

DRAFT
CERTIFIED BUSINESS ENTERPRISE UTILIZATION AGREEMENT

THIS CERTIFIED BUSINESS ENTERPRISE UTILIZATION AGREEMENT (this "Agreement") is dated as of _____ and is made by and between the **DISTRICT OF COLUMBIA DEPARTMENT OF SMALL AND LOCAL BUSINESS DEVELOPMENT**, ("DSLBD") and Conference Center Associates I, LLC, or its designees, successors or assigns ("Developer").

RECITALS

A. Pursuant to approval given by the District of Columbia, c/o the Office of Zoning, an instrumentality of the District of Columbia (the "Zoning Commission") to the Developer in Zoning Commission Case No. 08-33, a Planned Unit Development for property located at Michigan Avenue and Irving Street, N.E. (the "PUD"), Developer intends to construct a mixed use complex composed of a hotel, conference center, a parking garage, and retail space in phase 1 and residential and/or hotel in phase 2 (the "Project").

B. Pursuant to the Zoning Commission approval, Developer covenants that it has executed and will comply in all respects with this Certified Business Enterprise Utilization Agreement.

NOW, THEREFORE, for and in consideration of the mutual covenants and agreements contained herein, the receipt and adequacy of which is hereby acknowledged by both parties hereto, DSLBD and Developer agree, as follows:

ARTICLE I
UTILIZATION OF CERTIFIED BUSINESS ENTERPRISES

Section 1.1 CBE Utilization Requirements. Developer, on its behalf and/or on behalf of its successors and assigns (if any), shall hire and contract with Certified Business Enterprises certified pursuant to the Small, Local and Disadvantaged Business Enterprise Development and Assistance Act of 2005, as amended (D.C. Law 16-33; D.C. Official Code § 2-218.01 *et seq.*) (each a "CBE") in connection with the predevelopment and development phases of the Project, including, but not limited to, professional and technical services, construction management, and construction trade work, and pre and post-construction procurements of maintenance, security, site improvements, janitorial, refuse collection, food services, travel arrangements and other goods and services in any way related to the Project. Developer shall expend funds contracting and procuring goods and services from CBEs in an amount equivalent to no less than thirty-five percent (35%) of the Adjusted Development Budget (the "CBE Minimum Expenditure"). As detailed in Attachment 1 hereto, the Adjusted Development Budget is _____. (\$ _____). The CBE Minimum Expenditure is therefore _____ (\$ _____).

Section 1.2 Capacity Building Incentives. Developer acknowledges that a priority of the District of Columbia is to assist local businesses in developing greater capacity, technical capabilities and valuable experience, especially in areas of development and construction related services. To that end, the parties agree that Developer will have the right to earn and receive certain incentives for engaging in activities that are likely to create opportunities for CBEs generally, and to facilitate capacity building for DBEs in particular. Such incentives when earned by Developer, will be applied by DSLBD to reduce Developer's CBE utilization requirements set forth in Section 1.1 of this Agreement.

(a) The Developer shall devise a list of professional services, trade specialties, or other vocational areas in which CBEs either lack capacity, lack depth, or in which such firms traditionally do not participate as prime contractors in construction projects of this nature and size (each, a "Target Sector"), and submit the list to DSLBD for approval within thirty (30) days of signing this Agreement. CBEs identified on the list shall not be eligible for a bonus, as described in paragraphs (1), (2), and (3) below ("Reporting Bonus"), unless the list is approved by DSLBD. Such list shall be attached hereto as Attachment 2 and made a part of this Agreement.

(1) For every dollar expended with a *DBE* for services that fall *within* a Target Sector, Borrower shall receive credit for \$1.50 against the CBE Minimum Expenditure. For example, a \$100,000 contract award paid to a DBE Construction Management firm within the Target Sector would be counted as \$150,000 by DSLBD when measuring Borrower's performance against the CBE Minimum Expenditure.

(2) For every dollar expended with a *CBE* that is not a DBE for services that fall *within* a Target Sector, Borrower shall receive credit for \$1.25 against the CBE Minimum Expenditure. For example, a \$100,000 contract award paid to a CBE Construction Management firm within the Target Sector would be counted as \$125,000 by DSLBD when measuring Borrower's performance against the CBE Minimum Expenditure.

(3) For every dollar expended with a *DBE* for services *not* included in a Target Sector, Borrower shall receive a credit for \$1.25 against the CBE Minimum Expenditure. For example, a \$100,000 contract award paid to a DBE Construction Management firm outside of the Target Sector would be counted as \$125,000 by DSLBD when measuring Borrower's performance against the CBE Minimum Expenditure.

(b) Every contract, purchase or task order (as applicable) issued by Developer to CBE firms, either directly or indirectly, which Developer believes should qualify for the Reporting Bonus shall be subject to review and approval by the Director of DSLBD (the "Director") to ensure that the scope of work is properly characterized within a Target Sector. The Reporting Bonus will not be credited to Developer unless the Director approves the specific procurement, provided, however, that a negative determination will not preclude Developer from receiving standard credit (either 1:1 or 1.25:1, as applicable) for the expenditure as set forth herein.

(c) The parties may mutually agree in writing to additional incentives that may be earned by Developer for instituting additional capacity building initiatives for CBEs (e.g., owner-controlled insurance program; pay without delay programs; waiver of bonding requirements on certain jobs; training or technical assistance programs). In particular, Developer is encouraged to work with its general contractors and/or construction managers to develop more flexible criteria for pre-qualifying CBEs for participation on the mixed-use projects. The modified pre-qualification criteria should consider the size and economic wherewithal usually present in small contractors as well as insurance and bonding requirements. Developer is also highly encouraged to establish CBE set-asides for certain procurements that will restrict bidders to those bid packages.

ARTICLE II CBE OUTREACH AND RECRUITMENT EFFORTS

Section 2.1 Identification of CBEs and Outreach Efforts. Developer shall utilize the resources of DSLBD, including the *CBE Business Center* found on DSLBD's website (<http://dslbd.dc.gov>). In particular, Developer shall publish all contracting opportunities within the CBE Business Center's Business Opportunities area. Developer shall use the CBE Company Directory as the primary source for identifying CBEs. The primary contact regarding CBE referrals shall be the Director or such other DSLBD representative as the Director may designate. Developer may use other resources to identify individuals or businesses that could qualify as CBEs and is encouraged to refer any such firms to DSLBD's Certification unit for certification. Throughout the duration of the Expenditure Period, Developer or its general contractor/construction manager shall (as set forth in Section 4.1) periodically publish notices in any of the following newspapers primarily serving the District of Columbia: *The Current Newspapers*, *The Washington Informer*, the *Washington Afro-American*, *Common Denominator*, *Washington Blade*, *Asian Fortune* and *El Tiempo Latino* (or if any of them should cease to exist, their successor, and if there is no successor, in another newspaper of general circulation) to inform CBEs, and entities that could qualify as CBEs, about the business opportunities at Developer. In the event that Developer currently uses or develops a website for its contracting and procurement activities, such website shall (i) advertise upcoming bid packages; (ii) present instructions on how to bid; and (iii) directly link to DSLBD's website.

ARTICLE III INFORMATION SUBMISSIONS AND REPORTING

Section 3.1 CBE Utilization Plans. Developer shall require its general contractor to submit a CBE utilization plan to DSLBD for approval no less than thirty (30) days following the date hereof, which plans shall be automatically incorporated and made a part of this Agreement as Attachment 3 following approval by DSLBD (each, a "Utilization Plan"). Each Utilization Plan shall list all of the projected procurement items, quantities and estimated costs, bid opening and closing dates, and start-up and completion dates. This plan should indicate whether any items will be bid without restriction in the open market, or limited to CBEs. Developer may not deviate materially from the steps and actions set forth in each Utilization Plan without first obtaining the written consent of the Director. For ease of monitoring, Developer agrees to work

with DSLBD to implement procedures for its general contractor to submit Utilization Plans electronically through the DSLBD compliance administration database, as applicable.

Section 3.2 Quarterly Reports. Throughout the duration of the Expenditure Period, Developer will submit quarterly contracting and subcontracting expenditure reports that identify:

- (i) those contracts where the party providing services, goods or materials was a CBE, including the amount of the contract;
- (ii) the nature of the contract;
- (iii) the amount actually paid by the Developer to the CBE under such contract that month and to date;
- (iv) the certification categories for each vendor/contractor;
- (v) the work performed by vendors/contractors in Target Sector(s) and relevant multipliers; and
- (vi) the percentage of overall expenditures which were to CBEs.

These reports shall be submitted no later than thirty days (30) after the end of each calendar year quarter. The reports shall be submitted on a form provided by DSLBD (a prototype of this form is included as Attachment 4). However, DSLBD reserves the right to reasonably amend this form, after consultation with Developer. This report shall also describe Developer's outreach efforts (if any) during the reporting period to identify CBEs and/or encourage them to bid on or otherwise apply to provide labor, services, goods, and materials to Developer. Companies that may be eligible for certification, but are not yet certified, or whose certification is pending with DSLBD shall not be included in these reports unless and until the company is certified. Further, only amounts expended after a company is certified shall be counted towards the CBE Minimum Expenditure. Concurrently with submission of the quarterly reports, Developer shall also submit vendor verification forms (each, a "Vendor Verification Form") substantially in the form of Attachment 5.

ARTICLE IV GENERAL CONTRACTORS AND CONSTRUCTION MANAGERS

Section 4.1 Adherence to CBE Minimum Expenditure. For each Construction Project, Developer shall require in its contractual agreements with the general contractor and/or construction manager for each construction project, as applicable, (the "General Contractor"), that the General Contractor comply with the relevant terms and conditions of this Agreement, with respect to achieving the CBE Minimum Expenditure. Developer further agrees to inform the General Contractor and subcontractors of the other obligations and requirements applicable to Developer under this Agreement. Developer shall inform the General Contractor about the implications of non-compliance with this Agreement that may negatively impact future opportunities for the Developer and the General Contractor respectively. Developer will obtain the following commitments from its General Contractor ("GC"):

DRAFT CBE AGREEMENT

- (i) The GC will publish a public notice in a newspaper whose primary circulation is in the District of Columbia (e.g. *Afro American*, *Washington Informer*, *El Tiempo Latino*, *Asian Fortune*, *the Current Newspapers*, etc.) for the purpose of soliciting bids for products or services being sought for construction and renovation projects and will allow a reasonable time (e.g., no less than 30 business days) for all bidders to respond to the invitations or requests for bids.
- (ii) The GC will contact DSLDB to obtain a current listing of all certified business enterprises qualified to bid on procurements as they arise and will make full use of the CBE Business Center found at <http://dslbd.dc.gov> for listing opportunities and for subcontracting compliance monitoring.
- (iii) The GC will negotiate with all bidders pre-qualified by Developer and the GC, including CBEs, to obtain each bidder's best and final price as understood in the marketplace.
- (iv) The GC will not require that CBEs provide bonding on contracts with a dollar value less than \$100,000, provided that in lieu of bonding the GC may accept a job specific certificate of insurance.
- (v) The GC will include in all contracts and subcontracts to CBEs, a process for alternative dispute resolution. This process shall afford an opportunity for documentation of work performed and invoices by CBEs regarding requests for payments. Included in the contract shall be a mutually agreed upon provision for mediation (to be conducted by DSLBD) or arbitration in accordance with the rules of the American Arbitration Association.
- (vi) The GC and subcontractors shall strictly adhere to their contractual obligations to pay all subcontractors in accordance with the contractually agreed upon schedule for payments. In the event that there is a delay in payment to the general contractor, the GC is to immediately notify the subcontractor and advise as to the date on which payment can be expected.
- (vii) The GC commits to pay all CBEs, within fifteen (15) days following the GC's receipt of a payment which includes funds for such subcontractors, from Developer. Developer also agrees to establish a procedure for giving notice to the subcontractors of Developer's payment to the GC.

ARTICLE V CONTINGENT CONTRIBUTIONS

Section 5.1 Contingent Contributions for Failure to Meet CBE Minimum Expenditure. At the conclusion of the Project, DSLBD shall measure the percentage difference between the CBE Minimum Expenditure and Developer's actual expenditures. If Developer's actual expenditures are less than the CBE Minimum Expenditure, DSLBD shall identify the percentage difference (the "Shortfall"). If Developer fails to meet its CBE Minimum Expenditure within 60 days of

the conclusion of the Project, which shall be determined by issuance of certificate(s) of occupancy for the Project, Developer shall make the following payments (each, a “Contingent Contribution”), which shall be paid to the District of Columbia in the time and in a manner to be determined by DSLBD. The Contingent Contributions shall be based on twenty-five percent (25%) of the CBE Minimum Expenditure (the “Contribution Fund”). The Contribution Fund is therefore \$ _____.

- (i) If the Shortfall is more than 50% of the CBE Minimum Expenditure, Developer shall make a Contingent Contribution of one hundred percent (100%) of the Contribution Fund. For example, if at the conclusion of the Project, the Shortfall is 60%, Developer shall make a Contingent Contribution of \$ _____.
- (ii) If the Shortfall is between 10% and 50% of the CBE Minimum Expenditure, Developer shall make a Contingent Contribution that is the percentage of the Contribution Fund that is equal to the Shortfall. For example, if the Shortfall is 20%, the Developer shall make a Contingent Contribution of 20% of the Contribution Fund, *i.e.*, \$ _____.
- (iii) If the Shortfall is less than 10% of the CBE Minimum Expenditure, and Developer has taken all actions reasonably necessary (as reasonably determined by DSLBD based on Developer’s reports and other verifiable evidence) to achieve the CBE Minimum Expenditure, the Developer shall not be required to make a Contingent Contribution. The Developer may meet its burden to demonstrate it has taken all actions reasonably necessary to achieve its CBE Minimum Expenditure by (1) fulfilling all CBE outreach and recruitment efforts identified in Article II of this Agreement; (2) complying with Article IV of this Agreement; (3) providing evidence of the General Contractors’ compliance with the commitments set forth in Article IV of this Agreement, and (4) by taking the following actions, among other things¹:
 - a. In connection with the preparation of future bid packages, if any, develop a list of media outlets that target CBEs and *potential* CBEs hereafter referred to as “Target Audience” based on D.C. certification criteria;
 - b. During the initial construction of the Project, place advertisements in media outlets that address the Target Audience on a regular basis (*i.e.*, each time a new bid package is sent out) and advertise the programmatic activities established pursuant to the Agreement on an as needed basis;
 - c. Fax and/or email new procurement opportunity alerts to targeted CBEs according to trade category;
 - d. In connection with the preparation of future bid packages, if any, develop a list of academic institutions, business and community organizations that represent the Target Audience so that they may provide updated information on available opportunities to their constituents;

¹ See Attachment 6 for a list of suggested outreach activities.

- e. Make presentations and conduct pre-bid conferences advising of contracting opportunities for the Target Audience either one-on-one or through targeted business organizations;
 - f. Provide up to ten (10) sets of free plans and specifications for business organizations representing Target Audiences upon request;
 - g. Commit to promoting opportunities for joint ventures between non-CBE and CBE firms to further grow CBEs and increase contract participation.
- (iv) If the Shortfall is less than 10% of the CBE Minimum Expenditure, but Developer has *not* taken all actions reasonably necessary (as reasonably determined by DSLBD based on Developer's reports and other verifiable evidence) to achieve the CBE Minimum Expenditure, Developer shall make a Contingent Contribution that is the percentage of the Contribution Fund that is equal to the Shortfall. For example, if the Shortfall is 5%, the Developer shall make a Contingent Contribution of 5% of the Contribution Fund, *i.e.*, \$_____.

Section 5.2 Other Remedies. Failure to make any required Contingent Contribution in the time and manner specified by DSLBD shall be a material breach of this Agreement. In the event that the Developer breaches any of its obligations under this Agreement, in addition to the remedies stated herein, DSLBD does not waive its right to seek any other remedy against the Developer, the general contractor of the Project and any manager of the Project that might otherwise be available at law or in equity, including specific performance.

Section 5.3 Waiver of Contingent Contributions. Any Contingent Contribution required under this Section may be rescinded or modified by the Director upon consideration of the totality of the circumstances affecting such noncompliance.

ARTICLE VI MISCELLANEOUS

Section 6.1 Primary Contact. The Director, or his or her designee, shall be Developer's primary point of contact for the purposes of collecting or providing information or carrying out any of the activities under this Agreement. The Director and a representative of Developer with contracting and/or procurement authority shall meet regularly.

Section 6.2 Notices. Any notice, payment or instrument required or permitted by this Agreement to be given or delivered to either party shall be deemed to have been received when personally delivered or transmitted by telecopy or facsimile transmission (which shall be immediately confirmed by telephone or email and shall be followed by mailing an original of the same within 24 hours after such transmission) or 72 hours following deposit of the same in any United States Post Office, registered or certified mail, postage prepaid, addressed as follows:

DRAFT CBE AGREEMENT

To DSLBD: Department of Small and Local Business Development
441 4th Street, N.W., Suite 970 North
Washington, DC 20001
Attention: Director
Tel: (202) 727-3900
Fax: (202) 724-3786

and Office of Planning
801 North Capitol Street, NE, Suite 4000
Washington, DC 20002
Attention:
Tel: (202) 442-7600
Fax: (202)

With a copy to: Office of the Attorney General
John A. Wilson Building
1350 Pennsylvania Avenue, NW, Suite 407
Washington, DC 20004
Attention: Attorney General
Tel: (202) 724-3400
Fax: (202) 347-8922

To Developer: Developer

Washington, D.C.
Attention: _____
Tel:
Fax:

with copies to: Developer's Counsel

Attention: _____
Tel:
Fax:

Each party may change its address or addresses for delivery of notice by delivering written notice of such change of address to the other party.

Section 6.3 Severability. If any part of this Agreement is held to be illegal or unenforceable by a court of competent jurisdiction, the remainder of this Agreement shall be given effect to the fullest extent possible.

Section 6.4 Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of any permitted successors and assigns of the parties hereto. This Agreement shall not be assigned by Developer without prior written notice to DSLBD.

DRAFT CBE AGREEMENT

Section 6.5 Amendment; Waiver. This Agreement may be amended from time to time by written supplement hereto and executed by both DSLBD and Developer. Any obligations hereunder may not be waived, except by written instrument signed by the party to be bound by such waiver. No failure or delay of either party in the exercise of any right given to such party hereunder or the waiver by any party of any condition hereunder for its benefit (unless the time specified herein for exercise of such right, or satisfaction of such condition, has expired) shall constitute a waiver of any other or further right nor shall any single or partial exercise of any right preclude other or further exercise thereof or any other right. The waiver of any breach hereunder shall not be deemed to be a waiver of any other or any subsequent breach hereof.

Section 6.6 Governing Law. This Agreement shall be governed by the laws of the District of Columbia.

Section 6.7 Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original.

Section 6.8 Entire Agreement. All previous negotiations and understandings between the parties hereto or their respective agents and employees with respect to the transactions set forth herein are merged into this Agreement, and this Agreement alone fully and completely expresses the parties' rights, duties and obligations with respect to its subject matter.

Section 6.9 Captions, Gender, Number and Language of Inclusion. The captions are inserted in this Agreement only for convenience of reference and do not define, limit or describe the scope or intent of any provisions of this Agreement. Unless the context clearly requires otherwise, the singular includes the plural, and vice versa, and the masculine, feminine and neuter adjectives include one another. As used in this Agreement, the word "including" shall mean "including but not limited to".

Section 6.10 Attachments. The following exhibits shall be deemed incorporated into this Agreement in their entirety:

<i>Attachment 1:</i>	CBE Minimum Expenditure
<i>Attachment 2:</i>	Target Sector List
<i>Attachment 3:</i>	Utilization Plans
<i>Attachment 4:</i>	Quarterly CBE Reports
<i>Attachment 5:</i>	Vendor Verification Form
<i>Attachment 6:</i>	Suggested Outreach Activities

Section 6.11 Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors, assigns, heirs and personal representatives.

DRAFT CBE AGREEMENT

AGREED TO AND EXECUTED THIS _____ DAY OF _____, 2007

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF SMALL AND LOCAL BUSINESS DEVELOPMENT**

BY: _____
Lee A. Smith, III
INTERIM DIRECTOR

DEVELOPER

BY: _____