

## **CERTIFIED BUSINESS ENTERPRISE UTILIZATION AGREEMENT**

**THIS CERTIFIED BUSINESS ENTERPRISE UTILIZATION AGREEMENT** (this "Agreement") is dated as of \_\_\_\_, 2009, and is made by and between the **DISTRICT OF COLUMBIA DEPARTMENT OF SMALL AND LOCAL BUSINESS DEVELOPMENT**, ("DSLBD") and **SKYLAND HOLDINGS 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. 09-03, a Planned Unit Development for property located at the intersection of Alabama Avenue and Naylor Road SE, Washington, D.C. (the "PUD"), Developer intends to redevelop a shopping center into a town center and mixed use retail and residential project (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, and other good and valuable consideration, 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 \_\_\_\_\_. In the event that the Adjusted Development Budget is increased or reduced by more than 5%, the CBE Minimum Expenditure shall be subject to increase or reduction by DSLBD in its reasonable discretion to thirty-five percent (35%) of such increased or reduced Adjusted Development Budget amount. Developer has an ongoing duty to report any increase in the budget by more than 5% to DSLBD.

ZONING COMMISSION  
District of Columbia  
CASE NO.09-03  
EXHIBIT NO.19G

**Section 1.2 Time Period.** Developer shall achieve its CBE Minimum Expenditure within 18 months of execution of this Agreement. At the end of such time period and provided that all the requirements contained in this Agreement have been met, this Agreement shall terminate.

**Section 1.3 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, or deemed approved pursuant to Section 1.3(b) of this Agreement. Such list shall be attached hereto as Attachment 2 and made a part of this Agreement upon approval or deemed approval by DSLBD.

(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. If the Director does not complete his/her review no later than sixty (60) business days after receipt of the contract or purchase order, as applicable, from Developer, or Developer's agent, the Reporting Bonus will be deemed approved.

(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.

(d) If a CBE is validly certified by DSLBD at the execution of a contract with Developer and such CBE begins work under such contract in accordance with this Agreement, but such CBE's certification with DSLBD expires, Developer shall be allowed to continue to utilize such CBE under such contract for the full credit available under Section 1.3(a) of this Agreement, provided Developer shall not obtain credit for additional work with such CBE under a new contract until such expired CBE has been recertified with DSLBD. However, if Developer knows or has reason to believe that such certification would be revoked, Developer shall not be credited with incentives under Section 1.3(a) or standard credit for a CBE whose certification has been revoked from the moment of revocation, regardless if the CBE was under contract at the time of the revocation.

## **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 comprising the Adjusted Development Budget 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 DLSBD's website.

### **ARTICLE III INFORMATION SUBMISSIONS AND REPORTING**

**Section 3.1 CBE Utilization Plans.** Developer shall require its general contractor of the Project 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"), which shall be deemed approved if the Director does not complete his/her review no later than thirty (30) days after receipt of the Utilization Plan from Developer, or Developer's agent. 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. The Utilization Plan should indicate whether any items will be bid without restriction in the open market, or limited to CBEs. Developer and/or its general contractor may not deviate materially from the steps and actions set forth in each Utilization Plan without first obtaining the written consent of the Director, in Director's reasonable discretion. 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 the Project, Developer shall require in its contractual agreements with the general contractor and/or construction manager (the "General Contractor" or "GC"), 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:

- (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 CBE bidders pre-qualified by Developer and the GC to obtain each CBE 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 new 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, no later than 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.**

Eighteen (18) months after execution of this Agreement, 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 things<sup>1</sup>:

- 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;
  - 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 lieu of the remedy described in Section 5.1 of this Agreement (if applicable), DSLBD may 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. This

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<sup>1</sup> See Attachment 6 for a list of suggested outreach activities.

Agreement shall only be enforceable by DSLBD, the District of Columbia, and any agency of the District of Columbia.

**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:

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

and                            Office of Planning  
2000 14th Street, NW, 4th Floor  
Washington, DC 20009  
Tel:    (202) 442-7600  
Fax:    (202) 442-7638

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:             Skyland Holdings LLC

With a copy to: Pillsbury Winthrop Shaw Pittman, LLP  
2300 N Street, NW  
Washington, DC 20037  
Attention: Paul Tummonds  
Tel: (202) 663-8000  
Fax: (202) 663-8007

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.

**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.

**Section 6.13 Confidentiality.** Developer reserves the right to mark certain information provided to DSLBD as "confidential". If such label is applied to materials, DSLBD shall maintain the confidentiality of such materials except when otherwise required by law to disclose.

Approved as to legal sufficiency for the Department of Small and Local Business Development:

BY:

\_\_\_\_\_  
Duane M. Kokesch  
General Counsel

AGREED TO AND EXECUTED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2009

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

BY:

\_\_\_\_\_  
**LEE A. SMITH III  
DIRECTOR**

**SKYLAND HOLDINGS LLC**

BY: \_\_\_\_\_