RESOLUTION AUTHORIZING THE CITY MANAGER TO EXECUTE AN AMENDED AGREEMENT FOR MANAGEMENT OF THE CITY OF STOCKTON MARINA COMPLEX WITH WESTREC MARINA MANAGEMENT, INC. TO INCLUDE REVISIONS REQUIRED BY THE STATE OF CALIFORNIA, DEPARTMENT OF BOATING AND WATERWAYS

On October 20, 2009, the City Council adopted a Resolution (09-0341) authorizing the City Manager to execute a Marina Management Agreement with Westrec Marina Management, Inc. of Encino, California for the management of the City of Stockton Marina Complex; and

The State of California, Department of Boating and Waterways as a primary funding source for the Marina must approve the Marina Management Agreement; and

The State of California, Department of Boating and Waterways was provided copies of the Marina Management Agreement but was unable to respond prior to council action on October 20, 2009; and

On February 1, 2010 the City of Stockton received the changes required by the State of California, Department of Boating and Waterways; and

The required changes have been incorporated into an Amended Agreement; now, therefore,

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF STOCKTON, AS FOLLOWS:

1. The Amended Agreement with Westrec Marina Management, Inc. to manage and operate the Marina Complex including the Stockton Marina, Morelli Park Boat Launch Facility and Dry Stack Storage Facility including revisions required by the State of California, Department of Boating and Waterways is hereby approved.

2. The City Manager is hereby authorized to execute the Amended Agreement, substantially in the form as included as Exhibit A to the Staff Report, and incorporated herein by this reference. All other Exhibits and Attachments to the original Agreement are incorporated by this reference and remain unchanged.
3. The City Manager is hereby authorized and directed to take whatever actions are appropriate to carry out the purpose and intent of this Resolution.

PASSED, APPROVED and ADOPTED ________________ JUN 29 2010 ______________________.

ANN JOHNSTON, Mayor
of the City of Stockton

ATTEST:

KATHERINE GONG METTNET
City Clerk of the City of Stockton
AMENDED AGREEMENT FOR THE MANAGEMENT OF THE CITY OF STOCKTON DOWNTOWN MARINA FACILITIES

This Amended Agreement for the Management of the City of Stockton Downtown Marina Facilities (the “Agreement”) is made and entered into by and between the City of Stockton, a California municipal corporation (the "City") and Westrec Marina Management, Inc. a corporation existing under the laws of the State of California, whose current address is 16633 Ventura Boulevard, 6th Floor, Encino, California 91436 (hereinafter referred to as "Westrec").

RECITALS

City is empowered and authorized to manage, operate and maintain the Marina Facilities (as herein defined);

City desires to secure the highest level of management, operation and maintenance of the Marina Facilities in the best interest of the citizens of the City of Stockton;

City desires Westrec to administer, manage and otherwise supervise the operation of the Marina Facilities and the implementation of certain Capital Improvements that may be necessary or desirable during the term of this Agreement;

City issued a Request for Proposal for Marina Complex Operations (the "City RFP") with the general goals and objectives of:

A. Providing experienced management to the Marina Facilities;
B. Providing a wide array of services and improving the service of the Marina Facilities to the boating community and its visitors;
C. Complying with the City's obligations as a borrower under State of California Agreement No. 01-102-303 with the Department of Boating and Waterways (DBW), as approved on March 12, 2007, and as a grantee under State of California Agreement No. 02-101-317 with DBW, as approved on February 26, 2003;
D. Maximizing the use of the Marina Facilities by providing open and accessible facilities for the use and enjoyment of the general public on equal and reasonable terms; and
E. Protecting the City's capital investment in the Marina Facilities through the exercise of high standards of management, operation and maintenance;

Westrec responded to the City RFP (the "Westrec Response") and has indicated that it has significant specialized knowledge, expertise and experience in the management, operation and maintenance of a diverse mix of marina properties and in providing a wide array of services at various marinas;

City and Westrec desire to provide for the highest level of management, operation and maintenance of the Marina Facilities in order and to provide first-class boating services to the boating community and to assure the status of the Marina Facilities as major waterfront facilities in the region;
NOW THEREFORE, in consideration of the mutual covenants, terms, conditions, privileges and obligations herein set forth and intending themselves to be legally bound thereby, the City and Westrec, agree as follows:

ARTICLE I
FORM OF AGREEMENT

Section 1.1 This Agreement shall be known as the "Agreement for the Management, Operation and Maintenance of the Stockton Downtown Marina Facilities".

Section 1.2 This Agreement consists of the terms and conditions set forth in this Agreement and in the Exhibits hereto. In the event of any conflict between or among any of the terms and conditions set forth in this Agreement and those in the Exhibits which cannot be resolved so as to give full effect to both or all provisions, the terms and conditions of this Agreement shall control over any differing terms and conditions that may be found or contained in the Exhibits.

ARTICLE II DEFINITIONS

Unless otherwise specifically indicated or the context otherwise requires in this Agreement, the following words and phrases shall have the following meanings when used herein:

"ADA" shall mean the Americans with Disabilities Act and related local, state and federal laws.

"Affiliate" of a specified person shall mean a person or entity that directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, the specified person or entity. For purposes of this definition, "control" shall mean employment, agency relationship or contractual relationship with a person, or the ownership either directly or indirectly of equity securities or other ownership interests, which represent more than 5% of the voting power in the controlled entity.

As specifically related to Westrec, "Affiliate" shall mean: (1) a person related to an executive, director, principal officer or manager of Westrec by blood or marriage; (2) general partner, employee, officer or director of Westrec; (3) a partnership, one or more of the general partners of which is a partner in Westrec; (4) an organization, one or more of the partners, shareholders, directors or officers of which are partners, shareholders, directors or officers of Westrec; (5) an organization in which Westrec has more than a 5% ownership interest, directly or indirectly; or (6) a person or organization which has more than a 5% ownership interest in Westrec, directly or indirectly.

"Agreement" shall mean this Agreement between the City and Westrec for the management, operation, maintenance and construction management of the Marina Facilities.

"Agreement Administrator" shall have the meaning given that term in Section 3.8.

"Annual Plan" shall have the meaning given that term in Section 8.2.

"Applicable Law" shall mean any and all applicable laws, rules, regulations, Code (including the City Code) or orders of any federal, state or local governmental body or authority, and any applicable judicial order.

"Approved Budget" shall have the meaning given that term in Section 8.3.2.

"Audit" shall have the meaning given that term in Section 12.3.
"Authorized Representative" shall mean any officer, agent, employee of or independent contractor retained or employed by Westrec acting within the scope of authority of his or her employment. With respect to the City. "Authorized Representative" shall mean those individuals designated from time to time by the City’s Agreement Administrator.

"Bankruptcy Code" shall mean 'the Bankruptcy Reform Act of 1978, as amended.

"Capital Equipment" shall mean those items of personal property included in the Capital Plan.

"Capital Expenditures" shall mean all expenditures in accordance with the Capital Plan, as amended annually as part of the Annual Plan approval process and from time to time pursuant to Section 9.1.

"Capital Improvements" shall have the meaning given that term in the Capital Plan and shall include all building additions, alterations or any other improvements to be paid for by the City from the Marina Improvement Fund or other funds allocated by the City and included in the Capital Plan.

"Capital Improvement Account" shall have the meaning given that term in Section 8.4.9.

"Capital Plan" shall have the meaning given that term in Section 9.1.

"City" shall mean the City of Stockton and its officers, employees, agents or Authorized Representatives.

"City Code" shall mean the Stockton Municipal Code.

"City General Counsel" shall mean the City Attorney.

"City Indemnities" shall have the meaning given that term in Section 17.1.

"City RFP" shall have the meaning given that term in the preambles of this Agreement.

"Customer Service Program" shall have the meaning given that term in Section 2.3 of Exhibit A.

"Daily Deposit" shall have the meaning given that term in Section 8.4.6.

"Days" shall mean calendar days.

"DBW" shall mean the State of California, Department of Boating and Waterways.

"Depository" shall mean the place or places in which Westrec shall maintain its bank account or accounts for the receipt of all gross revenues, fees, commissions and other monies, checks, drafts or other commercial instruments tendered as payment to Westrec.

"Emergency Expenditure" shall have the meaning given that term in Section 3.12.7.

"Event of Default" shall have the meaning given that term in Section 14.1.

"Fiscal Year" shall mean a specified year beginning on July 1 and ending on June 30.

"GAAP" shall mean generally accepted accounting principles, consistently applied.

"Gross Operating Revenues" shall mean, for any Fiscal Year, any and all monies derived from the operation, use or condition of the Marina Facilities Term of this Agreement accrued in that Fiscal Year in accordance with generally accepted accounting principles as indicated in the Audit, not including: (i) taxes collected, if any, imposed by any governmental bodies, ii) interest or investment income accrued in the Revenue Account, Working Capital Account, Capital Improvements Account.

"Incentive Component" shall have the meaning set forth in Sections 7.1 and 7.3.

"Initial Term" shall mean that period commencing as of October 1, 2009 and ending as of September 30, 2014, subject to early termination or cancellation in accordance with the terms and conditions set forth herein.

"Marina Complex" shall mean Marina Facilities as described below.

"Marina Facilities" shall mean the Downtown Stockton Marina, slips, guest docks, Morelli
Park boat launch, dry stack storage facility, and all buildings, structures, facilities, connections, equipment, parking areas, and all other improvements for use in connection therewith, as shown on Exhibit 1.

"Marina Facilities Records" shall have the meaning given that term in Section 11.2.
"Marina Improvement Fund" shall mean the fund for financing Capital Improvements at the Marina Facilities. In each Fiscal Year, $100,000 (or such other amount as determined by the City Agreement Administrator and/or City Council) shall be used to finance Capital Improvements to the Marina Facilities.
"Management Fee" shall have the meaning set forth in Section 7.1,
"Monthly Cash Flow Report" shall have the meaning given that term in Section 8.4.2.
"Monthly Cash Summary" shall have the meaning given that term in Section 8.4.6.
"Net Operating Income" shall mean, for a Fiscal Year, the difference between (a) the Gross Operating Revenues derived from the Marina Facilities for such Fiscal Year and (b) the Operating Expenses attributable to the Marina Facilities for such Fiscal Year.
"Non-Reimbursable Expenses" shall have the meaning given that term in Section 8.3.1.
"O&P Manual" shall have the meaning given that term in Section 2.4 of Exhibit A.
"Operating Expenses" shall mean, for any Fiscal Year or portion thereof during the Term of this Agreement, any and all of the following: (i) any and all necessary or incidental and reasonable expenditures or obligations of whatever kind or nature incurred directly or indirectly or accrued in the management, operation, maintenance or promotion of the Marina Facilities, as indicated in the Audit, (ii) the Management Fee and (iii) possessory interest taxes. "Operating Expenses" shall not include: (i) expenditures which have not been included in an Approved Budget; (ii) the cost of procuring and maintaining the Fidelity Bond referred to in Section 4.1.31; (iii) the non-reimbursable expenses of Westrec; (iv) (Reserved) (v) Capital Expenditures, including Emergency Expenditures incurred in accordance with Section 3.7.7, which are payable out of the Marina Improvement Fund; (v) depreciation expenses; (vi) costs and expenses incurred directly by the City that are not included in the Approved Budget unless such costs and expenses are made with the prior approval of Westrec; (vii) the costs of wages, salaries and benefits for employees of Westrec and the City unless such costs are included in the Approved Budget; (viii) any expenses relating to Westrec personnel based in Westrec's corporate headquarters or its regional field locations who have no direct responsibility with respect to this contract; (ix) severance for Westrec employees, (x) costs and expenses incurred by the City; (xi) any suit, action or proceeding brought against Westrec based on Westrec's tortuous conduct, breach of contract or otherwise and Westrec is not the prevailing party; (xii) any suit, action or proceeding filed or instituted against City by Westrec; (xiii) Westrec's general home office overhead and capital expenses not directly and primarily related to this Agreement; (ix) costs incurred due to the willful misconduct or gross negligence of Westrec or its agents, employees or subcontractors; (xv) any income taxes or other taxes which are not directly related to this Agreement which are owed by Westrec; and (xvi) relocation expenses of Westrec employees unless such relocation expenses are approved in the Annual Budget or otherwise approved of in writing by the City.

"OSHA" shall mean the Occupational Safety and Health Act of 1970.
"Parking Lot" shall mean parking lots located within the security fences of the Marina Facilities as indicated by the shaded areas in the maps attached as Exhibit 1 hereto.
"Permits" shall have the meaning given that term in Section 17.2.
"Monthly Invoice" shall have the meaning given that term in Section 8.4.5.
"Regional Manager" shall have the meaning given that term in Section 12.1.
"Renewal Term" shall mean the five (5) year period beginning immediately after the Initial Term, or the first Renewal Term, as applicable, for which this Agreement may be renewed at the sole option of the City in accordance with Section 5.1, subject to early termination or cancellation in accordance with the terms and conditions set forth herein.
"Repair and Maintenance Plan" shall have the meaning given that term in Section 3.12.6.
"Review Committee" shall mean a review committee as may be established from time to time by the City.
"Term" shall mean the Initial Term and any Renewal Term.
"Westrec" shall mean Westrec Marina Management Inc" a California corporation and its officers, employees, agents or Authorized Representatives.
"Working Capital" shall have the meaning given that term in Section 8.4.4.
"Working Capital Account" shall have the meaning given that term in Section 8.4.8.

ARTICLE III
ENGAGEMENT OF WESTREC; RIGHTS AND RESPONSIBILITIES
Section 3.1 Engagement and General Scope. The City hereby engages Westrec to manage, operate and maintain the Marina Facilities as provided herein, and Westrec hereby accepts such engagement ("Engagement"). Westrec shall perform the Engagement according to the highest industry standards of operation of comparable marinas and marina facilities. The City and Westrec agree that the City will not pay any expenses that exceed the Approved Budget, unless Westrec receives the prior written approval of the City or through section 8.4.5. The City and Westrec in executing this Agreement agree to comply with the terms, conditions, and obligations that are set forth in State of California Agreements No. 01-102-330 and No. 02-101-317, and to which the City and DBW are parties. The City acknowledges that Westrec is in the business of managing marinas both for its own account and for others. It is hereby expressly agreed that Westrec and its Affiliates may continue to engage in such activities, may manage facilities other than those presently managed by it and may in the future engage in other business which may compete indirectly with the activities of the City.

Section 3.2 Management Agent for the Marina Facilities. Subject to the terms of this Agreement, City hereby engages Westrec to act as the sole and exclusive managing agent of the City to manage, operate and maintain the Marina Facilities and Westrec hereby undertakes and agrees to act as such managing agent in connection therewith and subject to the funding made available by the City. Westrec agrees to perform all of the services set forth in this Agreement, and to comply with the provisions of this Agreement and the Scope of Services attached hereto as Exhibit A. It is the intent of the parties that Westrec will have authority over the management, operation and maintenance of the Marina Facilities subject to policies and guidelines established by, or which may hereafter be established by, the City. Westrec agrees to not charge a fee or combination of fees totaling more than $13.00 to include, but not limited to, the following activities within the Marina Facilities: vessel launch and retrieval, parking, entry, day-use, and water-use. However, that total fee may be increased annually in accordance with percentage changes in the United States Bureau of Labor Statistics Price Index (CPA) using the U.S. City Average (1982-84 = 100) for July 2001 (177.5) as the base for any such adjustment. An adjustment exceeding the annual percentage change in the CPI shall be made only after Westrec obtains the written approval of the City and Boating and Waterways Commission.
Westrec agrees that vessel launching and retrieval, and related parking, entry, day-use, and water-use activities shall be open and accessible to the general public whenever the marina facilities are open. Nothing contained in this section shall be construed to limit the City's budgetary discretion.

Section 3.3 Property Rights. The ownership of the Marinas Facilities, including, but not limited to real estate, technical and office equipment and facilities, furniture, displays, fixtures, vehicles, moorings, docks, launch ramps and other property constituting the Marina Facilities shall remain with the City. Ownership rights in such property shall not accrue to Westrec, unless specifically provided for in this Agreement. The ownership of consumable assets (such as office supplies and cleaning materials) purchased with Operating Revenues or City funds shall remain with the City, but such assets may be utilized and consumed by Westrec in the performance of the Engagement under this Agreement. The ownership of data processing programs and software owned by the City shall remain with the City, and the ownership of data processing programs and software owned by Westrec shall remain with Westrec.

Westrec shall not take or use, for its own purposes, proprietary information such as customer lists or similar materials prepared or developed by the City or Westrec for use in connection with the Engagement, unless written consent is granted by the Authorized Representative. Ownership of equipment, furnishings, materials, fixtures and other personal property purchased by Westrec with Operating Revenue or City funds for use at and for the Engagement shall vest in the City automatically and immediately upon purchase or acquisition. The assets of the City as described herein shall not be pledged, liened, encumbered or otherwise alienated or assigned other than in the ordinary course of business of the Project without the prior approval of the City.

Section 3.4 Management Operations. Subject to the provisions of this Agreement, Westrec shall perform Marina management activities at the Marina Facilities. The management activities include management, administration, operation, maintenance and repair of the Marina Facilities. Westrec shall manage the total work effort associated with the operation, maintenance, repair and all other services required to ensure adequate and timely completion of all activities. Westrec shall schedule and arrange work so as to cause the least interference with normal City business. Subject to the limitations of the Approved Budget, Westrec shall furnish such management and supervisory services in a manner which equals or exceeds the industry standards of operation of comparable marina facilities. Comparative standards for the industry shall apply to the maintenance of all mechanical equipment. Subject to the provisions of this Agreement, Westrec shall:

(i) Employ, supervise and direct all employees Westrec requires to perform the services contemplated by this Agreement.

(ii) Subject to the other provisions of this Agreement and the Scope of Services, establish and adjust fees, prices, rates and rate schedules for use of the Marina Facilities and all licenses, agreements or contracts and any other commitments for the Marina Facilities to be negotiated by Westrec in the course of its management, operation or maintenance of the Marina Facilities. In determining such prices and rate schedules, Westrec shall evaluate comparable charges for similar goods and services at similar and/or competing facilities in order to establish annually in the budget a list of prices and rates. Westrec shall consult with and provide justification to the
City for any rate adjustment at the Marina Facilities. All Marina Facilities rates and fees must be approved by the City Council, with approval being expected to occur concurrently with the annual approval of the Approved Budget.

(iii) Westrec shall implement a dress code and provide on-site personnel with uniforms and name tags to be worn at all times while on duty.

Section 3.5 Administration of Marina-Related Agreements. Subject to the provisions of this Agreement, Westrec shall administer and negotiate licenses, occupancy agreements, marketing agreements and service contracts (including, without limitation, engineering, telephone and exterminator services), staffing and personnel needs, and other services which are reasonably necessary for the Marina Facilities and not in conflict with the Scope of Services and Approved Budget. Such licenses, agreements and contracts shall be executed by Westrec in its own name without prior approval by the City unless:

(i) The term of such license, agreement or contract extends beyond the Term of this Agreement, or crosses a fiscal year, Section 8.4.10 Non-Funding, in which case such license, agreement or contract may only be entered into if approved and executed by the City; or

(ii) Any such license agreement or contract is entered into between Westrec and an Affiliate, or could be construed as self-dealing or negotiated on other than an arms-length basis. Any such license, agreement or contract shall be at terms and for prices customarily charged for comparable goods and services in the City of Stockton and competitive within the industry, and is subject to approval by the City following the submission by Westrec of documentation setting forth the nature of the compensation arrangement and evidencing the competitive nature of the goods and services involved. The City shall have fifteen (15) days from the day of receipt of such documentation from Westrec to approve or disapprove any such license, agreement or contract. The failure of the City to approve such license, agreement or contract by the end of the fifteenth (15th) day shall be deemed to be a denial.

Section 3.6 Promotion. Subject to Section 2.11 of Exhibit A, Westrec shall engage in such marketing, solicitation or promotional activities as may be calculated to develop the full potential of the Marina Facilities in consultation with the City and in conformity with any marketing guidelines or goals provided by the City.

Section 3.7 Marina Rules. Westrec shall: (i) use diligent efforts to cause all users of the Marina Facilities to adhere to posted marina rules; (ii) strictly enforce such rules; and (iii) comply with such rules. Should violations of the posted marina rules lead to termination of a permit or license the Agreement Administrator will be notified immediately. Westrec shall be responsible for executing instructions from the Agreement Administrator. To the extent permitted by law, Westrec shall have the authority to revoke or refuse to grant permits, impound boats, provide notices of fines and collect fines.

Section 3.8 Agreement Administrator. Upon execution of this Agreement, the City shall name an Authorized Representative who shall have the authority to give all approvals for the City while administering this Agreement, with the exception of items which, in the judgment of the City, require approval by the City Manager or City Council or which are subject to DBW approval. This Authorized Representative shall also be known as the "Agreement Administrator" but shall have the power to designate other Agreement Administrators from time to time and for
specified purposes. The Agreement Administrator: (i) shall be the liaison between Westrec and the City on all matters relating to this Agreement; (ii) shall be responsible for seeing that any information supplied by Westrec is properly distributed to the appropriate City departments and personnel; (iii) shall be responsible for the day-to-day monitoring and assessment of the quality of services and maintenance of the Marina Facilities provided by Westrec and contract compliance by Westrec; and (iv) shall be authorized to call upon other City departments in carrying out the administration of his or her duties.

Section 3.9 Rate and Fee Structure. Notwithstanding any other provision contained herein and subject to the fee limitations set forth in Section 3.2, Westrec agrees that all rates and fees for use of the Marina Facilities must be approved by the City. However, Westrec shall submit by March 1 of each year recommendations based on documented market analysis and may submit other recommendations to the City regarding modifications to the rate and fee structure for use at the Marina Facilities and the City's approval thereof shall not be unreasonably withheld. Westrec acknowledges that the City must provide the market analysis to Department of Boating and Waterways by April 1 each year. In no event shall a decision by the City to accept or reject Westrec's recommendations have any effect on the calculation of the fees for which Westrec may qualify.

Section 3.10 Hours of Operation. Notwithstanding any other provision contained herein, Westrec agrees that all rights to determine the hours of operation for the Marina Facilities are reserved solely by and for the City throughout the Term of this Agreement. However, Westrec shall submit annual recommendations and may submit other recommendations to the City regarding the modifications to the hours of operation for the Marina Facilities. In no event shall a decision by the City to accept or reject Westrec's recommendations have any effect on the calculations of the fees for which Westrec may qualify. Westrec specifically acknowledges that the hours of operation (and any changes thereto) for the Marina Facilities may need to be approved by the City Council.

Section 3.12 Maintenance and Management of Equipment, Facilities and Supplies.

Section 3.12.1 Performance Standard. Subject to budgetary limitations, Westrec shall maintain the Marina Facilities and any improvements thereto in accordance with maintenance standards equal to or exceeding those of comparable marina and marina facilities.

Section 3.12.2 City Provided Facilities, Communication and Utilities. City shall furnish existing Marina Facilities to Westrec for Westrec's use in performing Marina management functions. Renovations and alterations to existing facilities, including infrastructure improvements to utility systems serving the Marinas shall be the responsibility of Westrec, through its administration of the Marina Improvement and City Capital Improvement Funds. City facilities and property shall not be altered in any way without the approval of the City.

Section 3.12.3 Westrec Furnished Items, Within the Approved Budget. Westrec shall provide all equipment, materials and services, other than those provided by City, required to perform its responsibilities under this Agreement. All replacement units, repair and alterations of facilities and equipment shall be new or rebuilt and shall be compatible with that which is
existing and shall be of the same quality as or better than, the original. Westrec shall not dispose of City equipment without the prior written approval of the City. Any Westrec supplied boats used regularly for the management of the Marinas shall be provided docking space in the Marina at no additional cost to Westrec.

Section 3.12.4 Equipment and Inventory. Westrec, as managing agent of the City, shall rent, lease or purchase all event-related and ordinary equipment, repair parts, materials, supplies and tools for the operation and maintenance of the Marina Facilities. Westrec may purchase supplies on a regional or national basis to take advantage of economies of scale in purchasing. By November 30 of each calendar year during the Term of this Agreement City and Westrec shall conduct a joint inventory of all equipment and supplies on hand at the Marina Facilities. Westrec shall prepare a written report of such inventory and provide a copy of each report to the Agreement Administrator by December 31 of each calendar year during the Term of this Agreement. City shall review and approve each inventory report. Each inventory report shall document each item that is at the Marina Facilities, determine the condition of each item and propose a long-term capital replacement program for items where appropriate. During the Term of this Agreement, Westrec shall maintain a reasonable inventory of equipment and supplies at levels at least equivalent to the best management practices employed by similar marinas and marina facilities. Supplies on hand shall, at a minimum, include miscellaneous supplies for the operation of the Marina Facilities; maintenance and equipment parts for vehicles, docks, launch ramps; and supplies and materials for marina maintenance, repair and upkeep. Westrec shall keep a record of the location and condition of all City equipment in its inventory. Included in Westrec's annual inventory report shall be a classification of the condition and required replacement status of all equipment. Employees shall be required to sign out City equipment.

Section 3.12.5 Control Procedures. Westrec shall account for City property by periodically verifying such property. Westrec shall perform this task on at least a quarterly basis or as requested by the Agreement Administrator.

Section 3.12.6 Maintenance Schedule. As part of the Annual Plan submission process set forth in Section 8.2, Westrec shall prepare for the approval of the City a schedule of operational repairs and maintenance to be accomplished each year (the "Repair and Maintenance Plan"). The Repair and Maintenance Plan shall set out the estimated annual operational repair and maintenance expenditures in all areas associated with maintaining the Marina Facilities. Deviations from the plan in excess of ten percent (10%) shall require prior review and written approval of the City. The Repair and Maintenance Plan shall include Westrec's recommendations for maintaining and repairing items for the Fiscal Year and shall be accompanied by an estimate of the cost of such items and projects.

Section 3.12.7 Emergency Expenditures. Westrec shall have the right to make Emergency Expenditures, but only in strict conformity with the procedures set forth in this Section 3.12.7. An "Emergency Expenditure" is defined as expenditure necessary to correct or repair a condition, which in the reasonable judgment of Westrec if not corrected or repaired immediately, would create at the Marina Facilities an imminent danger to persons or property and/or an unsafe condition threatening persons or property. Westrec shall obtain prior approval
from the City before making any emergency Expenditure whenever possible. If prior approval of an Emergency Expenditure is not reasonably obtainable from the City, Westrec shall immediately notify, or attempt to notify, the Agreement Administrator of the situation and is thereafter authorized to incur an Emergency Expenditure to correct the situation on a temporary basis. An Emergency Expenditure to correct the situation on anything other than a temporary basis shall require prior approval from the City. City shall reimburse Westrec from the Marina Complex Enterprise Fund for the full amount of any Emergency Expenditure in excess of the contingency amount set forth herein, provided that Westrec adheres to the notification and approval procedures set forth in this Section 3.12.7 and amounts in the Marina Improvement Fund are available to cover the Emergency Expenditure.

Section 3.12.8 Motor Vehicle and Equipment Fuels. Westrec shall be responsible for fueling all vehicles, boats and equipment used by Westrec in the performance of its obligations; provided that the cost of such fuels shall be deemed an operating expense for which Westrec may be reimbursed according to the terms hereof.

Section 3.12.9 Right of Entry Reserved. The Agreement Administrator or any City employees designated by him or her, shall have the right to enter all portions of the Marina Facilities to inspect the same, to check or observe the performance of Westrec of its obligations under this Agreement, to install, remove, adjust, repair, replace or otherwise handle any equipment, utility lines, or other matters in, on, or about the Marina Facilities, or to do any act or thing which the City may be obligated or have the right to do under this Agreement or otherwise. DBW and its employees, at any reasonable time during the term of this Agreement, may enter all portions of the Marina Facilities to determine if the facilities are maintained in accordance with the DBW Maintenance Guidelines. Nothing contained in this paragraph is intended or shall be construed to limit any other rights of the City under this Agreement. Nothing in this Agreement shall impose or be construed to impose upon the City any independent obligation to construct or maintain or make repairs, replacements, alterations, additions or improvements or create any independent liability for any failure to do so.

Section 3.12.10 Revenue Enhancement. Westrec will use its best efforts to enhance the revenue from the Marina Facilities and operate the Marina Facilities efficiently, provided that Westrec can demonstrate their contribution to the enhancement of the City’s goals. Westrec will not undertake, and the City reserves the right to prohibit, any measure that would, in the judgment of the City, be inconsistent with the City’s goals and objectives.

ARTICLE IV
NEGATIVE COVENANTS

Section 4.1 Negative Covenants of Westrec. Except as otherwise provided herein, Westrec shall not do any of the following:

(i) engage in any abuse or improper action with respect to the permit application or fee remittance process or violate or permit the violation of any provision of law;

(ii) manage, operate or maintain the Marina Facilities in any manner or for any purpose other than as set forth herein;
(iii) engage in or omit any act which would, to an ordinarily prudent person in the position of Westrec, be reasonably foreseeable to cause or result in damage to the Marina Facilities;
(iv) abandon the Marina Facilities during the Term of this Agreement;
(v) knowingly use or occupy or knowingly permit the Marina Facilities or any part thereof to be used or occupied for any unlawful, disreputable or any ultra-hazardous use or operate or conduct the business of the Marina Facilities in any manner known to constitute a nuisance of any kind; and
(vi) materially violate any Applicable Law included but not limited to the ADA, in connection with performing its obligations under this Agreement.
(vii) engage in any activity, or otherwise do anything that is in violation of Agreement No. 01-102-303 with DBW, as approved on March 12, 2007, and as a grantee under State of California Agreement No. 02-101-317 with DBW, as approved on February 25, 2003.

Section 4.2 Negative Covenant of the City. City shall not interfere with Westrec's right and benefits hereunder so long as Westrec is in compliance with the terms of this Agreement.

ARTICLE V
TERM

Section 5.1 Initial Term and Renewal Terms. The Initial Term of this Agreement shall commence as of October 1, 2009 and shall end on September 30, 2014, unless earlier terminated pursuant to the provisions of this Agreement. Unless written notice is given by either party prior to expiration of the Initial Term (or first Renewal Term), the Initial Term shall be extended on the same terms and conditions herein contained for up to two (2) additional five (5) year periods commencing on the day following the end of the Initial Term or the first Renewal Term, as applicable, and ending five (5) years thereafter.

Section 5.2 Penalties and Without Cause. Westrec specifically acknowledges and agrees that City may decide not to extend this Agreement beyond the Initial Term or the first Renewal Term, as applicable, without penalty or further obligation, and such decision is in the City's sole and absolute discretion and without the need for showing cause or reason of any kind.

Section 5.3 Termination for Convenience. Notwithstanding any other provision contained herein, either party may terminate this Agreement, without penalty or further obligation at any time, upon ninety (90) days prior written notice to the other party.

ARTICLE VI
RESERVED

ARTICLE VII
COMPENSATION

Section 7.1 Total Compensation. In consideration of the performance of its duties and services
hereunder, City shall pay Westrec a management fee (the "Management Fee") consisting of the following two components: (a) for each Fiscal Year (or portion thereof) during the Term of this Agreement, the fixed fee described in Section 7.2 (the "Fixed Component"), and (b) for each Fiscal Year (or portion thereof) during the Term of this Agreement, any incentive fee to which Westrec becomes entitled as set forth in Section 7.3 (the "Incentive Component"), said Incentive Component (but not the Fixed Component) being subject to City's right of set off described in Section 13.3. No compensation shall be earned following date of termination of this Agreement.

Section 7.2 Fixed Component of Management Fee. Monthly payment equal to six percent (6%) or three thousand dollars ($3,000.00), whichever amount is greater of the previous month's Gross Operating Revenues, subject to reconciliation at year end based on audited financial statements. A monthly Accounting and Reporting fee, in an amount designated in the approved annual budget, is due on the first day of each month during the term of this agreement.

Section 7.3.1 Incentive Component of Management Fee. After successful completion of year three of the Term, an Incentive Fee equal to twenty percent (20%) of any year-to-year increase in Net Operating Income based on audited financial statements.

Section 7.3.2 Payment of Incentive Component. The Net Operating Income of each Fiscal Year during the Term of this Agreement shall be determined from the Audit pursuant to Sections 11.3 and 11.4. The audited Net Operating Income figure for a Fiscal Year shall be used to determine the amount of any Incentive Component, as applicable. During each Fiscal Year, Westrec shall be eligible to receive 25% of its Incentive Compensation for that year based upon the projected Net Operating Income as of October 15, an additional 25% of its Incentive Component as of January 31, and an additional 25% of its Incentive Component as of April 30. Within fifteen (15) days after the completion of the Audit by Westrec and acceptance for such Audit by the City during the Term of this Agreement, City shall pay Westrec the remaining 25% of its Incentive Component, as reconciled based on previous payments during the Fiscal Year as compared to the Audited Net Operating Income.

Section 7.4 Proration of Management Fees. Notwithstanding any other term herein, the Management Fees shall be prorated for any partial Fiscal Year.

Section 7.5 Other Marina Facilities. The aforementioned provisions of this Article VII shall apply to Westrec's compensation for the management services provided under this Agreement with respect to the Marina Facilities and shall not apply to any Marina facilities that may be the subject of any subsequent agreements.

ARTICLE VIII
FUNDING, BUDGETS AND BANK ACCOUNTS

Section 8.1 Generally. As set forth in this Article VIII, Westrec agrees to prepare certain plans, budgets and invoices and create certain bank accounts, for the purposes of authorizing and remitting funds relating to the Marina Facilities. City reserves the right to review and approve
any and all budgets and funding plans relating to the Marina Facilities. Westrec agrees to make best efforts, but with minimal duplication of effort, to set up accounts and reports for ease of transmitting information to the Department of Boating and Waterways as per the provisions set forth in Exhibit A, Attachment B.

Section 8.2 Annual Plan. Westrec shall provide to the City on or before March 1 of each year for its review, revision and approval, an annual plan (the "Annual Plan") comprised of a management plan as described in this Section 8.2 and annual budget as described in Section 8.3 for the next Fiscal Year. The "Management Plan" shall include all information regarding Westrec's anticipated operations for such Fiscal Year, including the Repair and Maintenance Plan prepared pursuant to Section 3.12.6, requested Capital Expenditures pursuant to Section 9.1 and the anticipated costs thereof, anticipated events at the Marina Facilities, anticipated marketing and promotional activities, and requested non-capital equipment and furnishings purchases. The Annual Plan shall be subject to review, revision and approval by the City. Following such review and revision, Westrec shall incorporate such revisions into the Annual Plan and submit the Annual Plan no later than May 1 of each year for approval by the City. Upon approval by the City, the Annual Plan shall constitute the operating program for Westrec for the following Fiscal Year. Annual expenditures for operations and maintenance for the Marina Facilities shall not exceed amounts set and budgeted by the City in its formal budgeting process as provided in Section 8.3, except as provided for in Section 2.12.7 Emergency Expenditures, or as provided for in section 8.4.5 Invoices for Operations.

Section 8.3 Annual Budget. As part of the Annual Plan as provided in Section 8.2, Westrec shall prepare, with assistance and advice of the City, and submit to the City, a proposed annual budget for the Marina Facilities which includes an annual operating budget and an annual cash flow budget for the next Fiscal Year to meet the scope and services and objectives under this Agreement. Westrec shall implement the Approved Budget and use commercially reasonable efforts to ensure that the cost of operating the Property shall not exceed the Approved Budget.

Section 8.3.1 Form and Contents. The proposed annual budget shall show a month by month projection of income, expenses, capital expenditures, reserves and other nonrecurring items. The proposed annual budget shall contain appropriate line items for Gross Operating Revenues, Operating Expenses, and Net Operating Income. Expenditures under this Agreement by Westrec shall only be authorized and reimbursable if such expenditures are included in the annual budget submitted and approved as provided herein or are Emergency Expenditures, or as provided for in Section 8.4.5 Invoices for Operations. The proposed annual budget shall include all revenues, costs and expenses related to the management, operation and maintenance of the Marina Facilities, including costs and expenses under this Agreement. Notwithstanding the foregoing, expenses incurred by Westrec in supplying corporate and administrative services (unless such services are budgeted services), the cost of the fidelity bond (as described in Section 4.1.31), costs for which the City is indemnified under Section 15.6 (collectively, the "Non-Reimbursable Expenses") shall not be reimbursable expenses.

Section 8.3.2 Timing. The proposed annual budget is subject to review and approval by the City and review and adoption by the City Council pursuant to the requirements of the City Code and applicable law. By June 1 of each year during the Term of this Agreement, the City shall notify
Westrec of any changes to the proposed annual budget for the succeeding Fiscal Year submitted by Westrec. After incorporating such changes, if any, as well as any subsequent changes approved by the City pursuant to this Section 8.3.2., such proposed annual budget shall be the approved budget for the following Fiscal Year as such approved budget may be supplemented or modified pursuant to this Section 8.3 (the "Approved Budget").

Section 8.3.3 Supplemental Budgets. Westrec may submit, at any time, a proposed supplemental operating budget or supplemental cash flow budget to the City for review, revision and approval. If in conjunction with the preparation of a proposed supplemental operating or cash flow budget or otherwise, Westrec proposes any project, event or activity which was not included in the approved Annual Plan and Approved Budget, Westrec must submit for approval by the City a written proposal with respect thereto, including proposed costs and methods of financing the project, event or activity.

Section 8.3.4 Budget Modifications. Modifications to the Approved Budget during the Fiscal Year, including those changes anticipated by Section 8.3.3, shall be subject to prior written approval of the City and may be subject to approval of the City Council. Any expenditure which is not included in the Approved Budget, other than Emergency Expenditures or as provided for in Section 8.4.5 Invoices for Operation, shall be the financial responsibility of Westrec unless approved by the City.

Section 8.4 Monthly Reports, Settlement and Remittance.

Section 8.4.1 Agreement Administrator. The Agreement Administrator shall meet at least once a month with Westrec's Regional Manager to discuss financial and non-financial operational and fiscal issues. In accordance with Section 8.4.3 hereof, all financial reports which are required by this Agreement to be produced monthly shall be submitted to the Agreement Administrator, electronically when available.

Section 8.4.2 Preparation of Monthly Financial and Service Reports. Westrec's accounting records and reports will be provided in Westrec's standard report format. Westrec shall prepare and submit the following reports and statements, which reports shall (i) be on either a cash, modified cash, or accrual basis (and not a combination of the foregoing) and, (ii) be prepared on a standard accounting platform supported by Westrec. The Financial Reports will include the following:
   a. Balance Sheet
   b. Actual vs. Budget Operating Statement
   c. Accounts Receivable Aging Report
   d. Cash Receipts Detail, "Monthly Cash Summary"
   e. Current Month General Ledger
   f. Prior Month Bank Reconciliation

Section 8.4.3 Timing for Provision of Monthly Reports. On a monthly basis, Westrec will provide City access to a report summarizing the financial operations of the Marina Facilities. It is jointly agreed that the purpose of these reports is to monitor actual expenditures by Westrec as compared to those expenditures anticipated in the Approved Budget. On the 30th day of each
month, Westrec shall provide the Agreement Administrator monthly financial reports which include operations for the previous month ended on the 30th. This report may incorporate the reports required by Sections 8.4.2.

Section 8.4.4 Working Capital. Commencing with the effective date of this Agreement and on the first (1st) business day of each Fiscal Year quarter thereafter during the Term of this Agreement, City shall advance to Westrec as "Working Capital" an amount equal to that amount indicated in the expense section of the Approved Annual Budget for that quarter to the extent those expenses in the Approved Annual Budget would be included in clause (i) of the definition of "Operating Expenses", together with any amounts required by Section 8.4.5, and including the Fixed Component of the Management Fee pursuant to Section 7.2.2.

Section 8.4.5 Invoices for Operations. No later than the twentieth (20th) day prior to the end of each Fiscal Year quarter during the Terms of this Agreement, commencing with the effective date of this Agreement, Westrec shall submit to City an invoice (the "Quarterly Invoice") setting forth all actual Operating Expenses incurred and Gross Operating Revenues generated in connection with the operation of the Marina Facilities for the immediately preceding quarter, by month, together with a comparison of such actual Operating Expenses to the Approved Budget. The Quarterly Invoice shall include the following:

1. A credit for the amount of the "Working Capital" advanced by the City to Westrec pursuant to Section 8.4.4 above for such immediately preceding quarter.
2. A credit for the gross operating revenues for each month of the preceding quarter, including an estimate for the final month of the quarter in which this Invoice is due.
3. A debit for each month of operating expenses.
4. The sum of items i – iii above shall offset the amount of Working Capital due for the subsequent quarter pursuant to Section 8.4.4.

If the Quarterly Invoice reflects a balance due by City to Westrec, then the balance due to Westrec shall be added to the amount of Working Capital advanced for the next succeeding quarter pursuant to Section 8.4.4. If the Quarterly Invoice reflects a credit due City by Westrec, the amount of such credit shall reduce the quarterly advance from the City to Westrec for the succeeding quarter.

If the aggregate balance due Westrec exceeds the Approved Budget for the Fiscal Year Quarter by more than ten percent (10%), Westrec shall submit a budget variance analysis to the City with an explanation for the same. Invoices shall be paid by the City per the terms set forth in Section 8.4.4 except if there is a budget variance exceeding twenty percent (20%). If there is a budget variance exceeding 20%, the invoices shall be paid following analysis of the variance but in no event more than twenty-five (25) business days following submission.

Section 8.4.6 Monthly Settlement Statement; Remittances of Revenues Collected. Westrec shall collect, hold in trust for the benefit of City, and deposit daily ("Daily Deposit") all other sums derived from the operation of the Marina Facilities by Westrec. In accordance with Section 8.4.2, Westrec shall give City a monthly summary of daily deposits ("Monthly Cash Summary"). If there is a difference between the total amount shown on a Monthly Cash Summary and the amount of all Daily Deposits made during the time period covered by such
Monthly Cash Summary, Westrec shall be immediately liable for the amount of such difference. As part of the Monthly Cash Summary, Westrec shall submit to the City such other financial information as the City may request from time to time. If at any time during the Fiscal Year Quarter the cash balance exceeds 20% of the amount advanced per Section 8.4.4, Westrec will remit the excess cash to the City.

Section 8.4.7 Invoices Upon Termination. On or before the thirtieth (30th) day of the month immediately following the month in which this Agreement expires or is terminated, Westrec shall submit a Monthly Invoice for the month of such expiration or termination. In the final Monthly Invoice reflects a balance due by City to Westrec, then City shall remit the balance to Westrec within thirty (30) days after receipt by City of the final Audit, which supports such final Monthly Invoice. If the final Monthly Invoice reflects a credit to City by Westrec, the amount of such credit shall be remitted by Westrec to City and such remittance shall accompany the Monthly Invoice (subject to reconciliation, if necessary, based on such final Audit). This paragraph shall survive the expiration or sooner termination of this Agreement.

Section 8.4.8 Westrec Bank Accounts. Westrec shall establish special interest bearing commercial bank account(s) as a fiduciary for the City and solely for the benefit and ownership of the City in financial institution(s) in the City of Stockton, separate from any other accounts of Westrec or City, that shall be known and designated as (1) the "Operating Expense Account" (the "Working Capital Account") and (2) the "Marina Capital Improvement Expense Account" (the "Capital Improvement Account"). Any and all Westrec signatories on these accounts shall be appropriately bonded to the satisfaction of the City. Copies of such bonds, which shall include DBW as a party who may make demand on the bond, shall be sent annually to DBW, no later than December 31 of each year. It is agreed that Westrec shall not be held liable in the event of bankruptcy or failure of a depository. Bank service charges, if any, on such accounts, shall be considered Operating Expenses. Interest or investment income accrued in such accounts shall not be part of Gross Operating Revenues. Westrec shall submit to the City copies of all bank statements concerning the accounts established by it upon receipt thereof from the depository banks. Westrec may, upon approval by the City, utilize multiple accounts in different financial institutions for each account. City shall provide to Westrec a list of investment products and accounts approved by the City for deposit of funds held in trust for the benefit of the City.

(i) Working Capital Account. The Working Capital Account shall be used for the funds, receipts, revenues and disbursements attributable to Westrec's management operation and maintenance of the Marina Facilities and shall be depository (excluding ordinary petty cash) for all such funds, receipts, revenues and disbursements. Notwithstanding any other provision of this Agreement, only those expenses properly chargeable as Operating Expenses under the Approved Budget, but not Capital Expenditures which pursuant to Section 9.1 will be excluded from the definition of "Operating Expenses," shall be payable from the Working Capital Account.

(ii) Capital Improvement Account. The Capital Improvement Account shall be used solely as a depository for funds and disbursements for Capital Improvements whether from the Marina Improvement Fund or City Capital Improvement Funds and disbursements as are made available by the City in its sole discretion pursuant to Section 9.1 and shall be the sole depository for such funds. Westrec shall give City prompt notice of all amounts deposited to or
withdrawn by it from the Capital Improvement Account.

Section 8.4.9 Accounts Separate From City Accounts. It is understood and agreed by the parties that the Operating Account, the Capital Improvement Account and Retail Sales Account are and shall be separate and distinct from other accounts which are owned and maintained solely and exclusively by City or on City's behalf by any local government entity. Neither the ownership nor the maintenance of such other City accounts shall be affected or controlled in any manner by this Agreement.

Section 8.4.10 Non-Funding. The City shall have no obligation to pay Operating Expenses for a Fiscal Year occurring during the Term of this Agreement unless and until the City shall have made an appropriation to fund the operation of the Marina Facilities for such Fiscal Year, provided that from and after such appropriation by the City, the City shall pay expenses within the meaning of clauses (i) and (ii) of the definition of "Operating Expenses" for such Fiscal Year to the extent described in this Agreement. Any failure by the City to make an appropriation with respect to any Fiscal Year occurring during the Term hereof shall not be construed as a breach of or Event of Default under this Agreement by the City and shall be without penalty, additional payments, or other charges to the City of any kind whatsoever and no right of actions for damages or other relief shall accrue to the benefit of Westrec, its subcontractors, successors or assigns in respect thereof. Westrec's inability to perform services hereunder or discharge any of its responsibilities hereunder due to such complete non-funding shall not be considered a breach of, or Event of Default under this Agreement by Westrec and shall be without penalty, additional payments, or other charges to Westrec of any kind whatsoever. Westrec shall have no obligation to take any actions which require the expenditure by Westrec of funds (except for Non-Reimbursable Expenses) if such funds are not available to Westrec, either as budgeted expenses or as otherwise made available, for the performance of Westrec's duties under this Agreement, and Westrec shall not be responsible for failing to perform its duties hereunder to the extent such failure is attributable to such shortfall in funds. In the event the City fails to appropriate any funds to be used pursuant to this Agreement for a Fiscal Year during the Initial or any Renewal Term, Westrec may give prompt written notice to the City that this Agreement will terminate pursuant to Section 13.1 effective sixty (60) days after receipt of such notice as a result of such non-appropriation.

ARTICLE IX
ANNUAL PLAN FOR CAPITAL IMPROVEMENTS AND EQUIPMENT

Section 9.1 Annual Capital Improvement and Equipment Plan. By March 1 of each year of this Agreement, Westrec shall submit to the City a capital improvement and equipment plan ("Capital Plan") in which Westrec shall create a list of all capital improvements ("Capital Improvement") and Capital Equipment it reasonably believes are needed in order to improve Marina operations and service to customers while maximizing Gross Operating Revenues and reducing Operating Expenses of the Marina Facilities. Included in such plan shall be:

(i) a prioritization of and justification for each expenditure for Capital Improvements and Capital Equipment;

(ii) a projection of any additional revenues provided by such expenditures; and
proposed timing for completion of the work and payment. In this plan Westrec shall identify Capital Improvements and Capital Equipment purchases it believes are required not only to optimize revenue-producing and expense reducing goals, but also to identify Capital Improvements and Capital Equipment purchases needed for asset protection, including the protection of structural integrity and the public health.

Section 9.1.2 Installing Capital Improvement and Capital Equipment. The Agreement Administrator shall monitor the progress of work to complete the installation of Capital Improvements and the purchases of Capital Equipment included in the Capital Plan, and, when necessary, review any requests made by Westrec for additional capital expenditures. The Review Committee may annually as part of the preparation of the Annual Plan and from time to time submit recommendations for amending the Capital Plan to the City and, upon approval by the City, the Capital Plan may be amended annually as part of the Annual Plan approval process and from time to time pursuant to this Section. For purposes of amending the Capital Plan annually as part of the Annual Plan approval process and from time to time during the Term of this Agreement pursuant to Review Committee recommendation, the parties hereby acknowledge that all Capital Expenditures will not be included under the definition of "Operating Expenses" unless the Review Committee jointly agrees that all or a portion of the cost of completing that item will be included in the definition of "Operating Expenses." Notwithstanding the definition of "Operating Expenses" set forth herein, if a Capital Expenditure is approved by the City outside of the Annual Plan approval process and no monies in the Marina Improvement Fund are available to fund such Capital Expenditure, then such Capital Expenditure will be included in the definition of "Operating Expenses" unless the cost of such Capital Expenditure exceeds $15,000 per item.

As part of the Annual Plan approval process for each Fiscal Year as set forth in Section 8.2, Westrec shall provide the City with a schedule of items from the Capital Plan that can reasonably be anticipated as necessary Capital Expenditures for the upcoming Fiscal Year. This schedule of items shall be accompanied by an estimate of the cost of such items. The City shall review and approve said schedule. Westrec shall supervise the implementation of the approved Capital Plan.

Section 9.1.3 Maintenance Compliance with DBW Grant and Loan. Westrec and City shall jointly be responsible to ensure that all capital improvements and maintenance shall comply with the City’s obligations as a borrower under State of California Agreement No. 01-102-303 with the Department of Boating and Waterways (DBW), as approved on March 12, 2007, Exhibit D, and as a grantee under State of California Agreement No. 02-101-317 with DBW, as approved February 25, 2003, Exhibit A, Article 7, Section D.

ARTICLE X
CAPITAL IMPROVEMENTS

Section 10.1 Capital Improvement Project Management. At the option and upon the request requested by the City, Westrec shall be the City’s agent, with respect to, and manager of all facets of any Capital Improvement Project included in the Capital Plan. Westrec will manage
and supervise Capital Project Expenditures during each Fiscal Year for a fee equal to 10% of the hard costs of the Capital Improvement Project as mutually agreed upon by the City and Westrec. Notwithstanding any contrary provision in this Agreement, the City retains the authority to manage and supervise or engage a third party to manage and supervise, any Capital Improvement Project or Capital Expenditure for the Marina Facilities. The City shall retain the sole discretion to determine whether and to what level to transfer funds from the Marina Improvement Fund to the Capital Improvement Account for Projects. City shall in all cases retain ownership of Capital Improvements or Capital Equipment.

Section 10.2 Scheduling. All Capital Improvements shall be scheduled to minimize interference with: (i) Westrec's management, operation and maintenance of the Marina Facilities if reasonably possible; and (ii) City's normal operations and special events occurring on the City's Downtown waterfront.

Section 10.3 City Approval of Capital Improvements. Westrec shall not undertake or contract for any Capital Improvements or purchase any Capital Equipment for the Marina Facilities without the prior written consent of the City, and shall in no cases disperse any funds from the Capital Improvement Account without the written consent of the City.

ARTICLE XI
RECORDS AND AUDITS

Section 11.1 Accounting. Westrec shall maintain full, accurate and complete financial and accounting books, records and reports ("Records") of the management, operation and maintenance of the Marina Facilities under this Agreement and shall use accounting and record systems in accordance with generally accepted accounting principles in the maintenance of such Records.

Section 11.2 Maintenance of Records. Westrec, its vendors and subcontractors and Affiliates, shall keep Records relating to their activities at the Marina Facilities ("Marina Facilities Records"). Westrec shall maintain a system of bookkeeping adequate for its operations hereunder. For these and similar purposes, Westrec may use its own computer software. Any changes to such system shall be subject to the approval of the City. The systems and procedures used to maintain these Records shall also include a system of internal controls which is in accordance with sound business procedures. At the City's or DBW's request, Westrec shall turn over all such Records to the City or DBW at the end of each Fiscal Year within thirty (30) days following the end of such year or the termination of this Agreement, as the case may be.

Section 11.3 Audit. On or before September 30 of each year, Westrec shall furnish to the City and DBW a Balance Sheet, Income Statement, Statement of Profit or Loss, and Statement of Cash Flows for the Marina Facilities for the preceding Fiscal Year, all prepared in accordance with generally accepted accounting principles (GAAP), accompanied by an independent auditor's report prepared by an independent certified public accountant licensed by the State of California, selected by Westrec and approved by the City ("Audit"). Such audit, the cost of which shall be a reimbursable expense subject to the requirements of Articles VIII and X, shall contain
an opinion expressed by the independent auditor of the accuracy of Records kept by Westrec and of amounts due to the City under this Agreement. Such audit shall also provide a certification of Gross Operating Revenues, Net Operating Income and Operating Expenses and the amounts of any Gross Operating Revenues, Net Operating Revenues, Net Operating Income and Operating Expenses from the Marina Facilities. As part of this audit, Westrec shall also require of the independent auditor and provide to the City and DBW an Internal Control Memorandum and Management Letter reporting on accounting controls and procedures of Westrec related to this Agreement at the end of each Fiscal Year. On or before the 120th day following the day on which this Agreement expires, is cancelled or is terminated, Westrec shall cause a comparable audit covering that portion of the Fiscal Year from July 1 up to and including the date of expiration, cancellation or termination to be prepared and submitted to the City and DBW. This audit shall be reviewed and accepted by the City before any expenses shall be remitted to Westrec pursuant to Section 13.3 or otherwise. This paragraph shall survive the expiration or sooner termination or cancellation of this Agreement.

Section 11.4 Additional Audits. The City shall have the right at any time, and from time to time, to cause an audit, comparable to that required by Section 11.3, and in connection therewith or otherwise, to review or cause the review of all of the inventory for the Marina Facilities and Records and Marina Records of Westrec, and the Records and Marina Records of any and all their contractors, subcontractors and vendors, and Affiliates thereof relating to Gross Operating Revenues, Net Operating Income and Operating Expenses including without limitation, sales slips, rental agreements, purchase orders, sales books, cash register tapes, credit card invoices, duplicate deposit tapes and invoices, bank accounts, cash receipts and cash disbursements, bank books, and other evidence of Gross Operating Revenues and Operating Expenses. This additional audit, together with the audit required by Section 11.3, shall collectively be called the "Audit" for purposes of this Agreement and shall be paid out of the Approved Budget. If the City shall exercise its right to have an additional audit made for any Fiscal Year and the Gross Operating Revenues or Operating Expenses shown by Westrec's audit for such Fiscal Year are found to be understated for Gross Operating Revenues or overstated for Operating Expenses by more than ten and one-half percent (10 1/2%), Westrec shall pay to the City the cost of such audit conducted, this Audit shall be reviewed by the City before any incentives shall be paid to Westrec per Section 7.3.2. This paragraph shall survive the expiration or sooner termination or cancellation of this Agreement.

Section 11.5 Access to Records. Westrec shall give the Agreement Administrator or DBW access to Marina Complex Records during normal business hours and upon reasonable advance notice. Should any of the Marina Complex Records be maintained on a computerized system, Westrec shall provide the City or DBW with access, during normal business hours upon reasonable notice, to such Records generated by the computerized system. Westrec shall maintain its Marina Complex Records in an accessible location for City's or DBW review. Westrec shall not reasonably withhold access for any personnel retained to conduct the Audit to review and test any proprietary software and its documentation used by Westrec for bookkeeping and the production of any reports.
ARTICLE XII
PERSONNEL

Section 12.1 General Requirements. Westrec acknowledges that certain personnel are required for the efficient and smooth operation of the Marina Facilities during the Initial Term and any Renewal Term. In that regard Westrec shall select, hire, employ, train, furnish, deploy and supervise the optimum number (to match work requirements and each work classification) of employees who are proficient, knowledgeable, productive and courteous to patrons. Westrec shall ensure that all staff are properly trained, and productive and that all services are delivered in a professional and courteous manner at all times. Westrec shall discipline, and if necessary, discharge any and all personnel working at the Marina Facilities. Westrec shall provide adequately trained "acting personnel" in the event of any employee absences. The City has the right to require Westrec to reassign from the Marina Facilities any employee deemed incompetent, careless, or otherwise objectionable, or any personnel whose actions are deemed to be contrary to public interests or inconsistent with the best interests of the City; however, the City shall not exercise this right arbitrarily, to the extent contrary to applicable laws. Westrec shall furnish all necessary qualified supervision for the performance of management, operation, maintenance and marketing of the Marina Facilities and shall assign to this operation a highly competent, regional manager to direct this operation. The regional manager shall be an individual who is responsible for the:

(i) operation of the Marina Facilities;
(ii) coordination of the Marina Facilities; and
(iii) communication with the City (the "Regional Manager").

Westrec shall secure the approval of the City in advance as to the qualifications of the Regional Manager for this assignment. If at any time the City finds that the Regional Manager is unsatisfactory, and such finding is reported in writing by the City to Westrec, then Westrec shall within thirty (30) days replace that person with one who is satisfactory to the Agreement Administrator. The Regional Manager shall also be responsible for directing the accounting and operational personnel in their compliance with certain of the required reports.

Section 12.2 Dock Master (Marina Inspector). In addition to the other obligations set forth in the RFP, Westrec shall employ an individual who, among other things will be responsible for monitoring the:

(i) adherence to City procedures, rules and regulations;
(ii) reconciliation of permits with moored boats;
(iii) maintenance of equipment and facilities;
(iv) customer service satisfaction levels; and
(v) safety and emergency equipment status (the "Marina Inspector").

The Marina Inspector shall make sure that City procedures are being followed with regard to permit assignments, and will constantly monitor vessel locations to assure that boaters and Westrec employees are in compliance with regulations. Regardless of the responsibilities of the Marina Inspector, Westrec shall have the ultimate and overall responsibility to make sure that City procedures and applicable law are adhered to and strictly followed.

Section 12.3 Background Checks. Westrec shall conduct criminal background checks, including fingerprinting, of all personnel prior to hiring them to work in the Marina Facilities. Westrec shall perform random drug testing of its employees as per Westrec's existing employment policies.
Section 12.4 Supervision. Supervisory personnel shall be on duty at the Marina Facility as necessary for Westrec to fully perform its duties and obligations hereunder.

Section 12.5 Status and Responsibility. Personnel supplied by Westrec shall be employees or contract employees of Westrec and shall not for any purpose be considered to be employees of the City.

Section 12.6 Contractors, Subcontractors, Suppliers, and Vendors. Westrec shall select all vendors, suppliers, contractors and subcontractors with respect to the Marina Facilities and shall select, hire, discharge and supervise all labor and employees which it deems necessary or advisable for the operation (including billing and collections) and maintenance of the Marina Facilities, including attorneys, accountants, consultants and clerical employees. The hiring or retaining of attorneys and accountants shall be subject to the prior approval of the City. Westrec may hire the types and number of personnel as Westrec, in its reasonable discretion, deems appropriate for operation and management of the Marina Facilities. Employees performing work on City's behalf may do so on a full-time or part-time basis. The City understands and acknowledges that some or all of certain persons may be simultaneously engaged by and/or for the account of the City and by and/or for the account of the owners of other marinas managed by Westrec, some of whom may be Affiliates of Westrec and compete with the City. Westrec will allocate the cost of these personnel among such owners on an equitable basis. Westrec shall not be separately reimbursed for the time or cost of its home-office personnel devoted to the City's affairs for the other overhead expenses of Westrec, unless agreed by the parties. In accordance with the relevant provisions of Articles III and IV, Westrec employees acting pursuant to Westrec's direction, shall have the authority to negotiate and execute on behalf of the City such agreements as Westrec deems necessary or advisable for the furnishing of utilities, services and supplies for the maintenance, repair and operation of the Marina Facilities and such other agreements as may benefit the Marina Facilities or be incidental to the matters for which Westrec is responsible hereunder, subject to the City's prior approval for: (a) agreements containing expenditures greater than $15,000; (b) agreements containing a term which extends beyond the Initial Term of this Agreement; or (c) licenses, agreements or contracts entered into between Westrec and an Affiliate or could be construed as self-dealing or negotiated on other than an arms-length basis.

Section 12.7 Compliance with Immigration Laws. Westrec shall comply with the Immigration Reform and Control Act of 1986, and represents and covenants to the City that Westrec, its officers, employees, agents and subcontractors, are lawfully permitted to pursue employment in the United States under applicable federal immigration laws. Westrec shall hold the City harmless as to any fines or other penalties levied against the City for any violation of any immigration laws.

Section 12.8 Adequate Staffing. Westrec shall assign and maintain adequate staff or competent personnel that are fully equipped licensed as appropriate, available as needed, qualified and assigned exclusively to perform the Services. Westrec shall include among its staff the personnel identified above. The level of staffing may be revised from time to time by notice in writing from Westrec to the City and with written consent of the City, which consent the City will not withhold unreasonably. If the City fails to object to the revision within 14 days after receiving
the notice, the revision will be considered accepted by the City.

Section 12.9 General Compliance. Westrec shall comply with the provisions of the City Code and any applicable law, federal statute or regulation, as the same may be amended from time to time, in connection with all employee and personnel matters. Westrec shall comply with any Applicable Law regarding the payment of applicable prevailing wages.

Section 12.10 Salaries and Wages. Westrec and its subcontractors shall pay all salaries and wages due all employees performing Services under the Agreement unconditionally and at least once a month without deduction or rebate on any account, except only for those payroll deductions that are mandatory by law or are permitted under applicable law and regulations. If in the performance of the Agreement, Westrec underpays any such salaries or wages, the City may withhold, out of payments due to Westrec, an amount sufficient to pay to employees underpaid the difference between the salaries or wages required to be paid under the Agreement and the salaries or wages actually paid these employees for the total number of hours worked. The amounts withheld may be disbursed by the City for and on account of Westrec to the respective employees to whom they are due. The parties acknowledge that this section is solely for the benefit of the City and that it does not grant any third party beneficiary rights.

Section 12.11 Assessment. The City shall be entitled to provide Westrec with an assessment and evaluation of Westrec employees and staff. Westrec shall take reasonable steps and actions to address any concerns or issues raised by the City.

Section 12.12 Expenses. Westrec will use its good faith efforts to minimize the cost and expenses associated with its personnel, including hiring of part-time employees, if appropriate.

Section 12.13 Non-Performance. In the event that the City notifies Westrec that it does not believe that a Westrec employee, agent or subcontractor is performing appropriately or to the satisfaction of the City, Westrec shall use its best good faith efforts to resolve the situation.

ARTICLE XIII
DEFAULT AND TERMINATION

Section 13.1 Default. The following shall constitute an event of default ("Event of Default") hereunder:

(i) failure by Westrec to pay any amount due hereunder when due and the continuance of this failure for twenty (20) days after notice by City to Westrec;
(ii) the material violation or breach by Westrec of any law, statute, rule or regulation of a governmental or administrative entity relating to the operation of the Marina Facilities and the continuation of such violation or breach for a period of thirty (30) days after such entity gives notice thereof to Westrec (or sooner if such violation or breach results in the initiation of enforcement proceedings or, in the judgment of the City, gives rise to a dangerous or hazardous condition);
(iii) any preferential treatment of boaters or non-compliance with the established City
permit and fee collection procedures in place by Westrec including but not limited to the
assignment of permits for the boating season or the assignment of boats to moorings,
stall and finger docks and the continuance of this failure for ten (10) days;
(iv) failure by City to transfer to Westrec any funds appropriated by the City Council for
operation of the Marina Facilities when due, and the continuation of this failure for sixty
(60) days after notice by Westrec to City;
(v) failure by Westrec to maintain any of the required insurance or bonds or pay the
premiums therefore when due;
(vi) the admission by Westrec of the inability to pay its respective debts when and as they
become due and the continuance of this failure for twenty (20) days;
(vii) the filing by Westrec of any petitions or proceedings under applicable state or federal
bankruptcy or insolvency law or statute;
(viii) the initiation against Westrec by any creditor of an involuntary petition or proceeding
under any state or federal bankruptcy or insolvency law or statute which petition or
proceeding is not dismissed within sixty (60) days after the date of filing;
(ix) except as permitted by Section 17.19 hereof, the transfer or assignment by Westrec
of its rights and obligations hereunder;
(x) any misrepresentation by Westrec of any material fact and the continuance of this
failure for twenty (20) days;
(xi) the appointment of a receiver for Westrec with respect to all or a portion of their
respective assets;
(xii) a material breach by Westrec of any other provision of this Agreement including, but
not limited to, a failure to meet any deadline for the submission of reports, proposals and
other documents required by any provision of this Agreement and the continuance of this
failure for twenty (20) days after notice by City to Westrec, as applicable; or
(xiii) there is a cessation or deterioration of services for a period that, in the reasonable
judgment of the City, materially and adversely affects the operation of the public services
required to be performed by Westrec and such cessation or deterioration of services is
not cured within ten (10) days after City gives notice to Westrec.

Upon the occurrence of an Event of Default described above, the non-defaulting party may
terminate this Agreement. Notwithstanding the provisions of the Bankruptcy Code, if Westrec
should hereafter file for protection under the bankruptcy laws, Westrec as debtor or any
successor or trustee in bankruptcy, shall have fifteen (15) days to exercise any right granted
by the Bankruptcy Code to assume or reject this Agreement, such fifteen (15) day period being
deemed by the parties hereto to be a reasonable period to exercise such right. If Westrec as
debtor, or any successor or the bankruptcy trustee, fails to timely exercise any right under the
Bankruptcy Code to assume this Agreement, this Agreement shall be deemed to be rejected by
Westrec as debtor or any such successor or bankruptcy trustee.

Section 13.2 Termination for Convenience. Should the City terminate this Agreement for
convenience in whole or in part pursuant to Section 5.3, the City shall only pay for the goods
delivered and accepted, or for contracts approved by the City should there be a termination
clause, and/or services performed prior to the date of such termination. Westrec will not be paid
or reimbursed for any anticipatory profits or for other amounts that have not been earned up to
the date of such termination.
Section 13.3 Effect of Termination. In the event of termination of this Agreement after an Event of Default, any outstanding amount owed to either party shall be remitted no later than thirty (30) days following the ascertainment of the amount due in accordance with the Audit. The City shall pay to Westrec a pro rata portion of any earned Management Fee, less the cost incurred by the City in replacing Westrec. The City may, in its discretion, assume the work theretofore performed by Westrec and see that the same is completed by agreement with another party. Westrec hereby acknowledges that upon termination or expiration of this Agreement, the City is hereby authorized, upon the occurrence of an Event of Default by Westrec or otherwise, at any time and from time to time to setoff and apply any and all monies representing the Management Fee for which Westrec has become eligible in accordance with Section 7.3.1 against any and all losses resulting from such Event of Default with respect to Westrec, whether or not the City shall have made any demand therefore from Westrec.

Section 13.4 Non-Exclusive Remedies. The exercise by the City or Westrec of remedies and rights provided herein shall in no way affect any other right or remedy available to the City or Westrec, except that no form of double recovery shall be allowed. In furtherance and without limiting the foregoing, upon a Westrec Default, the City may (i) terminate this Agreement upon written notice, (ii) seek recourse under any fidelity bond, (iii) perform Westrec obligations hereunder, (iv) withhold payment for services not yet performed, and (v) seek monetary damages (including direct and indirect costs) against Westrec.

Section 13.5 Surrender of Premises. Upon the expiration or cancellation of this Agreement or in the event of a termination of this Agreement, Westrec shall surrender and vacate the Marina Facilities upon the date of such expiration, cancellation or termination. The Marina Facilities and all related equipment, furnishing and other property shall be returned to the City in good repair, reasonable wear and tear excepted. Copies or originals of all reports, records, including financial records, and documents required to be maintained under this Agreement and related to this Agreement shall be immediately surrendered to the City and DBW by Westrec upon such expiration, cancellation or termination. Upon expiration, cancellation or termination of this Agreement, Westrec agrees to provide the City and DBW with a then-current inventory of equipment, furnishings and other property related to the Marina Facilities.

Section 13.6 No Damages For Delay. Neither Westrec nor Westrec's agents, employees or subcontractors are entitled to any damages from the City, nor is any party entitled to be reimbursed by the City, for damages, charges or other losses or expenses incurred by Westrec by reason of delays or hindrances in the performance of the services, whether or not caused by the City.

ARTICLE XIV
REPRESENTATIONS AND COVENANTS

Section 14.1 Organization, Ownership and Affiliates. Westrec represents and covenants that Westrec is a corporation duly organized, validly existing and in good standing under the laws of its jurisdiction of incorporation, and is duly qualified as a corporation and is in good standing in California and in each other jurisdiction in which such qualification is required by law. Westrec has the corporate power and authority to own or hold under lease the properties it purports to
own or hold under lease, to transact the business it transacts and proposes to transact, to execute and deliver this Agreement and to perform its obligations under the provisions hereof and thereof. Westrec hereby represents and warrants that all of the Affiliates of Westrec are listed in their response to the City’s RFP, included in Exhibit A, which also contains a separate listing of all individuals holding an ownership interest of five percent (5%) or more in Westrec, or any corporation, partnership, association, joint venture, common venture, or any other entity contained in the list of Affiliates.

Section 14.2 Authorization. Westrec represents and covenants that the execution and delivery of this Agreement has been duly authorized by all proper actions and proceedings, and this Agreement constitutes the legal, valid and binding obligations of Westrec.

Section 14.3 Conflicts. Westrec represents and covenants that neither the execution, nor the delivery or performance of this Agreement will violate or conflict with any law, rule, regulation, order or judgment of any governmental authority having jurisdiction over Westrec or with any organizational documents, indenture, instrument or agreement by which Westrec is bound.

Section 14.4 Litigation. Westrec represents and covenants that there is no litigation or proceeding pending or, to the best of the knowledge of Westrec, threatened against or affecting Westrec or any circumstance existing which would in any manner materially adversely affect the ability of Westrec to perform its obligations under this Agreement.

Section 14.5 Accuracy of Information. Westrec represents and covenants that no information, certification or reports submitted by Westrec to the City in connection with this Agreement contained, when submitted or as of the date hereof, any material misstatement of fact or failure to state a material fact or any fact necessary to make the information not misleading.

Section 14.6 No Other Activities. Westrec represents and covenants that Westrec shall not engage during the Term of this Agreement in any business or activities with respect to the Marina Facilities that are not directly related to this Agreement, unless otherwise approved in writing by the City.

Section 14.7 Notice of Changes. Westrec represents and covenants that Westrec shall give the City prompt written notice of any changes affecting the continued accuracy of the representations and compliance with the covenants contained in this Agreement.

Section 14.8 Organization, Ownership and Affiliates. City represents and covenants that City is a municipal corporation duly organized, validly existing and in good standing under the laws of California. City has the power and authority to own the properties it purports to own to transact the business it transacts and proposes to transact, to execute and deliver this Agreement and to perform its obligations under the provisions hereof and thereof.

Section 14.9 Authorization. City represents and covenants that the execution and delivery of this Agreement has been duly authorized by all proper actions and proceedings, and this Agreement constitutes the legal, valid and binding obligations of City.
Section 14.10 Conflicts. City represents and covenants that neither the execution, nor the delivery or performance of this Agreement will violate or conflict with any law, rule, regulation, order or judgment of any governmental authority having jurisdiction over City or with any organizational documents, indenture, instrument or agreement by which City is bound.

Section 14.11 Litigation. City represents and covenants that there is no litigation or proceeding pending or, to the best of the knowledge of City, threatened against or affecting City or any circumstance existing which would in any manner materially adversely affect the ability of City to perform its obligations under this Agreement.

Section 14.12 Notice of Changes. City represents and covenants that City shall give Westrec prompt written notice of any changes affecting the continued accuracy of the representations and compliance with the covenants contained in this Agreement.

Section 14.13 No Representations or Warranties from the City. THE CITY AND DBW MAKES NO WARRANTY THAT THE MARINA FACILITIES AND ALL OTHER CITY PROPERTY SHALL BE MERCHANTABLE OR FIT FOR ANY PARTICULAR PURPOSE. THE CITY AND DBW MAKES NO WARRANTY, EXPRESS OR IMPLIED, EXCEPT SUCH AS IS EXPRESSLY SET FORTH HEREIN. WESTREC SPECIFICALLY ACKNOWLEDGES THAT THE CITY IS FURNISHING CITY PROPERTY ON AN "AS IS, WHERE IS, WITH ALL FAULTS" BASIS, AND THAT WESTREC HAS INSPECTED OR HAS HAD AN OPPORTUNITY TO INSPECT THE SAME AND IS NOT RELYING ON ANY REPRESENTATIONS OR WARRANTIES OF ANY KIND WHATSOEVER, EXPRESS OR IMPLIED, FROM THE CITY OR DBW AS TO ANY MATTERS CONCERNING THE SAME.

ARTICLE XV
INSURANCE

Section 15.1 Operator's Insurance. At all times, Westrec shall maintain for its operations the types of insurance specified in Exhibit C. Department of Boating and Waterways and State of California, its officers, agents, employees, and servants shall be listed as additional insured under the terms of each and every policy of insurance maintained by Westrec under the terms of this Agreement. The cost of the insurance required pursuant to this Section 15.1 shall be an Operating Expense.

Section 15.2 Subcontractors and Independent Contractors. Westrec shall require all subcontractors and independent contractors including, but not limited to, security forces, maintenance, custodians, concessionaires, landscapers, exterminators, medical/ambulance service and food sanitation inspectors, to procure and maintain no less than the insurance requirements set forth in Exhibit C attached hereto as applicable, and submit documentation of the maintenance of such insurance from time to time as may be required by the City.

Section 15.3 Provisions. By September 30, 2009 and by July 1 of each Fiscal Year, Westrec shall furnish the City and DBW with original insurance certificates evidencing the required coverages. In addition, Westrec shall annually furnish the City and DBW copies of receipts for payments of premiums regarding such policies.
Section 15.4 No Offset or Contribution. The insurance protection to be furnished by Westrec, its subcontractors and independent contractors and promoters and permittees shall in no way limit Westrec's indemnification obligation hereunder. Any insurance or self insurance maintained by the City, its officers, employees or volunteers shall not contribute to the insurance of Westrec, its subcontractors, independent contractors or promoters and permittees.

Section 15.5 Modification. Upon reasonable notice (as defined by the City), the City reserves and maintains the right to modify, change, expand or amend the insurance requirements up to and including the right to purchase such insurance as required. However, DBW and State of California, its officers, agents, employees, and servants shall be listed as additional insured under the terms of each and every policy of insurance maintained or purchased by either Westrec or City under the terms of this Agreement.

Section 15.6 Fidelity Bond. Westrec, at its own expense, shall purchase and keep in force a Fidelity Bond in the amount of at least $500,000. The cost of the Fidelity Bond shall be an overhead expense of Westrec and shall not be deemed an Operating Expense nor be subject to reimbursement from the City.

ARTICLE XVI
INDEMNIFICATION

Section 16.1 General Indemnification. Westrec agrees to indemnify, defend and hold harmless the City, its commissioners, agents, officers, employees, representatives, and volunteers and DBW, its commissioners, agents, officers, employees, representatives and volunteers ("City and DBW Indemnities"), from and against any and all claims, liability, loss, damages, interest, judgments, liens, costs and expenses (including, but not limited to, reasonable counsel fees, disbursements and insurance deductibles) to the extent not insured under the provisions hereof and that arise out of, or are incurred in connection with any and all claims, demands, suits, actions or proceedings which may be made or brought against the City or DBW or any of the City or DBW Indemnities or as a result of (a) the lack of exercise of reasonable care by Westrec in the employment of any of its employees or the lack of reasonable care in the direction and supervision of Westrec's employees or City's or DBW's employees in the management, operation and maintenance of the Marina Facilities; (b) the negligent or willful act or omission of Westrec's employees or others in privity with Westrec; or (c) the failure or omission of Westrec to observe and perform any of its obligations, covenants and conditions to be observed and performed by it under this Agreement unless such failure or omission results from willful and wanton conduct of the City or DBW and such willful and wanton conduct proximately causes such injury.

Westrec shall indemnify, defend (using counsel reasonably satisfactory to the City and DBW), protect and hold harmless the City and DBW Indemnites from and against any loss, cost, expense, damage, fine, penalty, injury or liability (including reasonable attorneys fees relating to the defense or investigation of any matter) resulting from or arising out of any claim brought by any of Westrec's employees, agents, invitees or subcontractors.

Westrec will promptly provide, or cause to be provided, to the City and DBW copies of any such
notices as they may receive of any claims, actions, or suits as may be given or filed in connection with Westrec's performance under this Agreement.

Section 16.2 Contractor and Subcontractor Indemnification. Westrec hereby agrees to require any contractor and subcontractor to defend, indemnify, save and keep harmless the City and DBW Indemnitees against any liens, losses, claims, damages, liabilities, actions, suits, proceedings, costs or expenses that the City and DBW Indemnitees may suffer, incur or sustain or for which the City and DBW Indemnitees may become liable (including, but not limited to, personal and bodily injury to or death of persons or loss or damage to property), resulting from, arising out of, or being in any way connected with the contractor's or subcontractor's performance or lack thereof, except for matters shown by final judgment to have been solely caused by the willful and wanton conduct of the City or City Indemnites or DBW or DBW Indemnitees.

Section 16.3 Survival of Article. This Article shall survive the termination or expiration of this Agreement.

ARTICLE XVII
MISCELLANEOUS PROVISIONS

Section 17.1 Taxes, Licenses and Liens. Westrec shall promptly pay all taxes, excises, license fees and permit fees of whatever nature applicable to the operation of the Marina Facilities, and take out and keep current all local, state or federal licenses required for the conduct of its business hereunder and shall not permit any of said taxes, excises, license fees or permit fees to become delinquent. Westrec shall not permit any mechanic's or any other lien to become attached to the Marina Facilities or any improvements thereto or thereon, or any part or parcel thereof, by reason of any work or labor performed or materials furnished at Westrec's request for projects approved and funded by the City by any mechanic. Westrec shall furnish the City upon request, duplicate receipts or other satisfactory evidence showing the prompt payment by it of all such taxes, excises and fees arising out of its management, operation and maintenance of the Marina Facilities. Westrec shall promptly pay when due (subject to reimbursement by City as set forth herein) all bills, debts and obligations incurred by it in connection with its management, operation and maintenance of the Marina Facilities.

Section 17.2 Regulations and Permits. Westrec shall, on behalf of the City, use its reasonable efforts to cause all things to be done with respect to the Marina Facilities necessary to comply with any grant or loan contract with DBW, statute, ordinance, law, rule, regulation or order of any governmental or regulatory body, having jurisdiction over the Marina Facilities, respecting the use of the Marina Facilities or the maintenance or operation thereof. In connection with the management and operation of the Marina Facilities, Westrec shall apply for and attempt to obtain and maintain, on behalf of the City, all licenses and permits required or advisable in Westrec's reasonable judgment after consultation with the Agreement Administrator.

Section 17.3 Waiver. To the extent permitted by law, Westrec and its officers, employees and agents waive any claim or cause of action against DBW, its commissioners, agents, officers, employees, representatives and volunteers, or against the City, its officers, employees, City Council or agents for injury or damage to person or property resulting from or arising out of the
Section 17.4 Non-Collusion. Westrec and the City, in performing their obligations under this Agreement, shall comply with all federal, state and local laws, rules and regulations regarding collusion and bribery.

Section 17.5 Governmental Approvals. Westrec shall, after consultation with the Agreement Administrator, obtain any approvals of the State of California and United States Government required by applicable state and federal law for construction activities.

Section 17.6 Anti-Discrimination. During the performance of this Agreement, Westrec shall not discriminate on the basis of race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental handicap, unfavorable discharge from military service, parental status, or sexual orientation with respect to employment practices: (i) in providing access to the Marina Facilities and services under Westrec management; (ii) in the solicitation for or purchase of goods or services; or (iii) in the subcontracting of work in the performance of this Agreement.

Section 17.7 Sexual Harassment Policy. In accordance with applicable law Westrec shall have a written sexual harassment policy that shall include, at a minimum, the following information: (i) the illegality of sexual harassment; (ii) the definition of sexual harassment under state law; (iii) a description of sexual harassment, utilizing examples; (iv) Westrec’s internal complaint process including penalties; (v) the legal recourse, investigative and complaint process available through the State of California; (vi) directions on how to contact appropriate state agencies; and (vii) protection against retaliation as provided by applicable law. A copy of the policies shall be provided to the City or DBW upon request.

Section 17.8 Reserved.

Section 17.9 Gambling; Signage. Westrec agrees not to permit or suffer any gambling at any time, at any place on the premises of the Marina Facilities. In the event that the City objects to the form, content, or size of any signs or signage at the Marina facilities, Westrec shall have forty-eight (48) hours to remove such signs or signage or to make any modifications thereto required by the City. In the event that Westrec, fails to remove or modify such signs or signage within that forty-eight (48) hour period, the City shall have the right to remove such signs or signage without further notice.

Section 17.10 Force Majeure. Except as otherwise provided herein, neither party shall be obligated to perform hereunder and neither party shall be deemed to be in default if performance is prevented by (a) fire not caused by the negligence of either party; flood, act of God, major mechanical or structural failure, or civil commotion adversely affecting the reasonable management or operation of the Marina Facilities, or (b) any law, rule, regulation or order of any public or military authority stemming from the existence of economic or emergency controls, hostilities, war or governmental law or regulations; provided, however, that any such occurrence or the adverse effects of such occurrence are not reasonably foreseeable and are beyond the reasonable control of the affected party.
Section 17.11 Notices. All notices required herein shall be in writing and shall be deemed received when a copy thereof: addressed to such party as provided herein, is delivered by personal delivery, or the next business day after being sent by a generally recognized overnight delivery service, or three (3) days after being sent by certified or registered mail, return receipt requested, postage prepaid, to the address listed below or to such other address as one party may designate in writing to the other party.

For Westrec:
    Westrec Marinas
    16633 Ventura Boulevard 6th Floor
    Encino, California 91436-1835
    Attention: Regional Manager

With copies to:
    Westrec Marinas
    16633 Ventura Boulevard 6th Floor
    Encino, California 91436-1835
    Attention: Michael M. Sachs

    Westrec Marinas
    16633 Ventura Boulevard 6th Floor
    Encino, California 91436-1835
    Attention: William W. Anderson

    Westrec Marinas
    16633 Ventura Boulevard 6th Floor
    Encino, California 91436-1835
    Attention: Jeffrey K. Ellis

For the City:

    City of Stockton
    425 North El Dorado Street, Room 317
    Stockton, CA 95202
    Attention: Director of Revitalization

With copies to:

    City of Stockton
    425 North El Dorado Street, Room 317
    Stockton, CA 95202
    Attention: Marina Agreement Administrator

For DBW:

    State of California, Department of Boating and Waterways
    2000 Evergreen Street, Suite 100
Section 17.12 No Partnership or Joint Venture. It is understood and agreed that nothing herein contained is intended or shall be construed to in any way create or establish the relationship of partners or a joint venture between the City and Westrec. None of the officers, agents or employees of Westrec shall be or be deemed to be employees of the City for any purpose whatsoever.

Section 17.13 Entire Agreement. This Agreement, together with the Exhibits hereto, contains the entire agreement between the parties and no statements, promises or inducements made by either party or agents for either party not contained or required in this Agreement shall be binding or valid. In the event of an inconsistency in any of the provisions of the contract documents, the inconsistency shall be resolved by giving precedence in the following order:

1. This Agreement
2. The City's RFP
3. Westrec's Response to the City's RFP.

Section 17.14 Written Amendments. This Agreement shall not be altered, modified or amended in whole or in part, except upon agreement of the parties, in a writing executed by the parties hereto and consistent with the provisions of Section 3.5. Written additions, deletions, or changes in the provisions of this Agreement which do not comply with this requirement and Section 3.5 shall not be binding on either party. No oral modifications, additions, deletions or changes to this Agreement shall have any validity whatsoever. At the reasonable request of the City, Westrec shall agree to amend this Agreement as is necessary for the City to comply with any bond or tax regulations or requirements.

Section 17.15 Interpretation. The headings contained in this Agreement are for convenience of reference only and shall not limit or otherwise affect in any way the meaning or interpretation of the Agreement. Words importing the singular shall include the plural and vice versa, unless the context shall otherwise indicate. Words of any gender include the correlative words of the other gender. All references to any exhibit or document shall be deemed to include all supplements and/or amendments to such exhibits or documents entered into in accordance with this Agreement.

Section 17.16 Governing Law; Venue. This Agreement shall be construed in accordance with the laws of the State of California. The parties agree that the courts located in San Joaquin County, California shall be the exclusive venue for any action arising out of or brought pursuant
to this Agreement

Section 17.17 Dispute Resolution. With respect to any dispute arising from this Agreement, each party shall be obligated to follow the following procedure: First, the City Authorized Representative, and the Westrec Authorized Representative for the Engagement shall attempt in good faith to resolve such a dispute; second, if they cannot reach a resolution, then the City Manager of City and the president or an executive vice-president of Westrec shall attempt in good faith to resolve such dispute.; and third, if they cannot reach a resolution, then and only then shall the parties be entitled to file or institute a suit, action or proceeding in a court of competent jurisdiction.

Section 17.18 No Waiver. The making or failure to make any payment, take any actions or waive any rights shall not be deemed an amendment of this Agreement nor a consent to such action or to any future action or failure to act, unless the party required to so consent or act expressly agrees in writing. No waiver by any party of any breach of any provision of this Agreement shall be construed as a waiver of any continuing or succeeding breach of such provision, a waiver of the provision itself, or a waiver of any right, power or remedy under this Agreement No notice to, or demand on any party in any case shall, of itself, entitle such party to any other or further notice of demand in similar or other circumstances.

Section 17.19 Successors and Assigns. This Agreement shall bind and inure to the benefit of Westrec, the City and their successors and assigns. Westrec shall not attempt to nor shall it directly or indirectly assign, transfer or convey all or any portion of this Agreement or its rights or obligations hereunder without the prior written consent of the City and DBW (which consent may be withheld in the City's sole discretion). In furtherance of and without limiting the foregoing, Westrec shall not attempt to nor shall it directly or indirectly delegate or subcontract all or any portion of its management responsibilities or obligations hereunder without the prior written consent of the City and DBW (which consent may be withheld in the City's sole discretion). Any of the following events shall also be deemed an assignment of this Agreement for purposes of this Section: (i) the sale or transfer of a majority of the stock of or ownership interest in Westrec to one or more third parties through a single or series of transactions; (ii) the merger, consolidation or reorganization of Westrec with or into any third party; or (iii) any other transaction(s) that result in a "change in control" of Westrec. Neither DBW nor the City shall be required to recognize or give effect to any assignment, transfer, conveyance, subcontracting, or delegation that is or was made in violation of this Section.

Section 17.20 Severability. In the event that any provision of this Agreement shall be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

Section 17.21 Third Parties. Except with respect to third party rights or remedies conferred upon DBW under this Agreement and by law, nothing in this Agreement, whether express or implied, is intended to confer any rights or remedies under or by reason of this Agreement on any persons other than the parties hereto and their respective successors and assigns; and, except as expressly provided in this Agreement with regard to DBW, nothing in this Agreement is intended to relieve or discharge the obligation or liability of any third parties to any party to this
Agreement nor shall any provision give any third parties any right of subrogation or action over or against any party to this Agreement.

Section 17.22 Counterparts. This Agreement and any amendments thereto may be executed in counterparts, each of which shall be deemed an original Agreement having identical legal effect.

Section 17.23 Conflicts of Interest. No member of the governing body of the City (or any person who has served in such capacity during the prior two years), and no other officer, employee or agent of the City shall have any personal, financial or economic interest, direct or indirect, in this Agreement, or any subcontract or the performance of other work resulting therefrom.

Section 17.24 Use of Trademarks, Service Marks and Related Items. In providing its services under this Agreement, Westrec will use the name, trademark and service mark "Westrec" and such other trademarks, service marks, logos; commercial symbols, insignia and designs as Westrec shall deem appropriate and as approved by the City (collectively, the "Trademarks") and certain operations manuals and accounting software (including operations, emergency procedures, personnel, risk management and accounting software and manuals), formats (including financial reporting and budgeting formats) and forms (including' bookkeeping, accounting and lease forms) and software (collectively, the "Proprietary Material"); provided that Proprietary Material does not include information, materials nor documents provided by the City to Westrec or that Westrec specifically prepared, created, or acquired in connection with the performance of its obligations, including but not limited to boater information ("City Information"). Westrec hereby grants City the nonexclusive, nontransferable right to have Westrec, for the benefit of City, use the Trademarks and Proprietary Material in connection with the management and operation of the Marina Facilities all subject to Westrec's complete control. It is understood and agreed that Westrec shall have the right to use and license others to use the Trademarks and Proprietary Material elsewhere for any purpose whatsoever, including without limitation in the management and operation of the Marinas, even those in competition with the Marina Facilities, both during and after the expiration or termination of this Agreement. Immediately upon the expiration or termination of this Agreement, City shall (a) return to Westrec all materials bearing any of the Trademarks and all Proprietary Material without retaining any copies thereof, and (b) cease all use of the Trademarks and Proprietary Material by all means required, including without limitation changing all telephone listing using any of the Trademarks, removing all signs bearing any of the Trademark, and using its diligent efforts to have existing tenants at the Marina Facilities sign new leases to replace existing Westrec lease forms. Nothing contained in this Agreement shall give City any right, title or interest in or to any of the Trademarks or Proprietary Material, except the mere privilege and license during the Term of this Agreement to have Westrec, for the benefit of City, use the Trademarks and Proprietary Material in connection with the management and operation of the Marina Facilities. City acknowledges and agrees that the Trademarks and Proprietary Material are the exclusive property of Westrec and that City now asserts and will hereafter assert no claim to any goodwill, reputation or ownership of any of the Trademarks or Proprietary Material except that the City shall have no obligation of confidentiality and may assert a claim, relating to Proprietary Material which is not confidential. Proprietary Material that is not confidential includes information which is; (i) either currently publicly available or becomes publicly available in the future without City breach of any obligation or responsibility described in this Section; (ii) rightfully received by
either City from a third party where the information was received without any obligation of confidentiality associated with it; (iii) already in the possession of City without an obligation of confidentiality; (iv) independently developed by City; (v) approved for disclosure by Westrec; or (vi) treated by Westrec as non-confidential. City shall not do or permit any act or thing to be done in derogation of any of Westrec's rights in any of the Trademarks and Proprietary Material, either during the Term of this Agreement or thereafter. City shall not, during or after the Term of this Agreement, in any way dispute or impugn the validity of the Trademarks or Proprietary Material, the rights of Westrec therein, or the rights of Westrec or other licensees of Westrec to use the same, both during the Term of this Agreement and thereafter. To the extent that City used, or causes to be used, any of the Trademarks as and if permitted by this Agreement, City will adhere to Westrec's then-current reasonable quality control and other rules with regard to the Trademarks and/or the operations in connection with which City uses the Trademarks and City will permit Westrec to conduct reasonable inspections of such operations. The provisions of this Section shall survive the expiration or termination of this Agreement, except that with respect to Proprietary Material, this Agreement shall survive the expiration or termination of this Agreement for a period of three (3) years. Notwithstanding any other provision contained herein, Westrec acknowledges that the City owns all City Information and Westrec shall not disclose nor use the City information for any purpose other than the performance of its obligations hereunder. Upon termination of this Agreement, Westrec shall promptly deliver to the City the City Information.

Section 17.24.1 Release of Copyrighted Material Pursuant to Public Records Act Request

Notwithstanding any other provision in this Agreement to the contrary, any and all information, writings, reports, maps or materials generated or produced pursuant to this Agreement, whether in electronic, written, or any other format, are subject to disclosure by DBW pursuant to the requirements of the California Public Records act (PRA). Government Code section 6250 et seq., notwithstanding any copyright claims that may attach to such information, writings, reports, maps or materials. Any disclosure of such copyrighted material by DBW pursuant to the PRA shall not give the person or persons receiving such copyrighted information, license to violate the copyright, and any PRA requester who receives copyrighted material pursuant to PRA disclosure by the department shall be informed of that fact. Westrec and City understand and agree that they shall not be entitled to any compensation from DBW if any of the information, writings, reports, maps or materials generated or produced pursuant to this Agreement, whether in electronic, written, or any other format, are released by DBW pursuant to a demand for such information pursuant to the PRA.

In addition, Westrec and City hereby indemnify and hold DBW harmless for any and all violations of copyright perpetrated by any persons who receive such copyrighted information, writings, reports, maps or materials generated or produced pursuant to this contract, whether in electronic, written, or any other format, that is released by DBW pursuant to a demand for such information pursuant to the PRA.

Section 17.25 Reserved.

Section 17.26 Compliance with Laws. Westrec and City and each of their respective contractors
and subcontractors shall comply in all material respects with all federal, state and local laws, statutes, ordinances, codes and regulations, applicable to or affecting any work or services performed under this Agreement.

Section 17.27 New Contract. Nothing in this Agreement shall restrict or limit the City's right to issue, prior to the expiration for the Term, a request for proposals for the management and operations of the Marina Facilities. Westrec shall have the right if it so desires and to the extent provided by Applicable Law to submit a proposal in response to any such request for proposals made by the City.

Section 17.28 Non-Appropriation. In the event that the City Council does not or is unable to appropriate the necessary funds in order for the City to satisfy its obligations hereunder, then Westrec may terminate this Agreement upon sixty (60) days prior written notice to the City. Such non-appropriation and any failure of the City to perform its obligations as a result thereof shall not be deemed a City Default and Westrec's only remedy against the City shall be to terminate this Agreement as provided for in this Section, and to the extent permitted by Applicable Law, to be paid for services rendered prior to such non-appropriation. Any failure by Westrec to perform its obligations under this Agreement shall not be deemed a Westrec Default if such failure results from the City's failure to appropriate sufficient funds to manage, maintain, operate and promote the Marina Facilities as contemplated herein.

Section 17.29 Ownership of Documents. All reports, data, findings or information (the "Information") in any form prepared, assembled or encountered by or provided to Westrec under this Agreement are property of the City, including, all copyrights inherent in them or their preparation. During performance of its Services, Westrec shall use commercially reasonable efforts to protect and prevent any loss or damage to the Information while in Westrec's possession.

Section 17.30 Copyright Ownership. Westrec and the City intend that, to the extent permitted by law: (i) the Information to be produced by Westrec at the City's instance and expense under this Agreement are conclusively deemed "works made for hire" under Section 101 of the United States Copyright Act, 17 U.S.C. §101 et seq.; and (ii) the City will be the sole copyright owner of the Information and work product and of all aspects, elements and components of them in which copyright can subsist and of all rights to apply for copyright registration or prosecute any claim of infringement. (b) To the extent that such Information does not qualify as a "work made for hire," Westrec hereby irrevocably grants, conveys, bargains, sells, assigns, transfers and delivers to the City, its successors and assigns, all right, title and interest in and to the copyrights and all U.S. and foreign copyright registrations, copyright applications and copyright renewals for them, and other intangible, intellectual property embodied in or pertaining to the Information prepared for the City under this Agreement, and all goodwill relating to them, free and clear of any liens, claims or other encumbrances, to the fullest extent permitted by law. Westrec will, and will cause all of its employees, agents and other persons within its control to execute all documents and perform all acts that the City may reasonably request in order to assist the City in perfecting its rights in and to the copyrights relating to the Information, at the sole expense of the City.
Section 17.31 Confidentiality. All reports, data, findings, financial reports or information in any form prepared, assembled or encountered by or provided by Westrec under this Agreement are property of the City and are confidential, except as specifically authorized in this Agreement or as may be required by law. **With the exception of any and all information requested by DBW, which shall be promptly sent or turned over to DBW upon request,** Westrec must not allow the information to be made available to any other individual or organization without the prior written consent of the City. Further, **with the exception of any and all information requested by DBW, which shall be promptly sent or turned over to DBW upon request,** all documents and other information provided to Westrec by the City are confidential and must not be made available to any other individual or organization without the prior written consent of the City. Westrec shall use all confidential information only in connection with the purposes of this Agreement. Westrec must implement such measures as may be necessary to ensure that its employees and subcontractors are bound by the confidentiality provisions in this Agreement. **With the exception of any and all information requested by DBW, which shall be promptly sent or turned over to DBW upon request,** and except as may be required by law during or after the performance of this Agreement, Westrec may not issue any publicity news releases, grant press interviews, or disseminate any information, regarding City policies, material adverse events or events outside the ordinary course of business which relate to the Project without the prior written consent of the City. **With the exception of any and all information requested by DBW, which shall be promptly sent or turned over to DBW upon request,** if Westrec is presented with a request for public records, a request for documents by any administrative agency or with a *subpoena duces tecum* regarding any records, data or documents which may be in Westrec's possession by reason of this Agreement, Westrec must immediately give notice to the Agreement Administrator with the understanding that the City will have the opportunity to contest such process by any means available to it before the records, data or documents are submitted to a court or other third party. **With the exception of any and all information requested by DBW, which shall be promptly sent or turned over to DBW upon request,** Westrec is not obligated to withhold the delivery beyond the time ordered by the court or administrative agency, unless the *subpoena* or request is quashed or the time to produce is otherwise extended.

Section 17.32 Exceptions. Notwithstanding Section 17.29 and Section 17.30, the parties agree that Westrec is not transferring, pursuant to this Agreement, ownership of information and documentation to the extent that such information and documentation is generally applicable to Westrec's business and/or clients. Notwithstanding Section 17.31, the parties agree that "Confidential Information" shall not include information that (i) was already known by Westrec at the time of disclosure to Westrec by the City, (ii) is or becomes known or readily ascertainable by others by proper means without a breach of any confidentiality obligation, (iii) is properly received by Westrec from a third party who is not under any confidentiality obligation of which Westrec knew or had reason to know, (iv) is independently developed by Westrec without use of the Confidential Information, or (v) is a public record that the City expressly agrees in writing does not constitute Confidential Information.

Section 17.33 Timeliness of Performance. Westrec must provide the services in compliance with any specific time limits required by this Agreement. Westrec acknowledge that **TIME IS OF THE ESSENCE** in each and every term of this Agreement.
Section 17.34 Compliance. Westrec must comply with all Applicable Law in effect now or later and whether or not they appear in this Agreement. Westrec shall and shall cause its subcontractors to obtain all licenses, certificates and other authorizations required by Applicable Law and related to the Engagement. Westrec must comply with all applicable provisions of the City Code and all rules and regulations promulgated by the City. Westrec further acknowledges that this Agreement is voidable at the option of the City if it was entered into, negotiated or performed in violation of any of Applicable Law. Westrec shall cause its subcontractors and any related parties to execute a City approved form of Non-Collusion Affidavit and any other affidavits or certifications required by the City in connection with this Agreement (the "Subcontractors' Affidavits"). Westrec shall cause each subcontracting agreement to provide that notwithstanding acceptance by the City of the Subcontractor's Affidavits, failure of such subcontractors to include in the Subcontractors' Affidavits all information required in such subcontractors' Affidavits shall render such subcontracting agreement voidable at the option of the City or Westrec.

Section 17.35 Non-Liability of Public Officials. Westrec shall not charge any official, employee or agent of the City or DBW personally with any liability or expenses of defense or hold any official, employee or agent of such other party personally liable to them under any term or provision of this Agreement or because of the City's execution, attempted execution or any breach of this Agreement. The limitation on liability survives expiration or termination of this Agreement for matters occurring or arising during the Term or as a result of or during Westrec's performance of services beyond the Term. City shall not charge any employee of Westrec personally with any liability or expenses of defense or hold such employee personally liable under any term or provision of this Agreement except in connection with or related to misappropriation, fraud or other financial misconduct.

Section 17.36 Reentry. Representatives of the City and representatives of DBW, as designated in writing by the City Manager or his or her Authorized Representative, or as designated by DBW, shall have the right to enter (subject to any applicable security procedures or protocols) all portions of the Marina Facilities to inspect the same, to check or observe the performance of Westrec of its obligations under this Agreement, to install, remove, adjust, repair, replace or otherwise handle any equipment, utility lines, or other matters in, on, or about the Marina Facilities, or to do any act or thing which the City or DBW may be obligated or have the right to do under this Agreement or otherwise. Nothing contained in this paragraph is intended or shall be construed to limit any other rights of the City or DBW under this Agreement.

Section 17.37 Possessory Interest Taxes. This Agreement may be subject to Possessory Interest Taxes pursuant to California law.
IN WITNESS WHEREOF, the parties hereto have executed this Agreement by their authorized officers as of the dates so indicated below.

CITY: THE CITY OF STOCKTON, A Charter City

WESTREC: WESTREC MARINA MANAGEMENT, Inc., a California corporation

By: ________________________________ By: ________________________________
   City Manager

Date: ________________________________ Date: ________________________________

ATTEST:

By: ________________________________
   KATHERINE GONG MEISSNER
   City Clerk of the City of Stockton

Approved as to Form:

by______________________________
John M. Luebberke
Interim City Attorney
EXHIBIT A: SCOPE OF SERVICES

Section 1 General.

Section 1.2 RFP. Westrec acknowledges that the RFP is attached as Attachment A hereto and incorporated herein, and agrees that it is obligated to perform the services specifically set forth in the RFP to the same extent as if such services were set forth in the body of this Agreement.

Section 1.3 Westrec Cooperation. Westrec shall cooperate with the CITY in the event the City develops property within the Marina Complex boundaries. Westrec shall, upon request of CITY, make reasonable accommodations for specific events or groups use of the Marina Complex providing *that it does not restrict boater access to parking or launch facilities, and providing that* a prior commitment does not exist and to the extent the use is permitted under the provisions of this Agreement.

Section 1.4 Relations with Community Groups and Organizations. Westrec will create open and continuous lines of communication among boaters, yacht clubs, and other Marina Complex users. Westrec will coordinate, keep informed, and meet with community groups and organizations, institutions, and governmental bodies, as well as any other pertinent groups, as to event and activities taking place at the Marina Complex and in order to accomplish the objectives of this Agreement. Westrec will also act as the CITY's liaison to yacht clubs and the boating community at large and organize and attend regular meetings with these groups. Westrec shall maintain regular communication with designated CITY staff.

Section 1.5 Relations with California Department of Boating and Waterways. Westrec recognizes that construction of the Marina Complex was funded in part by a loan from the California Department of Boating and Waterways (DBAW). Westrec will *comply* with the "Marina Operations, Maintenance, and Capital Outlay Loan Requirements," as presented in Exhibit B. Westrec will comply with all requests for information and for access to inspect the Marina Complex from DBW and/or the CITY. Westrec will provide all necessary information and assist the City in completion and compliance with the following reports:
(i) Marina Operations, Maintenance, and Capital Outlay – Master Checklist
(ii) Marina Operations Report
(iii) Fiscal Year Operation Costs, Maintenance Expenses, and Gross Marina Revenues
(iv) Marina Maintenance Report
(v) Projected Capital Outlay Projects
(vi) Capital Outlay Budgetary Plan
(vii) Capital Outlay Reserve Account Report
Section 1.6 Requirements for Tracking Low and Moderate Income Jobs. Westrec recognizes that construction of the Marina Complex was funded in part by a loan from the United States Department of Housing and Urban Development (HUD). Westrec will assist CITY in complying with reporting requirements of low and moderate income jobs created by the Marina Complex and under the supervision of Westrec, as presented in Attachment C.

Section 2 Operation Services.

Section 2.1 License Agreement. Westrec shall be responsible for receiving and processing applications for a Boat Slip License Agreement. A Boat Slip License Agreement will be completed for services including, but not limited to: mooring, commercial, seasonal launching and seasonal mooring. Two-part Daily Revenue forms with language protecting both the City and Westrec will be used for daily activities, such as launching, transient mooring, and late leaver mooring. Boat Slip License Agreement and Daily Revenue records shall be maintained and made available for CITY review at all times. The CITY shall be the final arbiter of any disputes regarding changes that need to be made in the assignment of the slips or mooring locations. Westrec will develop and implement a web-based application process, where applicable.

Section 2.2 Boat Launch and Ramp Assistance. Westrec shall: (i) operate and maintain Morelli Park boat ramps; (ii) provide boat launch and (iv) collect all applicable fees for services provided. Receipts for fee collection shall be provided to the boater prior to launch, as applicable.

Section 2.3 Customer Service Program. Westrec shall establish and implement a Customer Service Program to ensure that performance by Westrec is in accordance with the performance requirements and as otherwise requested by the CITY. Westrec shall update this Customer Service Program as required by the CITY. If requested by the CITY, Westrec agrees to conduct customer satisfaction surveys and secret shopper surveys ("Customer Satisfaction Surveys") with respect to the Marina Complex. The CITY may use the results of these Customer Satisfaction Surveys to identify customer satisfaction issues to be addressed by Westrec. The CITY reserves its right to conduct its own customer survey with respect to the Marina Complex from time to time. Westrec shall also assist the CITY to organize a marina advisory council to further understand the needs and issues of boaters and take such other customer service initiative as the CITY may request from time to time.

Section 2.4 Subcontractors. Westrec may employ Subcontractors to provide specific operational and maintenance tasks at the Marina Complex provided the CITY has been notified of the service being provided and services are rendered at a competitive market rate. Westrec and CITY acknowledge that it may be appropriate to use existing CITY contracts for certain services for cost savings or to maintain service continuity. If subcontractor is producing events or using facilities designed for other customers, the subcontractor shall pay the applicable rates for use of the facility directly or as an offset from fees for services supplied by subcontractor. CITY reserves the right to approve any subcontractor receiving services or use of the facilities at a rate less than competitive market value. The CITY reserves the right to approve all contracts
which allow for an extended or special rental rate less than the fees established i.e. non-profit group facility rental.

Section 2.5 Records/Reports. Westrec shall maintain management, financial, operations, and maintenance records to be made available, at any time, upon the CITY’s request for review. Westrec shall prepare management, financial, operation, and maintenance reports and submit such reports to the CITY. These records/reports are described in Exhibit B attached hereto and shall be submitted in accordance with the identified frequencies. Record and reporting systems shall be automated and digitized where possible. All records will be turned over to the CITY upon termination or expiration of this Agreement.

Section 2.6 Regular Working Hours. Westrec acknowledges that working hours at the Marina Complex vary during the year and may be modified from time to time by the CITY. Westrec personnel must be available to provide services during the year including certain federal and other approved holidays. Westrec shall submit to CITY for approval an annual operating schedule. The schedule shall minimize overtime compensation and weekend and evening hours throughout the year shall be considered regularly scheduled hours.

Section 2.7 Emergency Situations. Westrec shall provide to the CITY the names and telephone numbers of persons to respond to emergency situations occurring at any time. The City, conversely, shall provide to Westrec the names and telephone numbers of persons to respond to emergency situations occurring at any time.

Section 2.8 Safety and Emergency Plans. Westrec shall work with City of Stockton Police, Fire, and other appropriate personnel as well as the San Joaquin County Sheriff’s Office to develop and implement adequate safety and emergency plans for the Marina Complex ("Safety and Emergency Plans"). To the extent possible given the condition of the Marina Complex, the Safety and Emergency Plan shall comply with United States Public Health Service, United States Coast Guard, applicable OSHA requirements, fire codes and any other federal, state or local requirements relating to fire protection and safety and health regulations.

Section 2.9 Security. Westrec shall be responsible for providing all security necessary, including but not limited to personnel and systems, to secure the structures, equipment and other Marina Complex facilities which are the subject of this Agreement. Westrec will have the option of employing a contracted service, or directly employing Security personnel as long as direct and indirect costs are equal or less than the approved budget and that adequate services are provided based on level of activity at the Marina Complex. The Marina Complex shall be patrolled when operational staff is not present in order to achieve security coverage at all times. Should the City request additional guards or additional time frames than in the scope of service, City acknowledges that the cost may be higher than in the approved budget and will compensate Westrec accordingly. Westrec acknowledges that additional security and patrols will be required for holidays and busy weekends. Westrec will also manage all dock doors to ensure that they function properly and will re-set the dock doors entry codes each year or as necessary to ensure proper security. Guest Boat Dock gate codes shall be modified regularly to ensure proper revenue generation and security. Westrec personnel on duty shall monitor all
activities at the Marina Complex and report incidents to the CITY and/or police as appropriate. Vehicles, equipment, tools and supplies shall be secured when not in use.

Section 2.10 Collection of Fees/Fines. Westrec acknowledges the CITY’s desire to maximize revenue at the Marina Complex to cover all costs of operations as well as cover debt service associated with construction. Westrec shall be responsible for:

(i)  Recommending changes to the fee structure and providing justification for change to CITY not less than annually;
(ii) The collection of all CITY approved fees associated with Boat License Agreements in strict conformity with applicable provisions of the CITY Code;
(iii) Reconciling fees with licenses assigned;
(iv) Accounting for all fees and depositing revenue into appropriate accounts;
(v) The collection and processing of fines in strict conformity with applicable provisions of the CITY Code and in accordance with best business practices.

Westrec shall also collect other fees associated with activity at the Marina Complex, including, but not limited to: launch ramps, daily dockage, ice, beverages and other miscellaneous sales. Strict accounting procedures shall be implemented and enforced. Procedures must provide for an accurate audit trail for all collections. Fee collection and accounting records shall be maintained and made available for the CITY’s review at all times.

Section 2.11 Marketing Plan and Promotional Activities. Westrec shall develop a Marketing Plan, identifying activities and strategies to achieve a successful Marina Complex operation within six months of the date of this Agreement. The Marketing Plan shall include an implementation schedule identifying items to be completed within one year of the date of this Agreement. Any marketing or promotion documents prepared by Westrec using the City of Stockton Logo, including advertisements and brochures, shall be approved by the CITY’s Public Information Officer prior to their implementation, publication, distribution or dissemination. Westrec shall periodically provide the CITY with reports, recommendations and proposals on different ways in which to increase the activity level and revenue generated by the Marina Complex through marketing and promotional activities.

Section 2.12 Operating Budget. Westrec shall prepare an annual line item Operating Budget for CITY’s review and approval. The CITY will deposit funds into the Marina Operations Account not less than quarterly as appropriated by the approved Operating Budget. The Operating Budget shall reflect the CITY’s fiscal year range: July 1 through June 30.

Section 2.13 Administrative. Commencing with the execution of this Agreement Westrec shall provide day-to-day administrative services in support of its management activities outlined in this Agreement including, but not limited to, the acquisition of services, equipment, supplies and facilities; internal budgeting and accounting; maintenance and property management; personnel management; record-keeping; collections and billing; and similar services. Westrec shall submit to the CITY within the time period required by this Agreement, such records, reports and budgets as are herein required. Westrec shall furnish original insurance policy certificates or evidence of insurance coverage to the CITY as required by Article XV.
Section 2.14 Operations and Procedures Manual. Westrec shall compile a comprehensive Operations and Procedures Manual (the "O & P Manual") within six months of the date of this Agreement. The O & P Manual shall provide basic guidance on policies, practices and procedures covering all aspects of the management, operation and maintenance of the Marina Complex. The O & P Manual shall reflect the standards of performance agreed to between Westrec and the CITY, shall be maintained and kept updated with any changes to policy or operations. This manual must include, at a minimum, the following details:

- Westrec mission statement, goals and objectives;
- General Westrec operating and management policies;
- Organizational structure of Westrec;
- Administrative responsibilities;
- Equipment for operations and maintenance, including operating and safety procedures and warranties;
- Procedures for cash control, accounting, receiving, handling and processing receipts, auditing and report processing;
- Employee hiring, benefits, training and performance standards;
- Personnel policies and procedures;
- Staff schedules, position descriptions and duties;
- Maintenance/schedules and repair policies;
- Customer service policies;
- Marketing policies;
- Westrec's home office support;
- Emergency, accident and safety procedures;
- Emergency fuel spill response procedures;
- Medical services;
- Environmental controls and procedures;
- MBE/WBE polices; and
- Any other item deemed necessary and approved by the CITY.

The O & P Manual shall be kept in a location visible and readily accessible to all employees. The O & P Manual shall also contain the Safety and Emergency Plan required by Section 2.8 of this Exhibit A. Westrec shall furnish a copy of the O & P Manual to the CITY and provide updates as appropriate.

Section 2.15 Marine Sanitation. The discharge of septic waste and pollutants into the Stockton Deep Water Channel is prohibited. To ensure compliance with all applicable rules and regulations, Westrec will be required to establish and operate a marine sanitation program and implement any additions or improvements to it as needed. The program may include, but is not limited to:

1. enforcing all applicable rules and regulations;
2. inspecting all boats in the Marina Complex not less than annually;
3. conducting random boat inspections throughout the year;
4. hire and train inspectors to perform these duties;
5. maintaining, re-building, and repairing pump outs throughout the Marina Complex;
6. testing all pump out systems to ensure proper functioning.
Section 2.16 Waste Removal and Disposal. Westrec will be responsible for (i) proper containing, labeling, storing, and disposing of all waste material at the Marina Complex; and (ii) implementing and enforcing a waste recycling program and initiatives at the Marina Complex, as directed by the CITY. All waste will be disposed of either immediately or at a mutually agreeable time. Waste should not be stored at the Marina Complex; there should be no piles of debris, old equipment, or wood chips at the Marina Complex. Westrec may provide a temporary storage structure for waste and other needs, if pre-approved by the CITY.

Section 3 Maintenance Services.

Section 3.1 Capital Improvement, Equipment, Budget, and Schedule. Westrec shall provide for CITY's approval a schedule of required capital improvements and capital equipment needed to carry out the purpose and intent of this Agreement. Westrec shall also prepare a Capital Expenditure Budget for review and approval by the CITY. Westrec shall prepare capital expenditure budgets in accordance with California Department of Boating and Waterways guidelines. Capital expenditure budgets shall be modified not less than annually. CITY and Westrec agree that certain improvements may require capital investment beyond the CITY’s available resources and to the extent possible both parties will identify other sources of funding.

Section 3.2 Vehicle and Equipment Maintenance and Repair. Westrec shall maintain and repair all vehicles, vessels and equipment belonging to the CITY and used for the Marina Complex, Westrec shall: (i) perform a background check for insurance purposes on all vehicle and vessel operators; (ii) train employees about the safe and efficient use of any vehicle or vessel; and (iii) maintain a schedule of maintenance and repair on all vehicles and vessels for the CITY's inspection.

Section 3.2 Opening, Closing, Maintenance and Repair of Docks and other Marina Complex Facilities. Westrec shall be responsible for the maintenance and repair of docks, facilities and other mooring equipment, and for opening and closing services at the Marina Complex. Facilities to be maintained and repaired include all docks, gangways, canopies, associated utility service panels, pumphouts, fencing and gates, storage facilities, administrative facilities, pavements, service roads within the Marina Complex security fences, retaining walls and launch ramps. Westrec shall provide maintenance and repair services to the Marina Complex docks, dry stack storage, offices, and facilities, at all times throughout the year. Westrec shall be responsible for the repair of damage caused by vandalism. Westrec shall be responsible for obtaining all appropriate building permits, if applicable, for maintenance and repair work.

Section 3.3 Marina Inspection. Westrec shall perform daily inspections of the Marina Complex with particular attention to maintenance, repair, and safety or as requested by the CITY. Inspections shall cover equipment, facilities, docks, moorings, slips and all other facilities within the Marina Complex. Inspections shall also cover the reconciliation of permits with moored boats and ensure that boats are in their assigned positions. Westrec shall document all inspections and provide this documentation to the CITY upon request. Westrec shall promptly notify CITY of any significant irregularity in the reconciliation of permits and moored boats.
Westrec shall maintain dock master checklists (approved by the CITY), generated by Westrec's accounting software to facilitate the checking of these vessels.

Section 3.4 Custodial Services. Westrec shall provide custodial services at all Marina Complex facilities and building areas occupied by Westrec personnel, and all public and boater washrooms, so as to keep the Marina Complex in a clean and attractive state at all times. A "clean and attractive state" shall include but is not limited to:

a. Maintaining the interior of all Marina administrative facilities;
b. Cleaning public restrooms at Morelli Park, providing restrooms with soap, towels, toilet paper, and other necessary items and providing for their disposal;
c. Providing and maintaining portable washrooms and/or bathroom trailers as applicable;
d. Maintaining the exterior grounds at the Marina Complex, as outlined in Exhibit D, keeping all areas free of debris, dirt, litter, trash and weeds at all times by collection, removal, and proper disposal;
e. Cleaning all fences, gates, and lights attached to fences;
f. Scrubbing and/or power washing all docks, cleaning all dock lights;
g. Maintaining and replacing all flags and flagpoles, as applicable;
h. Replacing bulbs and ballast in lamps and lighting fixtures throughout the Marina Complex;
i. Cleaning, repairing and replacing all signs;
j. Maintaining fire alarm call boxes, Knox boxes, fire extinguishers and hose boxes in good working condition;
k. Maintaining and repairing electrical equipment and plumbing fixtures;
l. Periodically painting pedestrian areas, offices, restrooms and all public places; and
m. Making any other repairs as directed by the CITY.

Section 3.5 Clean-Up of Work Site. Westrec shall clean-up work sites during and after work assignments. Westrec work and personnel-generated refuse shall be removed from the work site at the end of each work day. Unused or usable CITY provided material shall be secured until used or returned to CITY upon task accomplishment. All such material shall be stored in appropriate containers and disposed of at certified locations in compliance with applicable governmental ordinances, statutes and regulations.

Section 3.6 Clearing Marina Complex of Aquatic Weeds, Debris and Obstructions. Westrec shall maintain and keep the Marina Complex free of aquatic weeds, debris and obstructions on a daily basis and as otherwise requested by the CITY. Aquatic weeds shall be controlled through methods approved by the CITY. Current methods to control aquatic weeds include cutting and the use of aquatic herbicides. Westrec shall not use aquatic herbicides without first obtaining the necessary permits and licenses; obtaining such licenses shall be Westrec's responsibility. Aquatic weeds shall be immediately treated and properly disposed. Aquatic weeds, debris and obstructions not on land shall be transported to shore for pick-up as soon as possible. Debris shall be regularly removed from the Marina Complex and the Parking Lots and disposed of in appropriate trash containers. Obstructions to boat traffic shall be removed immediately and transported to shore for proper disposal.
Section 3.7 Pest Control. Westrec shall maintain a pest, pigeon, rodent, nuisance and non-native bird species, and vermin control program that minimizes the infestation of pests, pigeons, rodents, nuisance and non-native bird species, and vermin in accordance with applicable governmental ordinances, statutes and regulations.

Section 3.8 Graffiti Removal. Westrec shall remove or cause to be removed all graffiti applied to the surfaces of the Marina Complex. Westrec will report to the CITY any graffiti it notices outside any Marina Complex Facility boundary. The chemicals and process to be used to remove the graffiti shall be biodegradable.

Section 3.9 Hazardous Wastes. All hazardous waste generated at the Marina Complex during the Term of this Agreement shall be containerized, disposed of, handled, labeled and transported by Westrec, in accordance with all federal, state and local laws and regulations. Such hazardous waste shall be appropriately containerized, disposed of, handled, labeled and transported to an approved and certified site for receipt of such waste. Westrec will maintain documentation to substantiate the foregoing.

Section 3.10 Warranties/Guarantees. Westrec shall implement a program to collect warranty/guaranty certificates and data and the registration of warranty/guaranty agreements as necessary. The program will ensure that all equipment, components and materials under warranty/guaranty are identified and warranties/guarantees used to the maximum extent practicable and economical. In addition, Westrec shall, maintain recall notifications and ensure that all vehicles, equipment and components recalled are returned for service. Westrec shall not take any action that would impair or void any applicable warranties/guaranty certificates.

Section 3.11 Maintenance of Parking Lots. In accordance with the Approved Budget, and in addition to responsibilities created by any other provision in this Agreement, Westrec shall be responsible for the management, operation and maintenance of the Parking Lots. Westrec shall not be responsible for the maintenance of parking meters and meter revenue along Weber Avenue, adjacent to the Marina Complex.

Section 3.12 Automation. Westrec shall provide the CITY with recommendations and proposals with respect to using automation and technology to improve the management, operation and maintenance of the Marina Complex.

Section 3.13 Landscaping. Westrec will maintain the landscaping at the Marina Complex in a clean and attractive state at all times. Services include mowing lawns, repairing damage to lawns, removing weeds, trimming trees and shrubs, and properly disposing all materials. Such landscaping shall be performed in the areas identified in Exhibit D.

Section 3.14 Plumbing. Westrec will maintain plumbing at the Marina Complex. Plumbing includes, but is not limited to, fixtures (interior and exterior), underground piping, meters, valves, and main water source.

Section 3.15 Power. Westrec will maintain all lights, poles, lamps, fixtures, wiring (including underground) and related electrical power supply equipment sources located within the Marina
Complex. Lights to be maintained include dock lights, canopy lights, harbor lights, navigation lights, parking lot lights, pedestrian lights, and pole lights. Westrec will also: (i) maintain power from the trans-closures through the docks; (ii) maintain and replace cables and transformers; and (iii) provide, maintain and replace electrical pedestals for every dock as needed and ensure that they are operational.