

1 **CONTRACT FOR CITY SERVICES AND PROGRAMS FOR**
2 **THE DOWNTOWN DURHAM MUNICIPAL SERVICE**
3 **DISTRICT – FY-2013**

4
5
6 By and Between

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9 THE CITY OF DURHAM, NORTH CAROLINA

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11 and

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14 DOWNTOWN DURHAM, INC.

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17 This Contract (the “Contract”) is dated, made, and entered into as of the ____ day
18 of _____, 20 __, between the CITY OF DURHAM (“City”) and
19 DOWNTOWN DURHAM, INC. (“DDI” or “Contractor”), a 501(c) (6) non-profit
20 corporation organized and existing under the laws of North Carolina, having its principal
21 place of business at 115 Market Street, Suite 213, Durham, NC 27701.

22
23 WITNESSETH:

24
25 **WHEREAS**, the North Carolina General Assembly enacted “The Municipal
26 Service District Act of 1973,” (the “Act”) pursuant to Article V, Sec. 2(4) of the
27 Constitution of North Carolina; and,

28
29 **WHEREAS**, the Durham City Council established a Municipal Service District
30 pursuant to the Act on May 2, 2011 by adoption and approval of Resolution No. 9761,
31 titled “Resolution Establishing a Business Improvement District in Downtown Durham,
32 North Carolina” (the “BID Resolution”); and,

33
34 **WHEREAS**, the BID Resolution established a Municipal Service District (also
35 referred to as a Business Improvement District (“BID”)) located within the Downtown
36 Development Tier of the City of Durham specifically identified in the maps titled
37 “Downtown Improvement District” and prepared by Durham GIS dated April 28, 2011
38 and maintained by the Office of the City Clerk of Durham; and,

39
40 **WHEREAS**, under the authority of G.S. § 160A-536 (d), the City desires to enter
41 into this Contract with DDI to provide both basic city services and enhanced services and
42 programs within the BID.

43
44 NOW, THEREFORE, for and in consideration of the mutual terms and conditions
45 hereinafter contained, and other good valuable consideration, the Parties agree as follows:
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49 **1.0 PURPOSE AND ENGAGEMENT**

50 Pursuant to the BID Resolution the City finds a need for specialized services and
51 programs within the BID, which comprises the downtown area and has experienced a
52 marked increase in pedestrian intensity and activity due to various economic
53 development efforts. Multiple public and private amenities would benefit from the
54 specialized services and programs within the BID, which amenities include, but are not
55 limited to, the Durham Performing Arts Center (DPAC), the Carolina Theater, the
56 Durham Bulls Athletic Park, CCB Plaza, the Downtown Durham Marriott and
57 Convention Center, West Village, American Tobacco Campus, Brightleaf Square,
58 Golden Belt, Central Park and the numerous businesses and restaurants throughout the
59 BID. The BID will receive an increase in street-level, appearance-related services, such
60 as frequent sidewalk cleaning, and pressure-washing; street level hospitality services to
61 direct people to key downtown sites and services while acting as safety eyes-and-ears
62 within the BID District; increased directed marketing and promotion of downtown
63 attractions within the BID; concentrated special event services; and concentrated
64 economic development programs that build upon the momentum of existing development
65 and leads to job creation, tax base growth and more downtown activity.

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67 **2.0 DEFINED TERMS**

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69 **2.1** “BID” is the geographic area of the Municipal Service District (BID)
70 located within the Downtown Development Tier of the City of Durham, specifically
71 identified in the maps titled “Downtown Improvement District” and prepared by Durham
72 GIS dated April 28, 2011 and maintained by the Office of the City Clerk of Durham.

73
74 **2.2** “BID Resolution” is Resolution No. 9761, titled “Resolution Establishing
75 a Business Improvement District in Downtown Durham, North Carolina” adopted and
76 approved by the Durham City Council on May 2, 2011.

77
78 **2.3** “BID Services” are all the services and programs that DDI is required to
79 perform pursuant to this Contract within the BID, which services and programs are both
80 (a) those cleaning and basic sanitation related city services set forth in subsection (a) of
81 Exhibit A, and (b) those enhanced or additional city services and programs set forth in
82 subsection (b) of Exhibit A.

83
84 **2.4** “BID Services Budget” refers to the contracted budget amount allocated to
85 the Contractor to perform the BID Services in accordance with this Contract pursuant to
86 Section 6.0 below.

87
88 **2.5** “Citizen Service Request” is a request to the Contractor from a citizen,
89 whether directly or through the City (e.g., “Durham OneCall”), to perform a “clean and
90 safe” service within the BID as set forth in subsection (a) of Exhibit A that falls under the
91 scope of SGI’s “Snapshot” program.

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93 **2.6** “City Funds” refers to all funds received by DDI under this Contract to
94 perform the BID Services.

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2.7 “Effective Date” refers to the date upon which the City Council adopts and approves the additional tax rate on property within the BID. The Effective Date shall also be the trigger date for the duties and obligations of the Parties under this Contract.

2.8 “Generally Accepted Accounting Principles” or “GAAP” “Generally Accepted Accounting Principles” or “GAAP” shall mean those conventions, rules, procedures, and practices, consistently applied, affecting all aspects of recording and reporting financial transactions which are generally accepted by major independent accounting firms in the United States. Any financial or accounting terms not otherwise limited or defined in this Contract shall be construed and applied according to Generally Accepted Accounting Principles.

2.9 “Implementing Department” shall be the city’s Office of Economic and Workforce Department (“OEWD”), the city department primarily responsible for the administration and oversight of this Contract.

2.10 “Including” The word “including” and any variants thereof, whether capitalized or not, shall mean “including, but not limited to” or otherwise imply that it is without limitation.

2.11 “Independent Accountant” is a firm of independent certified public accountants, or an independent certified public accountant, chosen by Contractor and subject to the approval of City which shall not be unreasonably withheld, delayed or conditioned.

2.12 “Legal Requirements” are all material laws, statutes, ordinances, rules, regulations, permits, licenses, and requirements of all governments or regulatory authorities, that now or hereafter may be applicable to the BID .

2.13 “Parties” means the parties to this Contract.

2.14 “Service Standards” are the performance standards of services and programs to be provided by DDI under this Contract, which service standards shall be conducted in a manner (i) consistent with the requirements and limitations set forth in this Contract; (ii) consistent with current prudent public services and management practices to promote general public safety and welfare; (iii) comparable to standards applicable to other BID areas found in other similarly situated downtown city settings; (iv) consistent with keeping the BID in a clean, sanitary and attractive condition, and (v) performed in compliance with Legal Requirements.

2.15 “SGI” means Service Group, Inc., the company that Contractor intends to engage as a subcontractor for the performance of certain of the BID Services.

2.16 “SGI Contract” means the contract that Contractor executes with SGI for the performance of certain of the BID Services.

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144 **3.0 TERM OF AGREEMENT AND RENEWALS.**

145 The term of this Contract shall be 1 year (“Term”) according to the City’s fiscal
146 calendar, beginning on July 1, 2012 to June 30, 2013. Unless Contractor provides the
147 City with at a least 90-day prior written notice of its intention not to renew, the City, in
148 the discretion of the City Manager, shall have the option to renew the Contract for two
149 (2) additional one (1) year terms with an amendment extending the term if for each
150 additional fiscal year the City Council approves the appropriate funds for the BID
151 Services covered under this Contract. The effective date for each renewal shall be July 1,
152 unless stated differently in the renewal amendment. If the City elects not to renew for
153 one or both of the 2 additional one-year terms, such non-renewal procedure shall follow
154 the Termination for Convenience procedure described in Section 11.1 below, including
155 the requirement that the City will give Contractor 90-days notice of its intention not to
156 renew.

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158 **4.0 SCOPE OF CONTRACT SERVICES TO BE PERFORMED.**

159 The BID Services are listed and described in Exhibit A, titled “Scope of BID
160 Services.” DDI affirmatively represents that it shall provide the BID Services set forth
161 below during the subject fiscal year. By the end of the subject fiscal year, and before
162 entering into any amendment for a following fiscal year, DDI shall use the City Funds
163 paid to it by the City pursuant to this Contract exclusively in the category of the BID
164 Services described in this Section 4.0 and Section 6.0. Pursuant to Section 7.0,
165 Contractor shall provide an accounting to the City of all unused City Funds within the
166 BID Services categories prior to 30 days after the end of the Term. At the discretion of
167 the City, any unused City Funds shall be returned to the City within 20 days of notice by
168 the City, unless such funds are incorporated into the next fiscal amendment to the
169 Contract.

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172 **5.0 CONDUCT OF CONTRACTOR**

173 Contractor shall at all times perform the BID Services consistent with the Service
174 Standards defined by this Contract. Contractor will undertake commercially reasonable
175 efforts to commence provision of the BID Services as soon as possible after the Effective
176 Date subject to the City’s payment of the initial invoice as described in Section 6.1 and
177 subject to the understanding that the BID Services will not be fully implemented
178 immediately after the Effective Date.

179

180 **5.1 Citizen Service Request Reporting.** – Contractor shall respond to Citizen
181 Service Requests as promptly as reasonably feasible during operational hours. Contractor
182 shall maintain records of the description, date and time when the Citizen Service Request
183 is first received and the date, time and description of resolution (if any) of the Citizen
184 Service Request. Contractor shall maintain and record additional details of the Citizen
185 Service Request as may be necessary for the City to evaluate the services performed.
186 Contractor shall cooperate and consult with Durham One-Call and City administration to
187 allow adequate routing and responses to Citizen Service Requests, which response time
188 shall be as good, or better, than the City’s historic response time. At the request of the

189 City, the Contractor shall submit an accounting of Citizen Service Request information
190 with its detailed quarterly report of program activities required under Section 7.0 below.
191

192 **5.2 Security.** – Contractor is not authorized to perform any security or law
193 enforcement activities under this Contract. However, it is agreed that while performing
194 the BID Services, Contractor’s employees or subcontractor employees may observe
195 suspicions or unsafe activities by others. Contractor shall coordinate with the City
196 regarding appropriate protocol in addressing observed unsafe or potentially criminal
197 activities within the BID. If required by the City, Contractor shall promptly report to the
198 Durham Police Department any incidents involving what may appear to be suspicious,
199 unsafe, or criminal activities. The Contractor shall make a report of all such activities
200 that are reported to the Durham Police Department and include a summary of all such
201 reports in the Contractor’s quarterly reporting of program activities and accomplishments
202 pursuant to Section 7.0. Contractor shall maintain a copy of each report and deliver the
203 same to the City, upon request. This report shall be delivered to the Office of Economic
204 and Workforce Development to the attention of the Director.
205

206 **5.3 Private Property.** Contractor is prohibited from performing any BID
207 Services for the exclusive benefit of private properties or private entities. Contractor
208 must abide by all Legal Requirements in performing any BID Services on or near private
209 property.
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211 **6.0 PAYMENT AND USE OF CITY FUNDS**

212 The City shall make payments to DDI as provided herein for each category of
213 BID Services for the fiscal year according to the two (2) budget categories identified in
214 Exhibit B, titled “BID Services Budget for FY-2013.” The annual fiscal payment to
215 Contractor for the BID Services is as follows:

<u>CATEGORY OF SERVICE</u>	<u>ESTIMATED ANNUAL BUDGET</u>
BID Services Budget	\$610,000.00**

219
220 ** estimated
221

222 **6.1 Estimated BID Services Budget.** -- Contractor acknowledges that the “BID
223 Services Budget” is only an estimate of the City Funds available for the Contract based
224 upon the anticipated BID tax rate to be approved by the City Council on the Effective
225 Date. Such BID Tax rate will determine the BID tax revenues collected from the
226 additional taxes levied on property within the BID pursuant to the BID Resolution. The
227 current BID Services Budget includes estimated BID tax revenues of \$360,000.
228 However, the BID tax revenues cannot be reliably estimated, until after the Effective
229 Date.
230

231 **6.2 Amendment to BID Services Contract.** The Parties agree to amend the
232 Contract to address any substantive shortfall in the BID Services Budget.
233 Notwithstanding the foregoing, the Contractor acknowledges and agrees that any shortfall
234 in the estimated BID Services Budget of 5% or less shall not be considered substantive
235 and shall not require any Contract amendment. The City Manager shall have the

236 authority to make any amendments to this Contract as a result of a substantive shortfall in
237 the BID Services Budget (as described above), or if the City decides to augment the BID
238 Services provided by the Contractor as a result of BID revenues received in excess of the
239 expected BID Services Budget. The City will keep Contractor informed of BID tax
240 revenues actually collected and if it appears that BID tax revenues collected during the
241 Term will result in an overage, the City will meet with Contractor to discuss the impact
242 of such overage on the Contract, if any..
243

244 **6.3** Form of Invoices. -- Except for the initial invoice (described below), the
245 Contractor shall send invoices to the City on a monthly basis equal to one-twelfth (1/12)
246 of the BID Services Budget. In order for the Contractor to receive advance payments
247 from the City for the BID Services to be rendered, the City must receive the appropriate
248 invoice at least 20 days prior to commencement of the BID Services for the specified
249 time period. The initial invoice shall be delivered to the City immediately after the
250 Effective Date and in an amount equal to 2 months payment (i.e., 1/6 of the BID Services
251 Budget). Each subsequent invoice shall be delivered monthly to the City at least 20 days
252 in advance of the month for which services are to be provided. For example, after the
253 initial invoice is delivered, the next invoice shall be delivered at least 20 days prior to the
254 3rd month of BID Service to be provided.
255

256 **6.4** Payment of Undisputed Amounts. -- The City shall make payment on the
257 invoices from the Contractor within 20 days from receipt of the invoice. The City shall
258 not be obligated to pay Contractor any payments, fees, expenses, or compensation other
259 than those authorized by this section. Such payment schedule may be amended by
260 written consent of the City and Contractor. The City Manager and the Director of the
261 Implementing Department (the "Director") shall have authority to give that consent on
262 behalf of the City. The City, in its sole discretion, and without affecting its other rights
263 and remedies, may delay or cancel any or all of those payments for failure by Contractor
264 to comply with any of the provisions of this Contract, including deadlines for submitting
265 any accounting, audit, statement, information, record, documentation, or report. The City
266 Manager or Director shall have the authority to decide whether Contractor has complied
267 with this Contract, including the attachments. Unless the City otherwise specifies, if the
268 withholding is designated to be a delay of payment instead of a cancellation of payment,
269 the payment so delayed shall be made when Contractor has submitted the missing items,
270 provided that such items are received by the City within 45 days after the date that they
271 were due. If any of said missing items is not received by the City before the expiration of
272 the additional 45-day period, then the amounts so withheld shall not be paid to Contractor
273 unless the missing items are later received by the City before expiration of the current
274 fiscal year. If the City does not delay or cancel in one instance, the City shall still have
275 the right to delay or cancel after any other instance of failure by DDI.
276

277 **6.5** Repayment of Funds. -- DDI shall repay to the City the full amount of any
278 City Funds lost, misapplied, unaccounted for, not used (as provided in Sections 4.0 and
279 7.0), or inadequately accounted for in violation of this Contract.
280

281 **7.0 REPORTING REQUIREMENTS**

282 **7.1 General Accounting** DDI, at DDI’s sole expense, shall account for all City
283 Funds received from the City under this Contract and all expenditures made from City
284 Funds according to each category of BID Services detailed under Exhibit A. DDI shall
285 submit a detailed quarterly report of program activities and accomplishments associated
286 with the expenditure of City Funds to the City’s Office of Economic and Workforce
287 Development (the “Implementing Department”). That report shall be submitted within
288 20 days after each quarter of the fiscal year in accordance to the reasonable requirements
289 of the Implementing Department and shall include a detailed description of the services
290 performed in accordance with the service categories referenced in Exhibit A. If
291 necessary, the Department may require additional detailed information (in addition to the
292 required report), including but not limited to accounts, records, budget-to-actual
293 statements, and other supporting documentation. As part of the final quarterly report for
294 the subject fiscal year, Contractor shall include an annual summary of the same
295 information required as part of each quarterly report. If, as part of the final quarterly
296 review, the City determines that the payment of City Funds exceeded the actual costs of
297 BID Services provided, including a reasonable allocation of Contractor administrative
298 costs and expenses base upon generally accepted accounting practices, the City shall have
299 the right to require Contractor to return the unused funds. Without limiting the preceding
300 sentence, it is agreed that, if requested in writing by the City, Contractor shall make all of
301 that information available for inspection and audit by the City at any time during the
302 workday of the Implementing Department or such other department of the City that the
303 City Manager specifies in writing to Contractor.

304
305 **7.2 Annual Audit Report**. – Annually, DDI, at DDI’s sole expense, shall obtain an
306 audit of its financial statements. The audit shall be performed by an Independent
307 Accountant. This audit shall be conducted in accordance with Generally Accepted
308 Accounting Principles standards, and the financial statements shall be prepared in
309 conformity with generally accepted accounting principles. DDI shall see that the City’s
310 Director of Audit Services receives the audit report within four months after the close of
311 the City’s fiscal year. If the independent annual audit shows a difference in the
312 accounting of City Funds from the final quarterly report required under sub-section 7.1
313 above, the Parties agree to make the appropriate payment adjustment in accordance with
314 the Contract consistent with the findings of the independent Audit.

315
316 **8.0 CONTRACTOR REPRESENTATIONS AND WARRANTIES.**

317 **8.1 DDI Warrantees and Representations.** During the term of this Contract,
318 DDI warrants, represents and covenants that all information provided or submitted to the
319 City regarding the proposed use of all the City Funds being granted by the City to DDI
320 pursuant to this Contract for described programs shall be accurate and true. DDI
321 represents that it is an organization described by Section 501(c)(6) of the Internal
322 Revenue Code and that it has provided the City with a valid, un-revoked letter from the
323 Internal Revenue Service that it is such an organization.

324
325 **8.2 No Liens or Encumbrances** -- The execution, delivery and performance of
326 this Contract by Contractor does not and will not, with or without the giving of notice or
327 the lapse of time, or both, (i) result in any violation of its constitutional documents; (ii)
328 result in a breach of, or conflict with, any of the terms or provisions of, or constitute a

329 default under, or result in the modification or termination of, or result in the creation or
330 imposition of any encumbrance upon any of its properties or assets pursuant to any
331 indenture, mortgage, note, contract, commitment or other contract or instrument to which
332 it is a party; or (iii) violate any existing applicable law, rule, regulation, judgment, order
333 or decree of any governmental agency or court, domestic or foreign, having jurisdiction
334 over it or its assets.

335

336 **9.0 CITY LOGOS AND BRANDING.**

337 **9.1 Use of City Logo or Brand** -- Contractor shall include the City of
338 Durham's name and/or logo in all communications with respect to BID Services
339 provided, which communications are produced during the Term. The style of presentation
340 (text and/or logo, font size, tec.) shall be determined by the Contractor. Provided,
341 however, at a minimum the following statement (where applicable) shall be inserted:
342 "Funding for this product/service has been provided by the City of Durham." It is
343 generally expected that when another person or entity is identified in the communication
344 as a sponsor, donor, or contributor with respect to the same BID Services, and that
345 person's or entity's logo appears in the communication, the City's logo would also
346 appear. When the style of presentation is based on the amount of financial support
347 provided, the City's name and/or logo shall be treated equally with other supporters
348 providing similar financial support, and shall be based on the total amount of City funds
349 received and to be received pursuant to this Contract by the Contractor.

350

351

352 **10.0 EXHIBITS**

353 The following Exhibits are made a part of this Contract:

354 Exhibit A - "Scope of BID Services" containing _____ pages; and,

355 Exhibit B -- "BID District Services Budget for FY-2013" containing 1 page;

356 In case of conflict between an exhibit and the text of this Contract excluding the
357 exhibit, the text of this Contract shall control.

358

359 **11.0 TERMINATION PROVISIONS.**

360 **11.1 Termination for Convenience ("TFC") by City** (a) Procedure. Without
361 limiting any party's right to terminate for breach, the parties agree that the City may,
362 without cause, and in its discretion, terminate this Contract for convenience by giving the
363 Contractor at least a 90-day advanced written notice that refers to this section ("TFC
364 Notice"). TFC shall be effective at the time indicated in the notice but at least 90-days
365 from the date of the receipt of the TFC Notice. (b) Obligations. Upon TFC, all
366 obligations that are still executory on both sides are discharged except that any right
367 based on prior breach or performance survives, and the indemnification provisions shall
368 remain in force. At the time of TFC Notice or as soon afterwards as is practical, the
369 Contractor shall provide a final accounting and verification of all direct contractual costs
370 and charges to be incurred by Contractor as a result of TFC, including SGI Contract and
371 any other subcontractor termination costs and charges. (c) Payment. Within 20 days
372 after the TFC Notice date, the City shall pay the Contractor one hundred dollars as a TFC
373 fee; provided, however, the City shall not be required to pay a TFC fee in the event of
374 non-renewal of this Contract as described in Section 3. Within 20 days after the TFC
375 effective date, the City shall pay the Contractor for all BID Services performed except to

376 the extent previously paid for. BID Services shall be paid for in accordance with the
377 method (unit prices, hourly fees, etc.) to be used for payment had the BID Services been
378 completed except to the extent it would be inequitable to either party. Such payment to
379 the Contractor may include the costs and charges related to reasonable equipment
380 amortization obligations to SGI and any other subcontractor(s) but only over the
381 remaining Term of this Contract, including any possible extensions. Such payment for
382 reasonable equipment amortization obligations shall not exceed (i) \$65,000.00, if
383 termination occurs during the first one-year of the Term or the City does not renew this
384 Contract after the first one-year term; (ii) \$43,333, if the City renews this Contract for
385 one additional one-year term and terminates this Contract during such renewal term; or
386 (iii) \$21,667, if the City renews this Contract for a second one-year term and terminates
387 this Contract during such second renewal term. If the BID Services were to be paid for on
388 a lump-sum basis, the City shall pay the part of the lump sum that reflects the percentage
389 of completion attained for that BID Service. The Contractor shall not be entitled to any
390 payment because of TFC except as stated in this section, whether on the basis of
391 overhead, profit, damages, other economic loss, or otherwise.

392
393 11.2 Termination for Convenience by Contractor. (a) Procedure. Without
394 limiting any party's right to terminate for breach, the parties agree that the Contractor
395 may, without cause, and in its discretion, terminate this Contract for convenience by
396 giving the City at least a 90-day advanced written notice that refers to this section ("TFC
397 Notice"). TFC shall be effective at the time indicated in the notice but at least 90-days
398 from the date of the receipt of the TFC Notice. (b) Obligations. Upon TFC, all
399 obligations that are still executory on both sides are discharged except that any right
400 based on prior breach or performance survives, and the indemnification provisions shall
401 remain in force. At the time of TFC Notice or as soon afterwards as is practical, the
402 Contractor shall provide a final accounting and verification of all direct contractual costs
403 and charges to be incurred by Contractor as a result of TFC, excluding any costs,
404 expenses or charges that may be incurred beyond the effective date of the TFC (e.g., the
405 City shall not pay Contractor for any costs, expenses or charges related to equipment
406 amortization obligations to subcontractor(s) beyond the effective date of TFC). (c)
407 Payment. Within 20 days after the TFC Notice date, the Contractor shall pay the City
408 one hundred dollars as a TFC fee. Within 20 days after the TFC effective date, the City
409 shall pay the Contractor for all BID Services performed except to the extent previously
410 paid for. BID Services shall be paid for in accordance with the method (unit prices,
411 hourly fees, etc.) to be used for payment had the BID Services been completed except to
412 the extent it would be inequitable to either party. If the BID Services were to be paid for
413 on a lump-sum basis, the City shall pay the part of the lump sum that reflects the
414 percentage of completion attained for that BID Service. The Contractor shall not be
415 entitled to any payment because of TFC except as stated in this section, whether on the
416 basis of overhead, profit, damages, other economic loss, or otherwise.

417
418 **12.0 CONTRACTOR INSURANCE**

419 Contractor shall maintain insurance not less than the following:

- 420
421 Commercial General Liability, covering:
422 • Premises/operations

- 423 • Products/completed operations (two years minimum, from project
- 424 completion)
- 425 • Broad form property damage
- 426 • Contractual liability
- 427 • Independent contractors, if any are used in the performance of this
- 428 Contract
- 429 • City of Durham must be named additional insured, and an original of the
- 430 endorsement to effect the coverage must be attached to the certificate (if
- 431 by blanket endorsement, then agent may so indicate in the GL section of
- 432 the certificate, in lieu of an original endorsement)
- 433 • Combined single limit not less than \$1,000,000 per occurrence, with an
- 434 annual aggregate on not less than \$2,000,000.
- 435

436 Commercial Auto Liability, covering:

- 437 • Symbol 1, all vehicles
- 438 • Combined single limit of \$1,000,000
- 439 • City of Durham must be named additional insured
- 440

441 Workers' Compensation Insurance, covering:

- 442 • Statutory benefits;
- 443 • Covering employees; covering owners partners, officers, and relatives
- 444 (who work on this Contract) (this must be stated on the certificate)
- 445 • Employers' liability, \$1,000,000
- 446 • Waiver of subrogation in favor of the City of Durham
- 447

448 Insurance shall be provided by:

- 449 • Companies authorized to do business in the State of North Carolina
- 450 • Companies with Best rating of A-, VII or better.
- 451

452 Insurance shall be evidenced by a certificate:

- 453 • Providing notice to the City of not less than 30 days prior to cancellation
- 454 or reduction of coverage
- 455 • Certificates shall be addressed to:
- 456 City of Durham, North Carolina
- 457 Attention: (your name and address)
- 458

459 **13.0 INDEMNIFICATION**

460 **13.1 Indemnification.** To the maximum extent allowed by law, DDI shall
461 defend, indemnify, and save harmless Indemnitees from and against all Charges that arise
462 in any manner from, in connection with, or out of this Contract as a result of acts or
463 omissions of DDI or subcontractors or anyone directly or indirectly employed by any of
464 them or anyone for whose acts any of them may be liable. In performing its duties under
465 this subsection “13.1,” the Contractor shall at its sole expense defend Indemnitees with
466 legal counsel reasonably acceptable to City.

467
468 **13.2 Definitions.** As used in subsections “13.1” above and “13.3” below --
469 “Charges” means claims, judgments, costs, damages, losses, demands, liabilities, duties,

470 obligations, fines, penalties, royalties, settlements, and expenses (included without
471 limitation within “Charges” are (1) interest and reasonable attorneys' fees assessed as
472 part of any such item, and (2) amounts for alleged violations of sedimentation pollution,
473 erosion control, pollution, or other environmental laws, regulations, ordinances, rules, or
474 orders -- including but not limited to any such alleged violation that arises out of the
475 handling, transportation, deposit, or delivery of the items that are the subject of this
476 Contract). “Indemnitees” means City and its officers, officials, independent contractors,
477 agents, and employees, excluding the Contractor.

478
479 **13.3 Other Provisions Separate.** Nothing in this section shall affect any
480 warranties in favor of the City that are otherwise provided in or arise out of this Contract.
481 This section is in addition to and shall be construed separately from any other
482 indemnification provisions that may be in this Contract.

483
484 **13.4 Survival.** This section shall remain in force despite termination of this
485 Contract (whether by expiration of the term or otherwise) and termination of the services
486 of the Contractor under this Contract.

487
488 **13.5 Limitations of the Contractor’s Obligation.** If this section is in, or is in
489 connection with, a contract relative to the design, planning, construction, alteration, repair
490 or maintenance of a building, structure, highway, road, appurtenance or appliance,
491 including moving, demolition and excavating connected therewith, then subsection
492 “13.1” above shall not require the Contractor to indemnify or hold harmless Indemnitees
493 against liability for damages arising out of bodily injury to persons or damage to property
494 proximately caused by or resulting from the negligence, in whole or in part, of
495 Indemnitees.

496
497 **13.6 Notice and Cooperation.** Contractor shall notify the City promptly of
498 any claim or complaint that may arise from Contractor’s obligations under this Contract.
499 Contractor agrees to provide full and complete cooperation in addressing notices of
500 potential claims or complaints against Contractor or the Indemnitees.

501
502 **14.0 RELATIONSHIP OF THE PARTIES**

503 It is the express intention of the Parties hereto that Contractor and its
504 subcontractors is and shall be deemed an independent contractor under this Contract and
505 that no partnership shall exist between the City and Contractor (including its
506 subcontractors). Contractor shall have full discretion in determining the method for
507 performing its duties and obligations under this Contract and shall be fully responsible
508 for payment of any income taxes, Social Security taxes, unemployment compensations
509 taxes, workers’ compensation insurance premiums and other taxes with respect to itself,
510 its employees and its subcontractors. This Contract does not constitute Contractor as the
511 agent, legal representative or employee of the City for any purpose whatsoever.

512
513 **15.0 MISCELLANEOUS PROVISIONS**

514 **15.1 Livable Wage.** (a) In the event of a finding by the City Manager of City
515 or a judicial officer that any Service Worker has been paid less than the compensation to
516 which the Service Worker is entitled under the City’s Livable Wage ordinance, the

517 Contractor shall make restitution to the Service Worker for the amount due. The
518 Contractor shall also pay liquidated damages to the City in the amount of Fifty Dollars
519 (\$50.00) per day for each employee so underpaid, provided, however, that these damages
520 shall not be assessed for wage underpayment violations to any individual which amount
521 to a total of less than One Dollar (\$1.00) in any payroll period. Should a Service Worker
522 be found to have been discriminated against for seeking to enforce the provisions of the
523 City’s Livable Wage ordinance, and if the Service Worker has been terminated from
524 employment, he or she shall be reinstated upon an order to do so from the City Manager
525 or a judicial officer. A flyer stating the City of Durham’s Livable Wage amount shall be
526 posted at the workplace of the Contractor and all subcontractors in a location easily seen
527 by all employees. The Contractor agrees to comply with applicable provisions of the
528 ordinance, including but not limited to its severability provisions. Definitions of terms in
529 this paragraph are stated in the ordinance. “Service Contractor” includes DDI and all of
530 its subcontractors.

531

532 (b) The terms and provisions of Section 15 shall be null and void if the Durham
533 Livable Wage ordinance is terminated or repealed and the obligations of DDI under the
534 above section shall be modified if and to the extent that the Durham Livable Wage
535 ordinance is modified.

536

537 **15.2 Equal Opportunity/Equity Assurance.** The provisions of this section
538 15.2 shall apply only to contracts of \$100,000 or more but shall not apply to the SGI
539 Contract.

540

541 **15.2.1 General Requirements.**

542

543 (a) Contractor shall meet with the Director of the City’s Department of
544 Equal Opportunity/Equity Assurance (EO/EA) annually to discuss potential
545 contracting opportunities for goods and services for small disadvantaged
546 businesses certified by the City (SDBEs).

547

548 (b) The Director may set project specific goals as the Director
549 determines to be generally applicable under Article III of Chapter 18 (as amended
550 from time to time) in City contracting.

551

552 (c) In all solicitations for which goal(s) are established, Contractor
553 will not enter into contracts for goods or services without first soliciting bids from
554 SDBEs and requiring bidders to submit a Participation Plan to meet the goal(s).
555 Bidders must state their SDBE participation in a manner like that required by
556 bidders on contracts to be awarded by the City. If a bidder fails to achieve the
557 goal(s), the bidder must submit documentation to Contractor of its good faith
558 efforts to achieve the goal(s) within two working days after bid opening.
559 Contractor shall take all reasonable actions needed to see that bidders comply
560 with this subsection. Contractor shall make bids and documentation of good faith
561 efforts available to the Director.

562

563 (d) Contractor will notify the Director of EO/EA of upcoming
564 contracting opportunities to ascertain the availability of SDBEs that might be
565 capable of supplying the pertinent goods or services. Each such notice shall be
566 given in a manner and schedule so that the SDBEs will have a reasonable amount
567 of time to respond.
568

569 (e) Contractor shall comply with all applicable provisions of Article
570 III of Chapter 18. The failure of Contractor to comply with that chapter shall be a
571 material breach of contract which may result in the rescission or termination of
572 this Contract and/or other appropriate remedies in accordance with the provisions
573 of that chapter, this Contract, and State law. The Participation Plan submitted by
574 Contractor in accordance with that chapter is binding on Contractor.
575

576 (f) Section 18-59(f) of Article III of Chapter 18 provides, in part, “If
577 the City Manager determines that [Contractor] has failed to comply with the
578 provisions of [this Contract], the City Manager shall notify [Contractor] in writing
579 of the deficiencies. [Contractor] shall have 14 days, or such time as specified in
580 [this Contract], to cure the deficiencies or establish that there are no deficiencies.”
581 It is stipulated and agreed that those two quoted sentences apply only to
582 [Contractor’s] alleged violations of its obligations under Article III of Chapter 18
583 and not to [Contractor’s] alleged violations of other obligations.
584

585 **15.2.2 Definitions.** In this document, words, including “SDBE” and the
586 “Director” shall have the meaning assigned in Article III of Chapter 18, unless the
587 context requires otherwise. “Article III of Chapter 18” means Article III of
588 Chapter 18 of the Durham City Code (Equal Business Opportunities Ordinance).
589

590 **15.3 Non-Waiver.** No action or failure to act by the City shall constitute a
591 waiver of any of its rights or remedies that arise out of this Contract, nor shall such action
592 or failure to act constitute approval of or acquiescence in a breach thereunder, except as
593 may be specifically agreed in writing.
594

595 **15.4 Severability.** Any provision of this Contract that is prohibited or
596 unenforceable shall be ineffective to the extent of such prohibition or unenforceability
597 without invalidating the remaining portions of this Contract.
598

599 **15.5 Notices.** All notices and other communications required or permitted by
600 this Contract, unless otherwise provided for in this Contract, shall be in writing and shall
601 be given either by personal delivery, fax, or certified United States mail, return receipt
602 requested, addressed as follows:
603

604 To the City:
605 City Manager
606 City of Durham
607 101 City Hall Plaza
608 Durham, NC 27701
609 Fax (919) 560-4949.

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With a copy to:
Director of the Office of Economic and Workforce Development
City of Durham
101 City Hall Plaza
Durham, NC 27701
Fax (919) 560-4986

To the Contractor:
Downtown Durham, Inc.

With a copy to:

15.6 Change of Address. Date Notice Deemed Given. A change of address, fax number, or person to receive notice may be made by either party by notice given to the other party. Any notice or other communication under this Contract shall be deemed given at the time of actual delivery, if it is personally delivered or sent by fax. If the notice or other communication is sent by United States mail, it shall be deemed given upon the third calendar day following the day on which such notice or other communication is deposited with the United States Postal Service or upon actual delivery, whichever first occurs.

15.7 Performance of Government Functions. Nothing contained in this Contract shall be deemed or construed so as to in any way estop, limit, or impair the City from exercising or performing any regulatory, policing, legislative, governmental, or other powers or functions.

15.8 Compliance with Law. In performing all of their respective obligations under this Contract, the Contractor and the City shall comply with all Legal Requirements.

15.9 City Policy. THE CITY OPPOSES DISCRIMINATION ON THE BASIS OF RACE AND SEX AND URGES ALL OF ITS CONTRACTORS TO PROVIDE A FAIR OPPORTUNITY FOR MINORITIES AND WOMEN TO PARTICIPATE IN THEIR WORK FORCE AND AS SUBCONTRACTORS AND VENDORS UNDER CITY CONTRACTS.

657 **15.10 EEO Provisions.** In this section, “the Contractor” means the Contractor,
658 and “this Contract” means this Contract. During the performance of this Contract the
659 Contractor agrees as follows:

660
661 **15.10.1** The Contractor shall not discriminate against any employee or
662 applicant for employment because of race, color, religion, sex, national origin,
663 political affiliation or belief, age, or handicap. The Contractor shall take
664 affirmative action to insure that applicants are employed and that employees are
665 treated equally during employment, without regard to race, color, religion, sex,
666 national origin, political affiliation or belief, age, or handicap. Such action shall
667 include but not be limited to the following: employment, upgrading, demotion,
668 transfer, recruitment or advertising, layoff or termination, rates of pay or other
669 forms of compensation, and selection for training, including apprenticeship. The
670 Contractor shall post in conspicuous places, available to employees and applicants
671 for employment, notices setting forth these EEO provisions.
672

673 **15.10.2** The Contractor shall in all solicitations or advertisements for
674 employees placed by or on behalf of the Contractor, state that all qualified
675 applicants will receive consideration for employment without regard to race,
676 color, religion, sex, national origin, political affiliation or belief, age, or handicap.
677

678 **15.10.3** The Contractor shall send a copy of the EEO provisions to each
679 labor union or representative of workers with which it has a collective bargaining
680 Contract or other contract or understanding.
681

682 **15.10.4** In the event of the Contractor's noncompliance with these EEO
683 provisions, which Contractor fails to cure after the City gives Contractor notice of
684 such noncompliance, the City may cancel, terminate, or suspend this Contract, in
685 whole or in part, and the City may declare the Contractor ineligible for further
686 City contracts.
687

688 **15.10.5** Unless exempted by the City Council of the City of Durham, the
689 Contractor shall include these EEO provisions in every purchase order for goods
690 to be used in performing this Contract and in every subcontract related to this
691 Contract so that these EEO provisions will be binding upon such subcontractors
692 and vendors.
693

694 **15.11 No Third Party Rights Created.** This Contract is intended for the
695 benefit of the City and Contractor and not any other person.
696

697 **15.12 Modifications. Entire Contract.** A modification of this Contract is not
698 valid unless signed by both parties and otherwise in accordance with requirements of law.
699 Further, a modification is not enforceable against the City unless the City Manager or a
700 deputy or assistant City Manager signs it for the City. This Contract contains the entire
701 Contract between the parties pertaining to the subject matter of this Contract. With
702 respect to that subject matter, there are no promises, contracts, conditions, inducements,

703 warranties, or understandings, written or oral, expressed or implied, between the parties,
704 other than as set forth or referenced in this Contract.

705

706 **15.13 Assignment. Successors and Assigns.** Without the City’s written
707 consent, the Contractor shall not assign (which includes to delegate) any of its rights
708 (including the right to payment) or duties that arise out of this Contract; provided,
709 however, Contractor may subcontract certain clean and safe services to SGI. The City
710 Manager may consent to an assignment without action by the City Council. Unless the
711 City otherwise agrees in writing, the Contract and all assignees shall be subject to all of
712 the City’s defenses and shall be liable for all of the Contractor’s duties that arise out of
713 this Contract and all of the City’s claims that arise out of this Contract. Without granting
714 the Contractor the right to assign, it is agreed that the duties of the Contractor that arise
715 out of this Contract shall be binding upon it and its heirs, personal representatives,
716 successors, and assigns.

717

718 **15.14 City’s Manager’s Authority.** To the extent, if any, the City has the
719 power to suspend, terminate or amend this Contract or the Contractor’s services under
720 this Contract, that power may be exercised by the City Manager without City Council
721 action.

722

723 **15.15 Principles of Interpretation.** In this Contract, unless the context requires
724 otherwise: The singular includes the plural and the plural the singular. The pronouns “it”
725 and “its” include the masculine and feminine. References to statutes or regulations
726 include all statutory or regulatory provisions consolidating, amending, or replacing the
727 statute or regulation. References to contracts and Contracts shall be deemed to include
728 all amendments to them. The word “shall” is mandatory.

729

730 **15.16 North Carolina Right to Work.** The parties hereto agree and understand
731 that the law in effect as of the date of this Contract provides that North Carolina is a right
732 to work state and that the City is prohibited from collective bargaining. The parties agree
733 that changes in those laws shall not affect the obligations of the parties to comply with
734 this Contract.

735

736 **15.17 Arm’s Length Transaction.** The Parties agree that this Contract is the
737 result of arm’s length negotiations, and that any ambiguity or uncertainty herein, if any,
738 shall not be interpreted against either party.

739

740 **15.18 Choice of Laws.** The validity and construction of this Contract shall be
741 determined in all respects in accordance with the laws of the State of North Carolina.

742

743 IN WITNESS WHEREOF, the City and the Contractor have caused this Contract
744 to be executed under seal themselves or by their respective duly authorized agents or
745 officers.

746

747

748 By the CITY OF DURHAM:

749

Contract for City Services and Programs for the Downtown Durham
Municipal Service District—FY-2013

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_____ By: _____

Preaudit Certification, if necessary

By DOWNTOWN DURHAM, INC.

By: _____

Title of officer: _____

(Affix corporate seal.)

State of _____ ACKNOWLEDGMENT BY
County of _____ DOWNTOWN DURHAM, INC.

I, a notary public in and for the aforesaid county and state, certify that
_____ personally appeared
before me this day and stated that he or she is (strike through the inapplicable:)
chairperson/ president/ chief executive officer/ vice-president/ assistant vice-president/
treasurer/ chief financial officer of DOWNTOWN DURHAM, INC., a corporation, and
that by authority duly given and as the act of the corporation, he or she signed the
foregoing Contract with the City of Durham and the corporate seal was affixed thereto.
This the _____ day of _____, 20____.

Notary Public

My commission expires:
