

Staff Summary Report

Council Meeting Date: 1-10-08

Agenda Item Number: _____

SUBJECT: Request to award a three-year, limited source contract to Colliers International for property management and leasing services of the ground floor retail space in the downtown Transportation Center.

DOCUMENT NAME: 20080110fslg18 **PURCHASES (1004-01)**

SUPPORTING DOCS: Yes

COMMENTS: (Limited Source #08-036) Total cost for this contract shall not exceed \$25,800 during the contract period.

PREPARED BY: Lisa Goodman, CPPB, Procurement Officer, 480-350-8533

REVIEWED BY: Michael Greene, CPM, Central Services Administrator, 480-350-8516

**LEGAL REVIEW AS
TO CONTRACT FORM**

ONLY: Mary Wade, Assistant City Attorney, 480-350-8612

FISCAL NOTE: Sufficient funds have been appropriated in 3918-6672.

RECOMMENDATION: Award the contract.

ADDITIONAL INFO: City staff recommends the approval of a three (3)-year limited source agreement with Collier International for leasing and management of the ground floor retail space in the Transportation Center. A Request for Proposal (RFP) for leasing and management services with Leadership in Energy and Environmental Design (LEED) experience was posted and mailed to fifty-eight (58) vendors. No vendors responded to the RFP. Upon further research, staff identified one (1) company, Collier International, in the Phoenix metro area with specialization and experience in leasing and property management of sustainable buildings. Collier was asked to provide a proposal. Staff reviewed the Collier proposal and determined that the pricing for their services is reasonable and matches the cost of the leasing agent for other City properties.

Memorandum

TO: Michael Greene, CPM
Central Services Administrator

FM: Glenn Kephart
Public Works Manager

Carlos de Leon
Deputy Public Works Manager, Transportation Division

DATE: December 18, 2007

SUB: Limited Source Determination

As Head of the City Department for which the needed professional service will be contracted, I have made a determination that only one (1) reasonable and practicable professional services provider exists. As such, I am authorizing the City Procurement Office to work with my Department to negotiate an acceptable contract with:

Denise van den Bossche, LEED AP
Colliers International
2390 E. Camelback Road, Suite 100
Phoenix, AZ 85016
(602) 222-5000

Name of Professional Services Provider

Description of Professional Service to be provided:

Leasing and management of retail tenant spaces in the Tempe Transportation Center, a LEED certified mixed use building

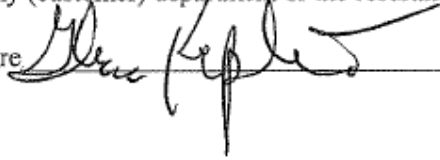
Refer to Requisition No. _____, dated _____ which has been transmitted to the City Procurement Office to initiate this Limited Source purchase.

My (customer) department contact for this procurement is Bonnie Richardson, at Ext. 8628.

My Limited Source determination is based upon extensive research conducted by my department as to possible providers and a written justification is attached for City Procurement Office records.

As related to this contract, there are no conflicts of interest, legal, ethical or preference issues which would compromise my (customer) department or the resulting contract.

Department Head's Signature



Date

12/19/07

City Procurement Ordinance 97.55 Sec. 26A-9 identifies the basis for a Limited Source procurement as follows:

"If the director of the using department determines in writing that the nature of the service presents such limited competition that a competitive process cannot reasonably be used or, if used, will result in a substantially higher cost to the city, will otherwise impair the city's financial interests or will substantially impede the city's administrative functions or the delivery of services to the public; or if only one provider has the experience and capability to successfully perform the contract; or if the need was not known in sufficient time to allow for competitive procurement and time is of the essence. The director of the using department shall be responsible for making a limited source determination, prepare and sign a written limited source justification for not seeking competition and transmit the justification to the procurement office with a requisition for the procurement."

Unless the director of the using department makes a limited source determination, the procurement office shall issue competitive solicitations for the professional services.

Professional service contracts shall be reviewed by the city risk manager and city attorney before signing; and contracts with a dollar value expected to exceed the dollar value requiring council approval shall be submitted for such review and approval.

Memorandum



December 17, 2007

To: Carlos de Leon, Deputy Public Works Manager

From: Bonnie Richardson, Architect, Principal Planner, Transportation

Re: Tempe Transportation Center: Property Management and Leasing

The Tempe Transportation Center is a 40,000 sq.ft. sustainable building that is designed to accommodate retail and office functions. Approximately 4,000 sq.ft of the ground floor will be managed and leased as transit-oriented retail, which will enhance and support the bus and light rail services.

RFP Process: In order to manage and lease the Transportation Center as a LEED (Leadership in Energy and Environmental Design) certified building, staff sought out a leasing agent who is a LEED Accredited Professional by issuing an RFP on February 29, 2006. Staff researched potential leasing agents and management firms that might be qualified in sustainable building management and expanded procurement's existing list of potential providers by adding several businesses. The RFP was advertised and mailed to 58 companies. No responses were received. In a more recent, similar RFP for city facilities, only one vendor submitted, and it does not have experience with sustainable buildings.

After conducting additional research on potential green leasing agents, staff identified one company in the Phoenix metro area with a specialization in management of high performance sustainable buildings. As a result, staff recommends Denise van den Bossche, LEED Accredited Professional, with Colliers International as its limited source provider for leasing and management for the Tempe Transportation Center.

The following criteria were used in making this determination:

1. Availability of service in Tempe. Green building is relatively new in the Phoenix metro area and up until now there has not been a need for this specialized service. Denise is a LEED Accredited Professional, educated in the field of sustainable development. Colliers International, located in Scottsdale, has established a department that specializes in LEED building services.

2. Effectiveness of reach and expertise. Ms. van den Bossche provides experience in the local real estate and development field and specialization in sustainability. She is active in the Arizona chapter of the US Green Building Council. Tempe will benefit from her experience, resources and contacts in the field.
3. Colliers International. Colliers International offers the resources of more than 9,000 professionals in 241 offices worldwide. High performance buildings have been constructed, leased and managed in other cities in the US and in Europe. Colliers offers worldwide expertise as well as local LEED AP management.
4. Reasonable Cost. Colliers International pricing is comparable to the leasing and property management cost for other city properties and is considered reasonable for these services.

Purchase Agreement #08-036

This Agreement is attached to the Limited "Source Contract Award Notice" and made a part thereof and is entered into by the City of Tempe (the "City") and Denise van den Bossche, LEED® AP, Colliers Iliff Thorn & Company Inc. dba Colliers International (Contractor).

The parties agree as follows:

1. Scope of Work

Contractor shall provide the following services in a professional manner to the City as identified below and incorporated by reference:

1. Serve as the exclusive leasing agent for the Transit facility.
2. Serve as the tenant LEED™ consultant.
3. Provide LEED™ associated Public Relations Assistance/on-going recruitment/and on-going LEED™ support.
4. Obtain current business insurance certificates from each tenant.
5. Provide property management responsibilities as shown in Attachment A.

2. Price

Rate structure for each area of work scope will be as follows:

Leasing Services provided by Contractor:

Leasing of New Tenants	6% of rental rate
Renewal of Existing Tenants	3% of rental rate

Property management of the lease area plus associated common areas of the building will be provided by Contractor at \$550.00 per month or \$.65 per square foot with \$550.00 being the minimum to be paid per month.

As needed and requested by the City, Prelease/Construction services and Public Relations Assistance/on-going recruitment/on-going LEED™ support will be provided by Contractor

Estimated hours: 100 Hourly rate: \$65

3. Term of Agreement

To begin after award of contract on _____, 2008 and be effective for a period of 36 months after award.

4. Agreement Termination

This contract may be terminated without default by either party by providing a written 30-day notice of termination to the other party. In the case of termination, Contractor and Owner will mutually acknowledge an accounting of commissions and fees due and payable. Contractor and Owner will mutually acknowledge a list of potential tenants under negotiation at the time of termination and contractor shall be paid commission upon such time that a listed tenant(s) takes occupancy.

5. Default Provisions

This contract is critical to the City and the City reserves the right to immediately cancel the whole or any part of this contract due to failure of the contractor to carry out any obligation, term, or condition of the contract as described within. The City will issue a written notice of default effective at once and not deferred by any interval of time. Default shall be for acting or failing to act as in any of the following:

1. The contractor fails to adequately perform the services set forth in the specifications of the contract;
2. The contractor fails to complete the work required or furnish the materials required within the time stipulated in the contract;
3. The contractor fails to make progress in the performance of the contract and/or gives the City reason to believe that the contractor will not or cannot perform to the requirements of the contract.

The City may resort to any single or combination of the following remedies:

1. Cancel any contract;
2. Reserve all rights or claims to damage for breach of any covenants of the contract;
3. Perform any test or analysis on materials (equipment/products) for compliance with the specifications of the contract. If the results of any test or analysis find a material non-compliance with the specifications the actual expense of testing will be borne by the contractor;
4. In case of default, the City reserves the right to purchase materials and/or services from another source, or to complete the required work in accordance with the needs of the City. The City may recover any actual excess costs from the contractor by:
 - A. Deduction from an unpaid balance;
 - B. Collection against the bid and/or performance bond, or;
 - C. Any combination of the above or any other remedies as provided by law.

6. Applicable Law

This contract shall be governed by, and the City and contractor shall have all remedies afforded each by the Uniform Commercial Code, as adopted in the State of Arizona, except as otherwise provided in this resultant contract or in statutes or ordinances pertaining specifically to the City. This contract shall be

governed by State of Arizona law and suits pertaining to this contract may only be brought in courts located in Maricopa County, Arizona.

7. Infringement of Patent or Copyright

The contractor agrees to save, keep, bear harmless and fully indemnify the City and any of its officers and employees from any and all damages, costs, or expenses in law or equity, that may at any time arise out of or be set up for any infringement of the patent right, copyright, or trademark of any person or persons in consequences of use by the City, or by any of its officers, or agents or employees of contractor supplied materials and of which the contractor is not a patentee or signee or lawfully entitled to sell the same.

Contractor (Seller) agrees to indemnify and hold harmless the City (buyer) from any and all license, royalty and proprietary fees or costs, including legal costs, which may arise out of the City's (buyer's) purchase and use of goods supplied by contractor (seller).

It is expressly agreed by seller that these covenants are irrevocable and perpetual.

8. Insurance

Prior to commencing services under this contract, contractor shall procure and maintain for the duration of the contract insurance against claims for injuries (including death) to persons and damages to property, which may arise from or in connection with the performance of the work hereunder by the Contractor, his agents, representatives, employees, subcontractors, or sub-subcontractors. For bidders with self-insurance, proof of self insurance with minimum limits expressed below must be submitted on proper forms for evaluation prior to award of contract.

A Contract Award Notice or Purchase Order will not be issued to an awarded vendor until receipt of all required insurance documents by the City Procurement Office and such documents must meet all requirements of this Insurance clause. In addition, before any contract is renewed for additional time periods, all required insurance must be in force and on file with the City Procurement Office. An awarded vendor or contractor must submit required insurance within 10 calendar days after request by the City Procurement Office or the award may be rescinded and another vendor selected for award.

Minimum Limits of Insurance

Contractor shall maintain limits no less than:

1. Commercial General Liability: \$1,000,000 combined single limit per occurrence for bodily injury and property damage, including coverage for contractual liability (including defense expense coverage for additional insureds), personal injury, broad form property damage, products and completed operations. The general aggregate limit shall apply separately

to this project/location or the general aggregate shall be twice the required occurrence limit.

2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage, including coverage for owned, hired, and non-owned vehicles as applicable.
3. Workers' Compensation and Employers Liability: Workers' Compensation and Employers Liability statutory limits as required by the State of Arizona.
4. Professional Liability: The Consultant retained by the City, to provide the consulting services required by the Contract will maintain Professional Liability insurance covering errors and omissions arising out of the services performed by the Consultant or any person employed by him with a limit of not less than \$1,000,000 all claims, or 10% of the agreed upon services, whichever is larger. In the event the insurance policy is written on a "Claims made" basis, coverage shall extend for two years past completion and acceptance of Services as evidenced by annual Certificates of Insurance.
5. Other Insurance: (If applicable, see supplement.)

Deductibles And Self-Insured Retentions

Any deductibles or self-insured retentions must be declared and approved by the City. At the option of the City, either the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officials, employees, and volunteers, or the Contractor shall procure a bond guaranteeing payment of losses and related investigations, claims administration, and defense expenses.

Other Insurance Provisions

The policies or self insurance certifications are to contain, or be endorsed to contain, the following provisions:

1. Commercial General Liability and Automobile Liability Coverage:
 - b. The contractor's insurance coverage shall be primary as respects the City, its officials, employees, and volunteers. Any insurance or self-insurance maintained by the City, its officials, employees, or volunteers shall be excess of the contractor's insurance and shall not contribute to it.
 - c. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City, its officials, employees, or volunteers.
 - d. Coverage shall state that the contractor's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

2. Workers' Compensation and Employers Liability Coverage

- a. The insurer shall agree to waive all rights of subrogation against the City, its officials, employees and volunteers for losses arising from work performed by the Contractor for the City.

3. All Coverages

- a. Each insurance policy required by this contract shall be endorsed to state the coverage shall not be suspended, voided, and/or canceled by either party, reduced in coverage or in limits except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to the City.

Other Insurance Requirements: Contractor shall:

1. Prior to commencement of services, furnish the City with certificates of insurance, in form and with insurers acceptable to the City which shall clearly evidence all insurance required in this contract and provide that such insurance shall not be canceled, allowed to expire or be materially reduced in coverage except on 30 days prior written notice to and approval by the City, and in accord with stated insurance requirements of this bid solicitation. City shall not be obligated, however, to review same or to advise contractor of any deficiencies in such policies and endorsements, and such receipt shall not relieve contractor from, or be deemed waiver of City's right to insist on, strict fulfillment of contractor's obligations under this contract.
2. Provide certified copies of endorsements and policies if requested by the City in lieu of or in addition to certificates of insurance.
3. Replace certificates, policies, and endorsements for any such insurance expiring prior to completion of services.
4. Maintain such insurance from the time services commence until services are completed. Should any required insurance lapse during the contract term, requests for payments originating after such lapse shall not be processed until the City receives satisfactory evidence of reinstated coverage as required by this contract, effective as of the lapse date. If insurance is not reinstated, City may at its sole option, terminate this contract effective on the date of such lapse of insurance.
5. Place such insurance with insurers and agents licensed and authorized to do business in Arizona and having a "Best's" rating of no less than A-VII.
6. Maintain such coverage continuously throughout the term of this contract and without lapse for a period of two years beyond the contract expiration,

should any of the required insurance be provided under a claims-made form, to the extent that should occurrences during the contract term give rise to the claims made after expiration of the contract, such claims shall be covered by such claims-made policies. Such extension of coverage shall be evidenced by annual certificates of insurance.

Subcontractors and Sub-Subcontractors

Contractor shall include all subcontractors and sub-subcontractors as insureds under its policies or shall furnish separate certificates and endorsements for each subcontractor and sub-subcontractor. All coverage for subcontractors and sub-subcontractors shall be subject to all of the requirements stated herein for the contractor.

Safety

The contractor shall be solely and completely responsible for conditions of the job site, including safety of all persons (including employees) and property during performance of the work. This requirement shall apply continuously and not be limited to normal working hours. Safety provisions shall conform to all applicable federal (including OSHA), state, county, and local laws, ordinances, codes, and regulations. Where any of these are in conflict, the more stringent requirement shall be followed. The Contractor's failure to thoroughly familiarize himself with the aforementioned safety provisions shall not relieve him from compliance with the obligations set forth therein.

9. Payments - After Acceptance of Delivery

Payment in full shall be made to the successful contractor within thirty (30) days after receipt and acceptance of delivery by the City. Unless terms other than net 30 days are offered as a discount.

10. Indemnification

Contractor shall, to the fullest extent, indemnify, defend, and save harmless the City, from any and all claims, demands, suits, actions, proceedings, loss, cost, and damages of every kind and description, including any attorney's fees and/or litigation expenses (hereafter collectively referred to as 'claims'), which may be brought or made against or incurred by the City on account of loss of or damage to any property for injuries to or death of any person except due to the sole negligence of the City, *to the extent such claims are allegedly caused by*, arising out of, or contributed to by reasons of any negligent act, or omission, professional error, fault, mistake, or negligence of contractor, Its employees, agents, representatives, subcontractors, or sub-subcontractors, their employees, agents, or representatives in connection with or incident to the performance of this Agreement, or to the extent such claims allege vicarious or derivative liability of the City or to the extent such claims are alleged to arise out of Worker's Compensation claims, Unemployment Compensation claims, or Unemployment Disability Compensation claims of employees of contractor and/or its subcontractors or claims under similar such laws or obligations. Contractor's

obligation under this section shall not extend to any liability caused by the negligence of the City, its agents, or employees.

11. Unauthorized Firearms & Explosives

No person conducting business on City property is to carry a firearm or explosive of any type. Any City bidder, contractor or subcontractor is to honor this requirement at all times and failure to honor this requirement will result in contract cancellation. This requirement also applies to persons who maintain a concealed weapon's permit. In addition to contract cancellation anyone carrying a firearm or explosive device will be subject to police and legal action.

12. Whole Agreement

This Agreement represents the parties' whole Agreement. There are no other promises, terms, conditions or obligations, and this Agreement shall supersede all previous communications, representations or agreements, either verbal or written.

13. Conflict of Interest

This Agreement is subject to cancellation pursuant to A.R.S. §38-511.

14. Ownership of Documents

All work products (electronically or manually generated) including but not limited to plans, specifications, cost estimates, tracings, studies, design analyses, original mylar drawings, computer aided drafting and design (CADD) file diskettes which reflect all final drawings, and other related products which are prepared in the performance of this Agreement are the property of the City and are to be delivered to the City before the final payment is made to the Consultant. The City shall retain ownership of these original drawing, however, if approved in writing by the City, the Consultant may retain the original drawings and supply the City with reproducible mylar.

15. Nondiscrimination

The parties agree to comply with all applicable state and federal laws, rules, regulation and executive orders governing equal employment opportunity, immigration, nondiscrimination, including the Americans with Disabilities Act, and affirmative action.

16. Conflict of Interest

This Agreement is subject to Section 38-511, Arizona Revised Statutes. This agreement may be canceled if any person significantly involved in initiating, negotiating, securing, drafting or creating this Agreement on behalf of the City is an employee, consultant, or agent of any other party to this Agreement.

17. Arbitration

Notice is provided of Sections 12-1518 and 12-133. Arizona Revised Statutes.

18. Dispute Resolution

If a dispute arises under this Agreement, the parties agree to exhaust all applicable administrative remedies provided for under Arizona Law.

19. Contractor's Records

To the extent required by Section 35-214, Arizona Revised Statutes, Contractor agrees to retain all records relating to this Agreement. Contractor agrees to make those records available at all reasonable times for inspection and audit by the Auditor of the City of Tempe during the term of this Agreement and for a period of five (5) years after the completion of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, this the _____ day of _____, 2007.

CITY OF TEMPE

By _____
Mayor

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

COLLIERS INTERNATIONAL

Name

Robert L. Broyles 12/20/07
Robert L. Broyles

Title

Interim Designated Broker

RESPONSIBILITIES OF PROPERTY MANAGER

Manager shall lease, operate, manage, and maintain the Property as an independent contractor acting as agent for Owner in accordance with Arizona real estate law and sound property management practices. Manager shall exercise prudence and diligence in performing its duties. The responsibilities of the Manager shall include, but not be limited to, the following:

1. Lease enforcement. Manager shall take all reasonable actions to enforce the terms of lease agreements including, but not limited to, all actions and proceedings to (i) collect or cause the collection of all rentals and other charges due Owner from tenants of the Property in accordance with the terms of their lease agreements; (ii) Manager is authorized to institute, in Owner's name, all legal actions or proceedings for the enforcement of any lease term, for the collection of rent or other income from the Property, or for the evicting or dispossessing of tenants or other persons from the Property. Manager is authorized to sign and serve such notices as Agent deems necessary for lease enforcement, including the collection of rent or other income. Manager is authorized, when expedient, to settle, compromise, and release such legal actions or suits or reinstate such tenancies. Attorneys' fees, filing fees, court costs, and other necessary expenses incurred in connection with such actions and not recovered from tenants shall be paid out of the Operating and/or Reserve Account(s) or reimbursed directly to Manager by Owner. Manager may select the attorney of its choice to handle such litigation.

Manager shall handle all tenant requests and negotiations on behalf of Owner and shall use all reasonable efforts to assure compliance by tenants with all provisions of their lease, and shall have the right to terminate tenancies subject to Owner approval for contractual default. Manager shall have the right to sign and serve notice to tenants. Manager shall also handle all communications with the tenants, including notices of transfer, rent changes, etc.

In connection with its leasing efforts, Manager may advertise the Property for lease subject to Owner's approval of the general marketing program.

2. Compliance with Legal Requirements. Manager shall take such action as may be necessary to comply with any and all orders or requirements affecting the Property by any federal, state, county or municipal authority having jurisdiction thereover and of which Manager has received written notice.

Manager, however, shall not take any such action as long as the Owner is contesting, or has affirmed its intention to contest, and promptly institutes proceedings contesting, any such order or requirement except that Owner and Manager shall promptly notify each other in writing of all such orders and notices or requirements. Manager shall prepare, execute, and, after obtaining the approval of Owner, file any such reports and documents as may be required by any local, state or federal authority.

Manager shall manage the Property under this Agreement in full compliance with any applicable state or federal legislation governing discrimination or fairness in housing or business, and shall take action considered appropriate to carry out the purposes of any such legislation.

3. Operation. Manager shall continually operate the Property as a high-quality project, and shall perform all acts which are customary for the management of properties of like size and character or as may be required for the efficient and businesslike operation of the Property.

4. Maintenance and Repairs. Manager shall, within the limitations of the Owner-Approved Budget, see that the physical facilities, personal property, and grounds are at all times well maintained, kept in good order and repair, and in a proper state of cleanliness.

Manager shall, on behalf of the Owner and at the Owner's expense, make or contract for all repairs which shall reasonably be required to preserve, maintain, and keep the Property in first-class condition.

Manager shall obtain and maintain records and enforce any guarantees or warranties that may concern Owner's personal property included within the Property. Written approval of the Owner must be obtained before pursuing any legal remedies to enforce said guarantees or warranties.

Owner's prior written approval shall be required for any contracts with a term of more than one (1) year. All contracts will have a thirty (30)-day written notice cancellation clause.

5. Emergency Maintenance and Repair. In an emergency where repairs are immediately necessary for the preservation and safety of the Property, or to avoid the suspension of any essential service to the Property, or to avoid danger to life or property, or to comply with federal, state, or local law, such emergency repairs shall be made by Manager at Owner's expense without prior written approval. Manager shall report to the Owner full details of any emergency orally within one (1) business day and by written report remitted within one (1) week of the incident.

Manager shall notify Owner or Owner's designated insurance agent promptly of any personal injury or property damage occurring to or claimed by any tenant or third party on or with respect to the Property and to promptly forward to such insurance agent, with copies to Owner, any summons, subpoena, or other legal document served upon Manager relating to the actual or alleged potential liability of the Owner, Manager, or the Property, with copies to Owner of all such documents.

6. Employment and Supervision of Personnel. Manager shall employ and supervise all personnel required for the operation, maintenance, and management of the Property. All such employees shall be employees of the Manager, and shall not be employees of the Owner.

Manager and Owner agree that there shall be no discrimination against or segregation of any person or group of persons on account of race, color, religion, creed, sex, or national origin in the leasing, use, occupancy, tenure, or enjoyment of the Property.

Manager shall procure and maintain worker's compensation insurance and employer's liability insurance covering all employees working on or about the Property, and fidelity bonds or employee dishonesty insurance, covering all employees who handle funds of the Owner.

Manager shall make all necessary payroll deductions for disability and unemployment insurance, social security, withholding taxes and other applicable taxes, and prepare, maintain, and file all necessary reports with respect to such taxes or deductions and all other necessary statements and

reports pertaining to labor employed by Manager in or about the Property. Costs of administering and managing such personnel are to be borne by Manager.

Notwithstanding the foregoing, Owner shall reimburse Manager for the total personnel costs incurred by Manager for employees at the Property. Such costs include all applicable federal and state taxes, employee's welfare benefits as may be required by law, worker's compensation insurance, accrued vacation, and applicable group health and dental insurance premiums. Owner shall reimburse Manager for the following costs incident to the hiring of employees for the Property: Background checks, employment advertising, fidelity bond or employee dishonesty insurance premiums, employment agency fees, and employee training, if required.

If this Agreement is terminated then Owner may not, directly or indirectly, including through a third party company for a period of one year following the date of termination, employ or solicit for employment any of Manager's employees with whom Owner had contact in connection with this Agreement prior to the date of termination. Owner acknowledges and agrees that a breach of the provisions of this Paragraph and or Article V of this Agreement could not adequately be compensated by money damages, and, therefore, Manager shall be entitled, in addition to any other right and remedy available to it, to an injunction restraining any breach or threatened breach. Owner further acknowledges and agrees that the provisions of this Paragraph are necessary and reasonable to protect Manager in the conduct of its business. Nothing herein shall be construed as prohibiting Manager from pursuing any other remedies, at law or in equity, for any such breach or threatened breach.

7. Disclosure. Manager shall disclose the name of any property owned and/or managed by the Manager which is within a two (2) mile radius of the Property and any other property owned and/or managed by the Manager which is in direct competition with the Property. Subsequent like-kind conflicts shall also be disclosed immediately upon occurrence.

8. Owner-Approved Budget. An annual budget shall be submitted to the Owner prior to the beginning of each fiscal year. Said budget shall include the estimated monthly income and operating expenses of the Property. Said budget shall include "below the line" any amounts necessary to be expended for capital improvements or debt service. Manager shall submit, along with the budget, a projection of capital expenditures for the forthcoming Fiscal Year.

After approval by the Owner in writing, budget shall be used by Manager as a guide for the actual operation of the Property and shall be subject to comparisons monthly. Manager agrees to obtain prior approval for any normal operating expenditure(s) which would cause any budget variance of One Thousand Dollars (\$1,000) and over, per occasion in any budget year, except for

emergencies. All expenses within the Owner-Approved Budget are to be borne by Owner, and it shall be the responsibility of the Owner, to make available sufficient funds to Manager to meet expenses anticipated in the Owner-Approved Budget.

9. Operating Account. Manager, serving as Agent for Owner, shall establish and maintain on behalf of Owner, a non-interest bearing operating account and, if necessary, an interest bearing reserve account. Said account(s) shall be opened in the name of Manager as trustee for owner, and maintained in a federally insured bank or savings institution. All receipts and disbursements for the operation of the Property shall be handled through these account(s). Owner shall be responsible for providing funds to pay the Owner-approved cash requirements of the Property on

a timely basis. Manager shall have no proprietary interest in Operating Account or reserve account, and all funds in these accounts shall at all times be the property of the Owner.

10. Collections. Manager shall make all reasonable steps to collect, and enforce the collection of, all payments and other charges due Owner from tenants of the Property in accordance with the terms of their tenancies.

11. Payment of Bills. From the Operating and/or Reserve Account(s), Manager is hereby authorized to pay or reimburse itself for all expenses and costs of operating the Property, including property taxes, insurance premiums, mortgage indebtedness, and for all other sums due Manager under this Agreement, including Manager's compensation under Section 2.1.

Owner shall give Manager advance written notice of at least seven (7) days if Owner desires Manager to make any additional monthly or recurring payments out of the proceeds from the Property. Any advance of funds by Manager must have prior approval by Owner.

In the event that the balance in the Operating and/or Reserve Account(s) is at any time insufficient to pay disbursements due and payable under Article II, Manager shall notify Owner of the deficiency. Manager shall give at least fifteen (15) days written notice to Owner of any funds required for deficiency and contingency reserve. Owner shall, immediately upon notice, remit to Manager sufficient funds to cover the deficiency and replenish the contingency reserve. In no event shall Manager be required to use its own funds to pay such disbursements, nor shall Manager be required to advance any monies to Owner or to bank accounts maintained by Manager on behalf of Owner. Manager shall pay, with all available Owner's funds, invoices in order of invoice date with the oldest taking the highest priority.

If Manager elects to advance any money in connection with the Property to pay any expenses for Owner, such advance shall be a loan subject to repayment with interest at an annual rate equal to the prevailing prime rate plus two percent (2%), calculated on a daily basis, and Owner hereby authorizes Manager to deduct such amounts from any monies due Owner.

Any balance existing in the Operating Account at the termination of this Agreement shall be returned to the Owner within thirty (30) days of termination, and the Owner agrees to pay expenses incurred during the term of the Agreement but which have not been received thirty (30) days after termination of the Agreement.

12. Books, Records and Reports. Manager shall establish and maintain an accounting and management reporting system that will duly account for all transactions relating to the Property.

On or before the tenth (10th) day of each month, Manager shall provide to Owner a report of the Property's operations for the preceding month, including:

- ♦ A detailed and itemized statement of all sources and uses of funds in a format satisfactory to Owner and Manager.
- ♦ A statement of ending balances in all trust accounts.
- ♦ General comments regarding the Property's operation and any requirements by Manager for the Owner, such as lease approvals and payments to cover unexpected expenses.

Owner shall at all reasonable times have access to the accounting records, as well as the books and other records of the Manager as they relate to the Property. Manager shall keep Owner notified in writing of the location of all such records. Owner shall have the right to audit said records and books at Owner's expense.

All original reports and documents are to be retained in Manager's possession. Copies, as required, will be made available to the Owner. Manager will retain said records for a period of three (3) years, or as required by law, after which time the records shall be transferred to Owner. At the termination of this agreement all records, except those required by law to be retained by Manager, shall be returned to Owner for retention. Copies of all leases and amendments shall be provided to Manager by Owner.

13. Use and Maintenance of Premises. Manager agrees not to knowingly permit the use of the Property for any purpose which might void any policy of insurance relating to the Property or which might render any loss there under uncollectible, or which would be in violation of any government restriction.