$10,000, which assumes that revenues exceed expenses by \$100,000.

3.3 The funds for management compensation shall be paid from the revenue of the operation of the Golf Course Facility.

3.4 The first payment of the management fee will be payable within 15 days of the execution of this Agreement and thereafter paid monthly.

4. Reporting

4.1 On execution of this Agreement, City and Contractor shall inventory all tangible property of City transferred to the custody of Contractor. All tangible property acquired during the course of this Agreement shall be the property of City when acquired by City grant, operating revenues, refunds, fund raising revenues, governmental grants and other grants. At the termination of this Agreement, Contractor shall provide an acquisition and disposal report for tangible property. At termination of this Agreement, all City tangible property shall physically remain at Golf Course Facility.

4.2 Contractor will supply City with its books, accounts and records of the operations of the Golf Course Facility and all transactions related to the Golf Course Facility. Such records must be accurate in all material respects with periodic reporting to City as may be feasible, utilizing current accounting systems maintained by the Golf Course Facility or its affiliates.

4.3 Contractor will provide monthly financial statements, including a balance sheet, statement of operations and other financial data reasonably requested by City no later than thirty (30) calendar days following the end of each month, as may be feasible utilizing agreed upon accounting systems maintained by the Golf Course Facility or provided by City.

4.4 Contractor shall provide requested records to City within five (5) working days of receipt of City's request and shall allow City access to books and records at all reasonable times. At the option of City, Contractor shall provide payroll tax reports, sales tax reports, income tax reports, hazardous materials reports, and other reports filed with federal, state and local government.

4.5 Contractor shall maintain financial and operational records until the later of five (5) years after the end of the Agreement or two (2) years after closure of all disputed matters. Such records during the period of the Agreement and the retention period are to be retained at a site of local administration or a storage site nearby with availability to City.

4.6 Contractor does not give any general or specific guarantee as to the profitability of the Golf Course Facility, its attendance or its revenues.

4.7 Contractor shall create and maintain the following records and reports:

4.7.1 Accounting Records. Contractor shall maintain a double entry set of accounting records maintained in accordance with generally accepted accounting principles based on an accrual system.

4.7.2. Monthly Reports to be submitted on or before the 25th of the next succeeding month (twelve times a year):

- a. Monthly statement of Total Income, Operating Expenses as well as all other expenses arising out of the operations of the Lake Chabot Golf Course and showing Net Income or loss and Net Income or loss compared to the same month of prior year (if prior year information is available);
 - b. Cumulative statement of Total Income, Operating Expenses as well as all other expenses arising out of operation of the Golf Course compared with the approved budget, e.g. on a monthly and quarterly basis;
 - c. Statement listing the Accounts Receivable with an aging analysis;
 - d. Statements listing the Accounts Payable with an aging analysis;
- and
- e. Statement listing the names of the parties with security deposits; and Monthly bank reconciliation.

4.7.3 Quarterly Reports to be submitted on or before the 30th of the month following the end of each quarter of the fiscal year:

- a. Balance Sheet;
- b. Statement of income and expense;
- c. Statement of Concessionaire income and expense;
- d. Itemized additions or disposition of fixed assets; and
- e. Operational Type Reports, including number of rounds played on the 18-hole and 9-hole course.
- f. Employment and Contracting statement of compliance with the City's local employment and contracting programs.
- g. Employees (position, compensation, ethnicity, gender and residency);
- h. Marketing efforts (advertising, promotions, etc.);
- i. Community outreach (including special programs for the disadvantaged);
- j. Special events;
- k. Physical changes to the facility; and
- l. Changes in programs and operations

4.8 At the end of each fiscal year, an audit of the books and records shall be performed; such audit to be completed and a report furnished within one hundred and twenty (120) days after the end of such fiscal year. Such audit may be waived at City's sole election. The report shall include a statement reflecting Gross Receipts, Operating Expenses, Gross Operating Profit or Loss and Net Operating Income or Loss. Such reports shall also include a balance sheet, statements of income and expenses, and a statement of retained earnings (deficit). The cost of such audit shall be deemed to be an Operating Expense. An independent certified public accounting firm selected by City shall perform such audit or the audit may be performed by the Oakland City Auditor. The audit will be paid for out of funds from Golf Course Facility Income.

4.9 Contractor shall permit City and its authorized representatives to have access to its books, records, accounts and any and all data relevant to this agreement, for the purpose of making an audit or examination for a period of four years following the fiscal year of the last expenditure under this agreement.

4.10 On termination of this Agreement, all account balances shall be determined and certified by an independent Certified Public Accountant.

5. Termination/Default

5.1 In addition to the provisions set forth herein Contractor, on termination shall turn over and transfer all assets and operations to City or its designated representative, and City will assume all financial and operational responsibilities for the Golf Course Facility, except Contractor's debts and liabilities, for which Contractor shall be solely responsible.

5.2 Contractor shall also transfer all licenses and permits that are required for the operation of the Golf Course Facility to the new management entity if identified; if not identified at termination of this Agreement, Contractor shall transfer all such licenses and permits to City.

5.3 On termination, Contractor shall also conduct a full inventory of Golf Course Facility, which shall be reviewed and approved by OPR prior to Contractor's transfer of all assets and operations to either the subsequent new management entity, if identified; and if not identified shall transfer same to City.

5.4 If Contractor defaults or fails to perform under any of the obligations herein, the City Administrator shall give written notice to Contractor expressly stating the nature of the default or nonperformance. Contractor shall have sixty (60) days from receipt of notice to correct its default or nonperformance, and in the event of Contractor's failure to do so, City, in addition to any other legal or equitable rights it may have, may elect any of the following:

5.4.1 Terminate this Agreement upon written notice to Contractor; or

5.4.2 Direct Contractor to assign its interest in and to this Agreement to a party designated by Oakland City Council without compensation to Contractor; or

5.4.3 Perform whatever corrective measures are deemed necessary, which costs of such services, plus administrative overhead, shall be charged to and paid by Contractor to City on demand.

5.5 If Contractor breaches or fails to perform any of its obligations under this Agreement, and notice and opportunity to cure has been given to Contractor as provided above, City may, but is not obligated to, cure Contractor's noncompliance. Prior to effecting such cure, and if City elects to cure, City shall give Contractor notice of its intent to cure. Any amounts expended by City along with the maximum legal rate of interest, not to exceed 10% per annum, shall be reimbursable by Contractor to City.

AMENDMENT ONE

Professional Services Agreement City of Oakland and Touchstone Golf, LLC

This AMENDMENT ONE, dated July 24, 2007, between the City of Oakland, a municipal corporation ("City") and Touchstone Golf, LLC, a Delaware limited liability company, based in Berkeley, CA, ("Contractor") amends the Agreement between the parties dated May 1, 2007, entitled "Professional Services Agreement Between The City of Oakland and Touchstone Golf, LLC—Interim Operation and Management of The Lake Chabot Golf Course" ("Original Agreement") and "Schedule A, Scope of Work and Method of Compensation" ("Schedule A").

A. The parties agree to amend Schedule A of the Original Agreement only as set forth below; the remainder of Schedule A remains in full force and effect.

1. Management

- 1.2 "Collect all Gross Revenues. Gross Revenues means all cash or cash equivalents derived directly or indirectly from or in connection with the management and operation of the Golf Course Facility, including but not limited to payments from greens fees, driving range, golf lessons, pro shop, all food and beverage licensees and vending machines. All of the above mentioned gross revenues shall be deposited into the Operating Account no later than the next business day.

However, any and all revenues received from the sale of alcoholic beverages at any retail location located at the Golf Course Facility shall not be included in the gross revenues used to compute the net operating income. The revenues received from the sale of all alcoholic beverages shall be retained by Contractor as the sole property of Contractor and shall not be deposited into the Operating Account. (See also Schedule A Amendment sections 2.2 and 3.1). City shall have no interest, whatsoever, in the revenues from the sale of alcoholic beverages.

Contractor shall retain all net income from the sale of alcoholic beverages, not to exceed \$500 per month in any month where sale of alcoholic beverages are permitted (partial months shall be treated on a pro-rata basis) as its sole property and as additional compensation ("Beverage Compensation") for the management and operation of the Golf Course Facility. In any given month if alcohol net income is less than \$500, Contractor will be owed the difference, to be made up from another month's alcohol net income. The Parties will review the monthly alcohol sales at the end of the term of the Original Agreement, before any extensions of the contract, for any payments owing to Contractor. The Parties will complete the same review after all extensions of the Original Agreement.

All alcoholic sales net income in excess of the above stated Beverage Compensation amount, if any, shall be placed in Contractor's Charity Fund ("Charity Fund"). Any amounts deposited and contained in the Charity Fund, shall, at the end of the contract term, be distributed to Friends of Oakland Parks and Recreation, a

California not-for-profit, 501(c) (3) corporation, to be used for junior golf programs and the junior course at the Golf Course Facility.

2. Budget And Accounts

2.2 “Contractor must maintain a separate system that accounts for all moneys received for all sales of alcoholic beverages and be prepared to submit accurate records of all alcoholic beverage sales. Additionally, Contractor must maintain another separate system for the Charity Fund, which accounts for all moneys received for all sales of alcoholic beverages above the Beverage Compensation, as set forth above in Section 1.2, and be prepared to submit accurate records for the Charity Fund.”

3. Compensation

3.1 “Contractor’s monthly management fee, as set forth in the original Schedule A, shall be reduced in the amount of \$500 per month. Contractors amended monthly management fee is \$7,500 per month, equaling a maximum total (including the two extensions) of \$112,500. As additional compensation, Contractor shall retain all revenues from the sales of alcoholic beverages, Beverage Compensation, as set forth above in Section 1.2.”

TOUCHSTONE GOLF, LLC
(Contractor)

CITY OF OAKLAND
(City)

Date: _____

Date: _____

By: _____
Stephen T. Harker
CEO/ President

By: _____
Deborah A. Edgerly
City Administrator

OFFICE OF PARKS AND RECREATION

APPROVED AS TO FORM AND LEGALITY:

Date: _____

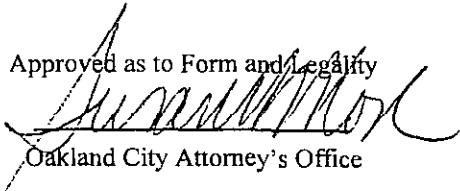
Date: _____

By: _____
Audree V. Jones-Taylor, Director

By: _____
Office of the City Attorney

FILED
OFFICE OF THE CITY CLERK
OAKLAND

Approved as to Form and Legality


Oakland City Attorney's Office

2007 NOV 29 PM 7:58

OAKLAND CITY COUNCIL

RESOLUTION NO. _____ C.M.S.

**RESOLUTION WAIVING THE REQUEST FOR PROPOSAL
REQUIREMENTS FOR THE OPERATION AND MANAGEMENT OF LAKE
CHABOT GOLF COURSE AND AUTHORIZING THE CITY ADMINISTRATOR
TO EXTEND THE EXISTING OPERATION AND MANAGEMENT
AGREEMENT WITH TOUCHSTONE GOLF LLC FOR AN ADDITIONAL
YEAR WITH TWO ONE-YEAR OPTIONS FOR EXTENSION IN AN AMOUNT
NOT TO EXCEED \$288,000**

WHEREAS, the City is the fee simple owner and the Office of Parks and Recreation is the custodial agency of the real property located at 11450 Golf Links Road, Oakland, California, known as "Lake Chabot Golf Course"; and

WHEREAS, Lake Chabot Golf Course offers one 18-hole and one 9-hole golf course in a uniquely beautiful Oakland setting; and

WHEREAS, the current golf management company at Lake Chabot Golf Course, Touchstone Golf, LLC has demonstrated success in managing the golf course under an interim Operation and Management Agreement, which expires on July 31, 2008; and

WHEREAS, the City seeks the necessary consistency of management to continue implementing additional maintenance and improvement activities at the site; and

WHEREAS, a management and operation agreement for Lake Chabot Golf Course will provide the City with the necessary oversight required; and

WHEREAS, the City will utilize the additional three-year time period to develop a master plan that will frame the City's goals for the site and guide future improvements; now, therefore, be it

RESOLVED, That pursuant to Oakland Municipal Code Section 2.04.051.B and findings set forth in the City Administrator's report accompanying this item, the City Council finds and determines that is in the best interests of the City to waive the competitive request for proposal process for a operation and management agreement for the Lake Chabot Golf Course, and so waives the requirement; and be it

FURTHER RESOLVED, that the City Administrator is hereby authorized to extend the existing Operation and Management Agreement with Touchstone Golf for an additional year with two one-year options to now expire on July 31, 2011; and be it

FURTHER RESOLVED, that the total amount of the Agreement is in an amount not to exceed \$288,000; and be it

FUTHER RESOLVED: that the Office of the City Attorney has approved this resolution as to form and legality and a copy will be on file in the Office of the City Clerk.

IN COUNCIL, OAKLAND, CALIFORNIA, _____, 2007.

PASSED BY THE FOLLOWING VOTE:

AYES- BROOKS, BRUNNER, CHANG, KERNIGHAN, NADEL, QUAN, REID and PRESIDENT DE LA FUENTE

NOES-

ABSENT-

ABSTENTION-

ATTEST: _____

LaTonda Simmons
City Clerk and Clerk of the Council
of the City of Oakland, California