

# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Jon Cicirelli

**SUBJECT:** SEE BELOW

**DATE:** October 25, 2021

Approved



Date

10/28/21

**COUNCIL DISTRICT: 5**

**SUBJECT: LONG-TERM USE AGREEMENT FOR THE OPERATION OF A SIX  
ACRE PORTION EMMA PRUSCH FARM PARK**

## **RECOMMENDATION**

Adopt a resolution authorizing the City Manager to negotiate and execute a long-term Agreement for up to 25 years with selected service provider, Veggielution, for the purposes of producing food and providing educational programming to enhance and support existing Emma Prusch Farm Park programs for the benefit of the community.

## **OUTCOME**

Acceptance of this recommendation will grant authority for the Department of Parks, Recreation and Neighborhood Services ("PRNS" or "Department") to enter into a long-term agreement for a period of up to 25 years in conformance with [Council Policy 7-8](#)<sup>1</sup> Long-Term Use of City Parklands for Private Enterprise Purposes ("Policy").

## **BACKGROUND**

Emma Prusch Farm Park is a 47- acre City of San José Regional Park located at the intersection of Interstate 680 and US Route 101 in San José. The land was dedicated to the City by Emma Prusch in 1962. After the original, larger parcel was bisected by the route Interstate 680 freeway, the remaining 47 acres south of the freeway were developed into the farm park.

<sup>1</sup> The link for this policy can be found here:

<https://www.sanjoseca.gov/home/showpublisheddocument/12755/636669904907370000>

Emma Prusch Farm Park has approximately 30 acres of highly developed parkland accessible to the public for a variety of activities ranging from casual leisure enjoyment to programmed and reserved activities. Among other activities, visitors to the park can enjoy reserved or drop-in picnicking, a playground, community gardening, livestock viewing, and structured activities such as multicultural dancing.

Volunteers help maintain hundreds of fruit trees, a native flower garden, and a German-themed kitchen garden. PRNS park staff maintains and operates the entire facility including providing farm tours and hay wagon rides to elementary school children; offering youth camps, afterschool, and preschool programs; teaching classes such as cooking, insect exploration, and gardening skills; hosting private and public special events, facility rentals, and picnic reservations; and, introducing youth to farm animals through the park's resident farm animal collection and 4H/FFA Barn use programs. The 1979 Emma Prusch Farm Park Master Plan and the 1994 Master Plan Update designate the western most portion of Emma Prusch Park to be used for "agricultural fields."

The Department has made strides to obtain a long-term partner and operator of Emma Prusch Farm Park, and in compliance with the Policy, developed an outreach plan that involved the issuance of a Request for Proposal ("RFP") to seek out organizations that can manage the operations of such a dynamic space. The goal of the RFP was to work with a partner that can maximize the available six acres of agricultural space to produce food and provide additional educational programming to enhance and support existing Emma Prusch Farm Park programs for the benefit of the community. In previous partnerships, the term of agreement was limited to 3 years. Acceptance of the recommendation would provide for a contractual relationship for up to 25 years. This would allow for a partner to raise capital to invest in the facility and programming for the long-term through grants or donations. Many grantors who provide funding for the improvement of spaces and implementation of programming are less likely to make those investments if an agreement is shorter in term.

## **ANALYSIS**

On November 4, 2008, the City Charter was amended to include Section 1700.1, entitled Council Authority to Enter into Long-Term Agreements ("City Charter"), which authorizes the City Council to enter into agreements with non-City entities or individuals, for use of certain City parks for a term of up to 25 years, without voter approval. City Council Policy Number 7-8, Long-Term Use of the City Parklands for Private Enterprise Purposes, establishes guidelines and procedures regarding the City Council's authority and parameters in this regard. Per the Policy, the City Council may approve long-term agreements (up to 25 years) on public parks that are more than five acres that have at least one community serving amenity.

According to City Charter, a "Community Serving Amenity" is defined as one of the following: Pool, Community Center or Reservable Sports Field or similar recreational improvements in a park and that is described in the City's approved master strategic plan, the "Greenprint," for

parks and community facilities. As a regional park, Emma Prusch Farm Park has a host of community serving amenities. The buildings found on the parkland, while not an official community center, serve the community with preschool, after school, leisure and other programs, and community space for neighbors and groups to meet and recreate. It also has, as noted above, six acres of agricultural land to produce food and provide agricultural and educational services.

The Policy further states that any Long-Term Agreement approved by City Council must be reflective of the following criteria:

- (a) Shall adhere to the Public Outreach Policy of the Department of Parks, Recreation and Neighborhood Services which provides for specific and timely means of outreach for projects based on size, complexity and potential interest by stakeholders. Public outreach meeting requirements on non-construction agreements will require the creation of a plan based on the size, complexity and potential interest by stakeholders, which will be approved by the Director of PRNS;
- (b) Shall conform to applicable Council policies for Environmental Review;
- (c) Shall comply with the City's policies on prevailing wage and living wage, to the extent applicable; and
- (d) Shall be reviewed by the Parks and Recreation Commission for recommendation to Mayor and City Council.

In order to satisfy the criteria above, the Department coordinated an outreach plan which included a Request for Proposal and extensive communication with external stakeholders and the general public via email and social media. The resulting agreement from this solicitation will include all applicable requirements surrounding living wage, prevailing wage, and Environmental Review.

### ***Request for Proposal Process***

On June 17, 2021, a Request for Proposal for the operation of Emma Prusch Farm Park was released through Biddingo, the City's procurement portal, for a period of 7 weeks, with the initial closing date of July 22, 2021. A second and final extension of the submission deadline was issued through July 29, 2021. The Department received two proposals prior to the submission deadline from the following organizations:

- 1. California Native Garden Foundation; and
- 2. Veggielution

### ***Evaluation Process***

These two proposals were reviewed and scored in accordance with the evaluation criteria set forth in the RFP document by a panel that consisted of three evaluators. All evaluators were from the Department. The evaluation categories and summary of scores are as follows:

Table 1. Evaluation Categories and Weighting Summary

<b>Evaluation Summary</b>	<b>Maximum Score</b>
Organizational Experience	20
Programming Experience	20
Operational Experience	20
Community Engagement	20
Budget	20
<b>Total Score</b>	<b>100</b>

***Interviews with Proposers***

The Department interviewed the two proposers on October 6, 2021. The interviews were evaluative, meaning that the final scores factored in the results of this interview. The proposers were each asked five questions that aligned with the evaluation categories stated in Table 1. The final proposer scores are as follows:

Table 2. Proposal Scores with Interview

<b>Organization Name</b>	<b>Points (out of 100)</b>
California Native Garden Foundation	68.4
Veggielution	83.8

**Appeals:** The RFP process included a ten-day appeal period that began on October 8, 2021. No appeals were received.

**Award:** The Department recommends Veggielution be awarded the long-term agreement of up to 25 years for the operation of six acres of land within Emma Prusch Farm Park. Veggielution brings in over 12 years of experience in serving San Jose residents and has educated almost 40,000 community members throughout San Jose, primarily in the East San Jose area. Veggielution has been a valued partner throughout the years, bringing in many collaborative efforts such as the Si Se Puede Collective, which consists of a group of five organizations that have been embedded in the Mayfair neighborhood for decades, building trust and understanding of residents' day-to-day realities and lived experience. Veggielution can leverage partnerships such as the Si Se Puede Collective to directly benefit the community and has led efforts at Emma Prusch Farm Park such as the COVID-19 food box distribution, distributing up to 5000 food boxes weekly. Their proposal demonstrated capacity to operate the dynamic Park space, as well as commitment to the residents of the East San Jose area and surrounding Mayfair community. Veggielution, as the current operator of the proposed space, has and continues to deploy

appropriate staffing, training, coordination, and relevant partnerships to successfully implement agricultural and education services to residents in San Jose.

***Summary of Proposed Agreement:*** The agreement will conform to the City's standard terms and conditions, including the Council Policy 7-8, and will include the following provisions:

- Specifications regarding the amount of space the agency will occupy.
- Scope of Agriculture and Education Services to be provided, which include, but are not limited to the following priorities:
  - Teaching the agricultural history of the region;
  - Promoting sustainable agriculture practices;
  - Promoting agricultural awareness;
  - Providing experiential learning in a farm environment;
  - Improving health and wellness;
  - Promoting youth development;
  - Providing access to a farm and rural environment;
  - Promoting stewardship and volunteerism;
  - Building and improving community livability; and
  - Promoting neighborhood development.
- Scopes and schedules of community access and involvement in the Educational Services provided at the site, with particular emphasis made for providing access to school-aged children and volunteer groups.
- Collaboration between the City and the agency to develop and implement a plan for educational services that aligns with the Department's ActivateSJ Strategic Plan and complements Department-led educational programming.

## **CONCLUSION**

Emma Prusch Farm Park serves San Jose residents and hosts a variety of educational and recreational opportunities on land designated for agriculture. To satisfy the City Charter, the Department followed Council Policy 7-8 to develop a public outreach plan which included a RFP process to secure a responsible operator for the long-term operation of Emma Prusch Farm Park. Furthermore, the Department recommends the award of the long-term contract to Veggielution, who continues to demonstrate their commitment to the community members of East San Jose for reinvestment into infrastructure improvements and programmatic development.

## **EVALUATION AND FOLLOW-UP**

This memorandum will be heard at the City Council meeting on November 9, 2021 for approval to authorize the City Manager to negotiate and execute the long-term agreement (see Attachment A, Agreement Exemplar, for an example of the contract that is subject to final negotiation with the selected service provider) for the operation of six acres of agricultural space within Emma Prusch Farm Park to produce food and provide additional educational programming as an enhancement of existing staff-run programs at the park for the benefit of the community.

## **CLIMATE SMART SAN JOSE**

The recommendation in this memorandum has no effect on Climate Smart San José energy, water, or mobility goals.

## **PUBLIC OUTREACH**

In accordance with Policy 7-8, the Director of PRNS approved a Public Outreach Plan on June 3, 2021. In that plan, the Department satisfied the Policy's provisions requiring staff to provide specific and timely means of outreach for the project based on its size, complexity, and potential interest of stakeholders by issuing the Emma Prusch Farm Park Operator RFP. Opportunities for direct stakeholder engagement included pre-proposal presentations, question and answer workshops, and site visits. These meetings included existing partners, potential applicants, and other interested members of the public.

### ***Outreach to Existing Partners and Potential Applicants***

The Department sent out notices for this RFP to agencies who are registered in Biddingo, the City's e-procurement system; and WebGrants, the City's Grant Management System. In addition, the Department emailed notices to its partner distribution list, which includes non-profit and community-based organizations, and grantee networks. With the guidance of Parks Division staff, the Department emailed key partners and stakeholders directly, including the Emma Prusch Foundation, 4H Barn Leaders, Master Gardeners, and Friendship Forest.

### ***Outreach to the General Public***

The Department posted announcements about this RFP through its various social media platforms, including the Department's Facebook page, as well as its Twitter and Instagram accounts. In addition, the Department issued announcements on its internet site and via a media release.

***Pre-Proposal Workshops and Public Site Walkthrough***

The Department conducted two Pre-Proposal Workshops aimed at answering potential applicants' questions regarding the RFP process, as well as addressing any questions or concerns voiced by the general public. Information provided included the following:

- RFP timeline;
- Scope of work;
- Required documents; and
- Application submission process (Bidding training).

Subsequently, the Department also hosted an in-person walkthrough at the Emma Prusch Farm Park site. In all instances, the public was allowed to ask questions pertaining to this RFP and all questions and responses were posted on Biddingo for public viewing.

**COORDINATION**

This memorandum was coordinated with the City Manager's Budget Office, and the City Attorney's Office.

**COMMISSION RECOMMENDATION/INPUT**

This memorandum is scheduled to be on the agenda for the Parks and Recreation Commission meeting on November 3, 2021. A supplemental memorandum will be issued following the meeting summarizing the Commission's recommendation and input.

**COST SUMMARY/IMPLICATIONS**

The agreement with the selected contractor will not have any cost implications. The use of the land by the contractor will be in exchange for the benefits that they bring to the community through services and programming.

HONORABLE MAYOR AND CITY COUNCIL

October 25, 2021

**Subject: Long-Term Use Agreement for the Operation of Emma Prusch Farm Park**

Page 8

**CEQA**

Not a Project, File No. PP17-003, Agreements/Contracts (New or Amended) resulting in no significant physical changes to the environment.

/s/

JON CICIRELLI

Director of Parks,

Recreation and Neighborhood Services

For questions, please contact Avi Yotam, Deputy Director, at [avi.yotam@sanjoseca.gov](mailto:avi.yotam@sanjoseca.gov).

Attachment A: Agreement Exemplar



## ATTACHMENT A: AGREEMENT EXEMPLAR

### SUMMARY PAGE

#### LEASE AGREEMENT BETWEEN THE CITY OF SAN JOSE AND [CONTRACTOR NAME HERE] FOR USE OF EMMA PRUSCH FARM PARK

This AGREEMENT is entered into this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by the CITY OF SAN JOSÉ, a municipal corporation (“CITY”), and [INSERT CONTRACTOR NAME HERE], a [insert entity type here] (“CONTRACTOR”).

Description:

Agreement for use of a portion of Emma Prusch Farm Park identified on Exhibit A (“Premises”) for an agricultural based operation which will provide educational and interpretive experiences.

Funding Source:

Amount Not to Exceed:

Payment Terms:

See Exhibit B

Agreement Term:

Start Date:

End Date:

PARTIES TO AGREEMENT:		GRANTEE	CITY
Name:			CITY OF SAN JOSÉ
Address for Legal Notice:			200 East Santa Clara Street, 9 <sup>th</sup> Floor San José, CA 95113
Attention:			Jon Cicirelli, Director
Email Address:			Jon.cicirelli@sanjoseca.gov
Telephone No.:			(408) 535-3570
Federal Taxpayer ID:			
City Business License/ Tax No.:			
Type of Entity:			
State of Incorporation or Residency:	California		

### **CONTACT INFORMATION**

CONTRACTOR CONTACT PERSON:	
Title:	
Telephone No:	
Email:	

### **EXHIBIT LIST & SIGNATURE PAGE**

**YES    N/A**

- |                                     |                          |              |   |
|-------------------------------------|--------------------------|--------------|---|
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Exhibit A:   | Description of Park and Facilities  |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Exhibit A-1: | Premise Map   |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Exhibit B:   | Description of Allowed Activities and Services, and Applicable City Fees and Charges                    |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Exhibit C:   | Maintenance   |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Exhibit D:   | Insurance   |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Exhibit E:   | Employee/Volunteer Clearance Verification and Compliance with the Child Abuse and Neglect Reporting Act |

\_\_\_\_\_

**The Exhibits and Certifications marked above are attached hereto and incorporated herein. I certify that I have read and hereby agree to comply with all the terms and provisions contained in this AGREEMENT, including without limitation, all Exhibits and Certifications.**

WITNESS THE EXECUTION HEREOF the day and year first hereinabove written.

**CITY OF SAN JOSE**

**[INSERT CONTRACTOR NAME HERE]**

By:		By:	
Name:	Sarah Zarate	Name:	
Title:	Director, Officer of the City Manager	Title:	
Date:		Date:	

**APPROVED AS TO FORM:**

By: \_\_\_\_\_  
Name: Jon Calegari  
Title: Deputy City Attorney  
Date: \_\_\_\_\_

## **CITY OF SAN JOSE AGREEMENT**

This AGREEMENT is made and entered upon execution by CITY, by and between the CITY OF SAN JOSE, a municipal corporation of the State of California (hereinafter referred to as "CITY"), and the person or entity identified as CONTRACTOR on page 1 of the Summary Pages at the beginning of this AGREEMENT (hereinafter referred to as "CONTRACTOR").

### **THE PARTIES HEREBY AGREE AS FOLLOWS:**

#### **RECITALS**

WHEREAS, CITY is the owner of the Property identified on Exhibit A within the City of San José ("PARK"); and

WHEREAS, CITY's Director of Parks, Recreation and Neighborhood Services and his or her designated representatives (individually and collectively "Director") is charged with the responsibility of supervising the use of CITY's parks and recreational facilities; and

WHEREAS, CITY and CONTRACTOR desire to enter into this AGREEMENT to grant permission to CONTRACTOR for the purposes identified on the Summary Pages and Exhibit B, contingent upon payment of fees and charges identified herein;

NOW, THEREFORE, CITY and CONTRACTOR agree as follows:

#### **1. REVOCABLE LICENSE/USE AND TIMES OF OPERATION**

- A.** CITY hereby grants CONTRACTOR the revocable license to conduct the activities identified on Exhibit B on the portion of the PARK identified on Exhibit A during the term of this AGREEMENT as set forth on the Summary Pages, subject to all licenses, easements, encumbrances, and any other claims of title affecting the Property ("Use").
- B.** The PARK may be used by CONTRACTOR only for purposes identified on Exhibit B and related activities as are permitted by the provisions of this AGREEMENT.
- C.** The Director shall meet with the CONTRACTOR prior to commencement of the work of this AGREEMENT and annually thereafter to confer on maintenance issues related to the PARK.
- D.** All CONTRACTOR activity shall conform to CITY's rules and regulations for use of the PARK. No activities shall occur outside this timeframe without specific written approval from the Director.

- E. CONTRACTOR expressly agrees and acknowledges that this AGREEMENT constitutes a license for use of PARK only and does not and shall not grant CONTRACTOR any right of possession, estate, title or other interest whatsoever in or to the PARK.

2. TERM

The term of this AGREEMENT shall commence upon execution and shall expire in twenty-five (25) years, unless sooner terminated in accordance with Section 26 of this AGREEMENT, entitled "TERMINATION."

3. USE FEE

CONTRACTOR shall pay CITY for use of the PARK, as set forth in EXHIBIT B, entitled "Description of Allowed Activities and Services, and Applicable City Fees and Charges."

4. ACCOUNTING RECORDS AND REPORTS

- A. CONTRACTOR shall establish and maintain at all times, during the term of this AGREEMENT and any extensions hereto and on a current basis in connection with CONTRACTOR's operations and programs as defined by and performed under its charter, an adequate accounting system in accordance with generally accepted accounting principles and standards acceptable to Director, covering all revenue costs and expenditures with respect to CONTRACTOR's performance under this AGREEMENT.
- B. CONTRACTOR shall submit a semiannual report to the Director including a summary of programs/events held at PARK during the previous two quarters, total attendance at each program/event, and a financial summary detailing program costs and revenues for the prior two quarters.

5. RIGHT OF EXAMINATION AND AUDIT

CITY's Auditor, Attorney, Manager, or the Director, or any duly authorized representatives thereof, shall have access to and the right to examine all facilities and activities of CONTRACTOR engaged in performance of this AGREEMENT, including the right to audit, examine and make excerpts or transcripts of or from such records, and to make audits of all contracts, subcontracts, invoices, payrolls, personnel records, conditions of employment, materials, and all other data or financial records relating to matters covered by this AGREEMENT. The right of CITY to examine or audit shall continue for three (3) years after the termination of this AGREEMENT.

6. SIGNS

- A. The prices of all items offered for sale shall be displayed on a sign located at the respective place of sale. Such display of prices shall be done in a manner to be seen clearly and read by customers. The separation of tax and price of each item shall also be clearly indicated.

- B. CONTRACTOR shall not install, erect, affix, paint, or place any sign, lettering or other advertising device in, on, or about the PARK without the written consent of the Director having been first obtained. Any and all signs, lettering or other advertising device, or a replacement thereof, which may be permitted by the Director shall, at the option of the Director, be removed by CONTRACTOR at CONTRACTOR's sole cost and expense upon the expiration or termination of this AGREEMENT.
- C. CONTRACTOR shall provide at least one sign approved by Director, easily visible to the public, which states the name, address and telephone number of at least one individual responsible for responding to emergencies and for servicing of complaints and concerns.

## 7. UTILITIES

- A. Exhibit B describes the utility service to the PARK and the cost allocation for such services.
- B. CONTRACTOR shall not cause the installation of any additional utility services without the prior written approval of Director.

## 8. NO WASTE, NUISANCE OR CONTAMINATION

CONTRACTOR shall not commit, nor suffer to be committed, any waste upon the PARK, nor any illegal activity, nor any public or private nuisance, nor other act or thing which may disturb the enjoyment of any occupant, tenant, patron or member of the public using or occupying any portion of the PARK.

## 9. MAINTENANCE OF FACILITIES

- A. CONTRACTOR shall, at its sole cost and expense, keep and maintain the facilities within the PARK in a clean and sanitary condition by performing those tasks and following the schedule set forth in Exhibit C.
- B. CITY and CONTRACTOR agree to conduct a pre-use walk through of the site, noting current conditions and clarifying roles and responsibilities as called out in this AGREEMENT.
- C. CITY shall provide CONTRACTOR with three (3) sets of keys to location(s) which may include but will not be limited to Restrooms, Restroom Supply Room, toilet fixtures, and padlock keys to agriculture field. All keys remain the property of the CITY and shall be returned upon termination of this AGREEMENT. CONTRACTOR shall not produce copies of the keys without permission of the Director. With approval from the Director, CONTRACTOR shall be responsible for the costs of re-keying due to lost or stolen keys. CITY shall send CONTRACTOR an invoice for its costs of re-keying, which shall be due and payable thirty (30) days from the date of invoice.

- D. CONTRACTOR may apply only pesticides, herbicides, and other chemicals at the PARK that have been pre-approved by CITY and are included in the CONTRACTOR's Initial Use Plan or Annual Use Plan. Only CITY-approved chemicals may be used to clean the Restrooms.
- E. CONTRACTOR shall prohibit any and all vehicles not reasonably necessary to provide the maintenance required hereunder, from entering and parking on PARK grounds. Any vehicle that is illegally parked may be cited and towed away at owner's expense.
- F. CONTRACTOR shall not make any modifications to the PARK, including any facilities located within the PARK, without the prior written approval of Director.
- G. CONTRACTOR shall, at its sole cost and expense, keep and maintain the PARK in the same condition as received, excepting ordinary wear and tear unless otherwise provided herein. Furthermore, CONTRACTOR shall keep all fire exits clear from obstruction and shall keep supplies and equipment in an orderly fashion to allow for CITY use if needed.
- H. CONTRACTOR recognizes that services, usage and maintenance of the PARK may be subject to the CITY's prevailing wage policy or living wage policy. To the extent the CITY determines that the activity is subject to such policies, CONTRACTOR shall be required to pay no less than the general prevailing rate of per-diem wages for any paid labor performed or the living wage, as determined by the CITY's Office of Equality Assurance.

10. AVAILABILITY OF CITY PROPERTY

The revocable license granted by CITY for CONTRACTOR to occupy and use the PARK covered by this AGREEMENT is contingent upon the same being CITY-owned property in a safe and usable condition and that if at any time during the term of this AGREEMENT the PARK should no longer be CITY-owned property or should become unsafe or unusable from any cause, this AGREEMENT shall terminate and the CITY shall have no obligation to provide other premises or furnishings to CONTRACTOR.

11. EMPLOYEES/VOLUNTEERS

- A. Any and all personnel employed or volunteers retained by CONTRACTOR in conducting the operations of CONTRACTOR's program shall be qualified to perform the duties assigned to them by CONTRACTOR.
- B. CONTRACTOR shall not hire employees or volunteers who will have supervisory or disciplinary authority over minors who have been convicted of any offense identified in California Public Resources Code Section 5164. CONTRACTOR shall fully indemnify, defend and hold harmless CITY for any such hiring. CONTRACTOR shall notify CITY immediately in writing of any violation of this provision upon discovery.

- C. CONTRACTOR shall also not employ any person, paid or unpaid, who is permitted to provide services requiring contact with children or providing food concessionaire services or other licensed concessionaire services in that area, unless CONTRACTOR has complied with the TB testing requirements set forth in Section 5163 of the California Public Resources Code.
- D. Regardless of whether services have been provided prior to full execution of this AGREEMENT, CONTRACTOR certifies to CITY that all services were provided in full compliance with the terms and provisions of this AGREEMENT.
- E. To give effect to California Public Resources Code Sections 5163 and 5164, CONTRACTOR shall follow the procedures specified in Exhibit E entitled "Employee/Volunteer Clearance Verification and Compliance with the Child Abuse and Neglect Reporting Act" attached hereto. In the event CONTRACTOR chooses a different national criminal database for compliance with the FBI requirement for background checks, then such alternative database shall receive prior written approval of CONTRACTOR's liability insurance provider.

12. NONDISCRIMINATION BY CONTRACTOR

CONTRACTOR shall not discriminate, in any manner, against any person on the basis of race, sex, color, age, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity or national origin in connection with or related to the performance of this AGREEMENT.

13. CONTRACTOR RIGHTS AND STATUS/CITY RIGHTS TO ENTER

- A. The rights herein given to CONTRACTOR are revocable contract rights only and in no respect shall the same constitute or be construed as granting a leasehold or other property interest in any of the real property described in this AGREEMENT.
- B. In addition, CONTRACTOR, its agents, employees and volunteers shall be at all times independent contractors and shall not be considered agents or employees of the CITY and shall not be entitled to any salary, fringe benefits, pension, Workers' Compensation, sick leave, insurance, or any other benefit or right connected with employment by the CITY, or any compensation than is prescribed herein. CONTRACTOR hereby expressly waives any claim it may have to any such employment related compensation, benefits and rights.
- C. CITY, its officers, employees and agents shall have the right to enter into and upon the PARK at all reasonable times without prior notice. CITY's right to enter shall be without rebate of fees to the CONTRACTOR for any loss of occupancy or quiet enjoyment of the PARK thereby occasioned.

14. ASSIGNABILITY

The parties agree that the expertise and experience of CONTRACTOR are material

considerations for this AGREEMENT. Unless specifically authorized by this AGREEMENT, CONTRACTOR may not assign the performance of any obligation or interest under this AGREEMENT without prior written consent of CITY. Any attempt by CONTRACTOR to assign this AGREEMENT, in violation of this Section, will be voidable at CITY's sole option.

15. SUBCONTRACTORS

A. Assignability

CONTRACTOR may not use subcontractors to perform any services authorized under this AGREEMENT.

B. Authorized Subcontractors

Notwithstanding Section 15A (Assignability) above, CONTRACTOR may use designated subcontractors approved in advance by CITY in performing CONTRACTOR's services. CONTRACTOR must obtain CITY's prior written consent in order to change or add subcontractors. CITY assumes no responsibility whatsoever concerning compensation to subcontractors.

C. Compliance with AGREEMENT

CONTRACTOR shall ensure that CONTRACTOR's subcontractors comply with this AGREEMENT. At CITY's request, CONTRACTOR shall require any or all of CONTRACTOR'S subcontractors to sign an agreement with CONTRACTOR requiring compliance with this AGREEMENT.

16. CONTRACTOR TO INDEMNIFY AND HOLD CITY HARMLESS

CONTRACTOR shall defend, indemnify and hold harmless CITY, its officers, agents and employees (collectively referred to hereinafter as "CITY") from and against any and all claims, demands, causes of action, or liabilities incurred by CITY arising, in whole or in part, directly or indirectly, from CONTRACTOR's acts or omissions under this AGREEMENT or any act or omission of CONTRACTOR's officers, agents, employees, contractors, or persons entering the PARK under this AGREEMENT with the express or implied permission or invitation of CONTRACTOR, except as may arise from the gross negligence or willful misconduct of CITY. In any action or claim against CITY in which CONTRACTOR is defending CITY, CITY shall have the right to approve legal counsel providing CITY's defense and such approval shall not be unreasonably withheld. CONTRACTOR further agrees to release CITY from any and all claims for any damages, including property damage, injury or death occurring or arising out of use of CITY's property, except as may be caused by the CITY's gross negligence or willful misconduct.

CONTRACTOR shall abide by the PARK Rules and Regulations and acknowledges having received a copy thereof. Further, CONTRACTOR will be held financially responsible for any damage to the PARK, which occurs through CONTRACTOR's Use of the property described in this AGREEMENT.

CONTRACTOR shall hold the CITY harmless as to any claim for loss or damage to any personal property belonging to CONTRACTOR or any other person which may be



damaged, lost or stolen from the PARK premises and agrees that CITY shall at no time be responsible for the safekeeping or protection of any such personal property.

17. ENVIRONMENTALLY PREFERABLE PROCUREMENT POLICY

- A. CONTRACTOR shall perform its obligations under the AGREEMENT in conformance with City Council Policy 4-6, Environmentally Preferable Procurement Policy. A description for environmentally preferable procurement and the policy can be found on the CITY's website at:  
<https://www.sanjoseca.gov/your-government/environment/business-school-resources/for-schools/environmentally-preferable-procurement> .
- B. Environmental procurement policies and activities related to the completion of work will include wherever practicable, but are not limited to:
1. Use of recycled and/or recyclable products in daily operations.(i.e. 30, 50, 100% PCW paper, chlorine process free; triclosan free hand cleaner, etc.)
  2. Use of Energy Star Compliant equipment.
  3. Vehicles and vehicle operations (i.e. Alternative Fuel, Hybrid, etc.)
  4. Internal waste reduction and reuse protocol(s).
  5. Water and resource conservation activities within facilities, including bans on individual serving bottled water and the use of compostable food service products, etc.

18. WAIVER OF CLAIMS

CONTRACTOR, as a material part of the consideration to be rendered to CITY under this AGREEMENT, hereby waives all claims or causes of action against the CITY, its officers or employees which CONTRACTOR may now or hereafter have for damages to goods, wares, merchandise or other property in, about or upon the PARK, from any cause or causes arising at any time. In particular, but not by way of limitation, CONTRACTOR hereby waives any and all claims or causes of action which CONTRACTOR may now or hereafter have against the CITY, its officers or employees: (a) for loss, injury or damage sustained by reason of any deficiency, impairment and interruption of any service or system serving any portion of the PARK, and (b) for any loss, damage to the property of, or injury or damage to CONTRACTOR, CONTRACTOR's agents, employees, or volunteers, from any cause or causes arising at any time because of CONTRACTOR's use or occupancy of the PARK.

19. INSURANCE

CONTRACTOR agrees to have and maintain the policies set forth in EXHIBIT D, entitled "INSURANCE" which is attached hereto and incorporated herein. All policies, endorsements, certificates and/or binders shall be subject to approval by CITY's Risk Manager as to form and content. These requirements are subject to amendment or waiver if so approved in writing by Risk Manager. CONTRACTOR agrees to provide CITY with a copy of said policies, certificates and/or endorsements before occupying any space under

this AGREEMENT.

20. LICENSES

CONTRACTOR represents and warrants that it currently possesses all requisite licenses, including, but not limited to, a City of San Jose business tax certificate or exemption, if qualified, with the CITY's Finance Department to operate in the CITY. CONTRACTOR shall maintain all such licenses or exemptions for the term of this AGREEMENT and all extensions or amendments thereto. CONTRACTOR is solely responsible for contacting the appropriate offices and filing the necessary documents to comply with these requirements and any associated fees.

21. TAXES ON CONTRACTOR'S INTEREST

- A. CONTRACTOR shall pay before delinquency any and all taxes, assessments, licenses, fees and other public charges which may be levied, assessed or imposed upon any of CONTRACTOR's interest, or which may be imposed upon CONTRACTOR's business, or which may be imposed upon CONTRACTOR for the privilege of selling merchandise or for operating at the PARK or which may be imposed upon any other property of CONTRACTOR.
- B. CONTRACTOR recognizes and understands that this AGREEMENT may create a possessory interest subject to property taxation and that CONTRACTOR may be subject to property taxation and that CONTRACTOR may be subject to payment of property taxes levied on such interest, and that such payment shall not reduce any fees due the CITY hereunder and any such tax shall be the liability of and be paid by the CONTRACTOR in a timely manner and without obligation of the CITY.

22. TIME OF ESSENCE/BREACH

Where performance of a covenant is specified herein to be on or before a certain date, time shall be of the essence of said covenant. Performance by the CONTRACTOR of each and every condition, covenant or provision of this AGREEMENT is material, the breach of which shall constitute a material breach of this AGREEMENT for which Director may terminate this AGREEMENT.

23. WAIVER OF BREACH

The waiver of any breach of any term, covenant or condition herein contained by the CITY shall not be deemed to be a waiver of any subsequent breach of the same or any other term, condition or covenant contained hereon.

24. BREACH OF AGREEMENT REMEDIES

- A. In the event of any breach of this AGREEMENT by CONTRACTOR, then CITY, in addition to other rights or remedies it may have, shall have the immediate right

to remove all persons and property from the PARK and such property so removed may be stored by the CITY in a public warehouse or elsewhere at the cost of, and for the account, of CONTRACTOR.

- B. Should CITY, upon breach of this AGREEMENT by CONTRACTOR, elect to remove persons or property from the PARK as hereinabove provided, or should CONTRACTOR abandon the PARK, this AGREEMENT shall terminate.
- C. Termination of CONTRACTOR's right to use the PARK shall not relieve CONTRACTOR from the payment of any sum due to CITY or from any claim for damages previously accrued or then accruing against CONTRACTOR.

25. AUTOMATIC TERMINATION

The rights and privileges given to CONTRACTOR shall automatically be deemed terminated and at an end without any notice whatsoever for any of the following reasons:

- A. Any action taken or suffered by the CONTRACTOR under any insolvency or bankruptcy act, including the appointment of a receiver to take possession of all or substantially all of the assets of the CONTRACTOR.
- B. Any general assignment by CONTRACTOR for the benefit of creditors.
- C. The loss of CONTRACTOR's non-profit corporate status for any reason.

26. TERMINATION

- A. Termination for Convenience  
CITY shall have the right to terminate this AGREEMENT, without cause, by giving not less than thirty (30) days' written notice of termination.
- B. Termination for Long Term Agreements  
Pursuant to Council Policy 7-8, regarding Long-Term Use of City Parklands for Private Enterprise Solutions, CITY shall have the right to terminate this AGREEMENT, without cause, no later than ten (10) years after the commencement date and no later than every ten (10) years thereafter and on such other terms satisfactory to City Council.
- B. Termination for Default or for Health and Safety Reasons  
If CONTRACTOR fails to perform any of its material obligations under this AGREEMENT, or in the event the condition of the premises or operations thereon are determined in the CITY's sole discretion to constitute a threat of harm to health and safety, in addition to all other remedies provided by law, CITY may terminate this AGREEMENT immediately upon written notice.
- C. Termination Authority  
The Director of Parks, Recreation and Neighborhood Services is empowered to terminate this AGREEMENT on behalf of the CITY.

- D. In the event of termination, CONTRACTOR shall deliver to CITY copies of all reports, documents, and other work performed by CONTRACTOR under this AGREEMENT.

27. SURRENDER OF PARK

- A. Upon termination of the rights and privileges given to the CONTRACTOR for any cause and for any reason, CONTRACTOR shall immediately and forthwith surrender possession of the PARK and CONTRACTOR shall return keys (if any) to the CITY in as good a condition as when received; reasonable wear and tear, damage caused by weather conditions and damage caused by fire that was not proximately caused by the negligence of CONTRACTOR, its agents and employees excepted.
- B. CONTRACTOR on or before the termination of this AGREEMENT shall remove all property owned by CONTRACTOR from the PARK, and all such property not so removed shall be deemed, at the option of the CITY, to have been abandoned by the CONTRACTOR.
- C. If possession of the PARK is not surrendered on the last day of the term or any sooner termination of this AGREEMENT, as hereinabove provided, CONTRACTOR shall defend and indemnify CITY against all loss, damage or liability suffered by CITY because of CONTRACTOR's delay.

28. NOTICES

All notices required or permitted to be given under this AGREEMENT shall be in writing and personally delivered or sent by certified mail, postage prepaid and return receipt requested, addressed to the addresses shown on the Summary Pages. Unless otherwise specified herein, notice shall be deemed effective on the date personally delivered or, if mailed, three (3) days after deposit in the mail. The parties shall each effect any change to their respective addresses for purposes of delivering notices by sending notice of such change to the other party.

29. COMPLIANCE WITH ALL LAWS AND PLANS

- A. If CONTRACTOR shall conduct any public work at the PARK, at its sole cost and expense, CONTRACTOR shall obtain all governmental reviews and approvals, licenses and permits which are, or may be, required and necessary to construct and complete the public work in accordance with the provisions of this AGREEMENT, including, but not limited to, all plans and specifications, approvals, site development reviews, development permits, and environmental review. CONTRACTOR shall comply with all conditions, restrictions, or contingencies imposed upon, or attached to, such governmental approvals, licenses, and permits, as well as with applicable laws and regulations.

- B. If CONTRACTOR for any reason fails to comply with any of CITY's requirements, including compliance with the plans, or any other legal requirement concerning CONTRACTOR's construction of the public work, then CITY has the right to require CONTRACTOR to alter, repair, remove, or replace any improvements or perform any other action to bring the public work into compliance with such requirements to the satisfaction of the Director of Public Works and at no cost to CITY. CITY shall provide notice to CONTRACTOR as provided in Section 28 of this AGREEMENT. The Director of Public Works will determine if the CITY's requirements have been met.
- C. CONTRACTOR shall comply with all applicable city, state and federal laws, regulations, and rules related to the use and operation of the PARK and to the sale of merchandise, including but not limited to, laws, regulations, and rules applicable to health, safety, and equal opportunity employment. Without limiting the generality of the foregoing, CONTRACTOR shall comply with the provisions of CITY's "No-Smoking" ordinance (Chapter 9.44 of the San José Municipal Code) regulating smoking at certain public places, CITY's prevailing wage and living wage policies, and CITY's public works bidding and bonding requirements, to the extent applicable.

30. TITLE TO PROPERTY

CONTRACTOR shall neither make nor cause to be made any lien, encumbrance, or other charge whatsoever against the PARK, or any portion thereof, or against any of the personal property located at the PARK (except property owned, or leased by, or on loan to CONTRACTOR), which lien, encumbrance or charge has not been approved in writing by CITY. Nothing herein shall be deemed to prevent CONTRACTOR from contesting the validity or amounts of any tax, assessment, encumbrance or lien, provided CONTRACTOR provides adequate bond or other financial assurance acceptable to CITY necessary to prevent PARK, or any portion thereof, from forfeiture or sale.

31. MISCELLANEOUS

- A. The headings of the sections and subsections of this AGREEMENT are inserted for convenience only.
- B. Any and all Exhibits which are referred to in this AGREEMENT are incorporated herein by reference and are deemed a part of this AGREEMENT. This AGREEMENT, including all Exhibits attached hereto, represents the entire understanding of the parties as to those matters contained herein. No prior oral or written understanding shall be of any force or effect with respect to those matters covered hereunder. This AGREEMENT may only be amended by formal written AGREEMENT executed by both parties.
- C. The Exhibits listed on the Summary pages are attached to this AGREEMENT and are incorporated herein by reference as a part of this AGREEMENT.

**EXHIBIT A**  
**DESCRIPTION OF PARK AND FACILITIES (PREMISES)**

The Premises consisting of approximately six (6) acres of undeveloped and unimproved vacant field space in Emma Prusch Farm Park, is available for this Agricultural and Education Services Project as more specifically described in Map of Premises below.

Of the available six (6) acres, four (4) acres have no access to water service while the remaining two (2) acres are supplied from a metered sub-main water line. Irrigation capacity of this existing line is of sufficient capacity for drip irrigation on about two (2) acres of the available space.

The field is situated along side the intersection of two (2) major freeway systems and as such is subject to existing levels of constant noise from automobile traffic. The field is offered “as is” with no improvements or preparation by CITY prior to occupancy.

Parking is available for staff and visitors in the main parking lot and at a small twenty (20) space parking lot nearby, restrooms are supplied on site, and a three-season service road surrounds the field. There is no dedicated or reserved parking available for the CONTRACTOR, nor is parking permitted in the fenced area near the field parcel.

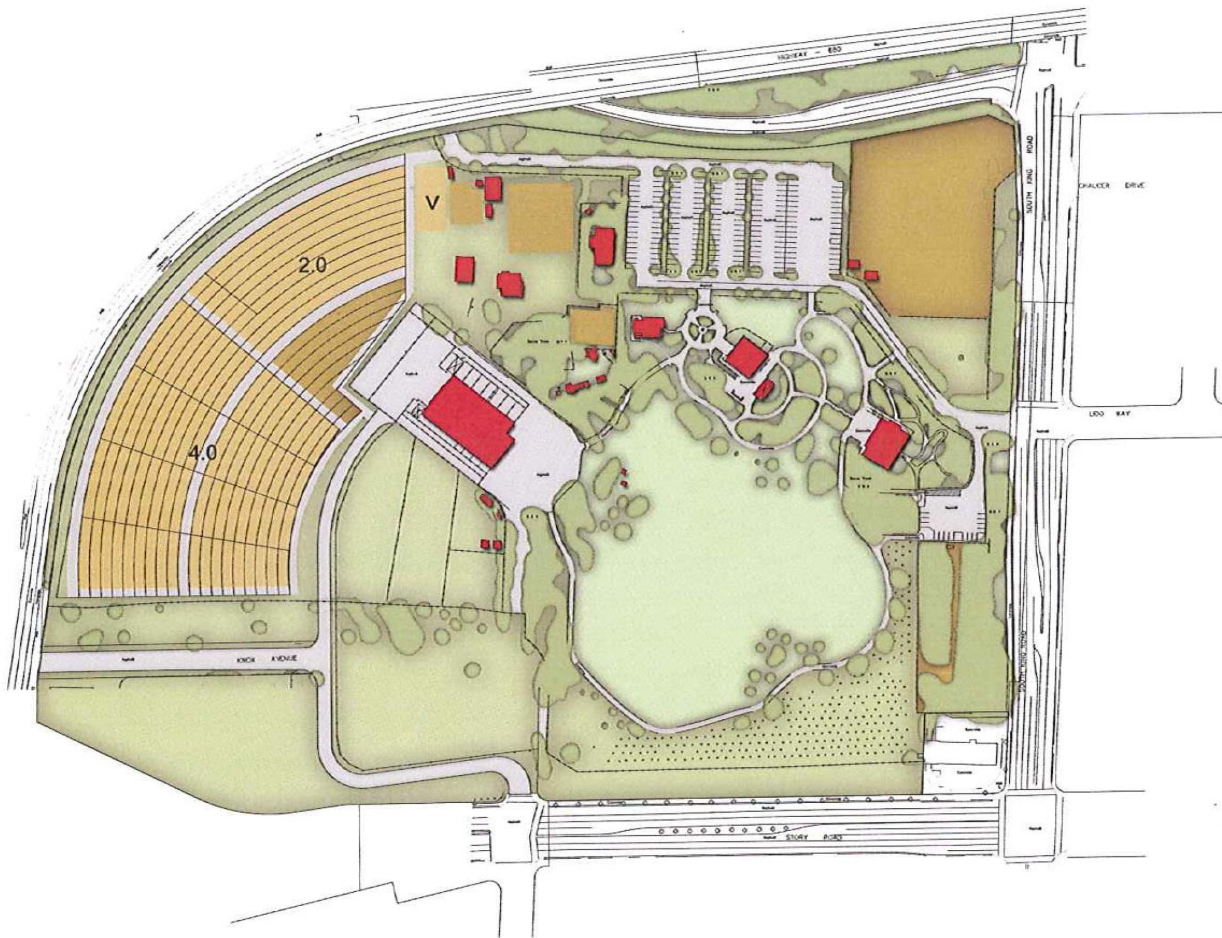
Existing storage facilities are not available, nor are dedicated electrical or other utility services.

**Use of Park Facilities:**

Various indoor and outdoor facilities are available for CONTRACTOR’s use at the PARK, subject to the terms and conditions of this Agreement. For specific details see Exhibit B, Section 11, “Fees and Charges”, Section 13, “Deposit”, Section 14, “Additional Fees and Charges”, and Section 15, “Special Events” for further details regarding CONTRACTOR’s usage of other PARK facilities.

### **EXHIBIT A-1: PREMISE MAP**

The Premises is described as approximately six (6) acres located at 647 South King Road, San Jose, CA, 95116. The location is highlighted in the map below as parcels 4.0 and 2.0 and the area labeled as "V". Final alignment of the parcel(s) shall be at the discretion of the CITY and will minimally exclude a 20-foot border (Karl Schiavo Grove) on the Western edge of both parcels and a 15-foot border on the Eastern edge of the parcel labeled 4.0. An Initial Use Plan and an Annual Use Plan (as specified in Exhibit B, Section 4), as approved by the CITY shall be the document that describes approved Use of PARK space.



**EXHIBIT B**  
**DESCRIPTION OF ALLOWED ACTIVITIES AND SERVICES**  
**AND APPLICABLE CITY FEES AND CHARGES**

**1) Education Services**

- a) The CONTRACTOR shall provide Agriculture and Education Services (“Education Services”) that include, but are not limited to the following priorities;
  - i) Teaching the agricultural history of the region;
  - ii) Promoting sustainable agriculture practices;
  - iii) Promoting agricultural awareness;
  - iv) Providing experiential learning in a farm environment;
  - v) Improving health and wellness;
  - vi) Promoting youth development;
  - vii) Providing access to a farm and rural environment;
  - viii) Promoting stewardship and volunteerism;
  - ix) Building and improving community livability; and
  - x) Promoting neighborhood development.
- b) The public, especially school aged children, community and volunteer groups, will be involved in the Education Services, and will have access to the site.
- c) CONTRACTOR shall include a plan for Education Services (classes and programs) in the Initial Use Plan and Annual Use Plan, subject to approval by CITY.
- d) CONTRACTOR will collaborate with CITY staff to create a plan for Education Services that complements existing services.

**2) Use and Operation**

- a) The CONTRACTOR will conduct field renovation, irrigation improvements and utility requirements, and may install fences, compost bins, planting tables, boxes, etc. in connection with their Education Services. Notwithstanding the foregoing, any and all work or services that are a Public Work, including but not limited to plans, drawings, specifications, design and/or construction shall be performed in accordance with the provisions set forth in Paragraph 29 of this AGREEMENT, and all pertinent codes and regulations of the City of San José. CONTRACTOR shall obtain prior approval for all proposed improvements, storage, structures, and utilities from the CITY and shall obtain all required permits for such work prior to commencing any such work.
- b) CONTRACTOR shall comply with CITY policies and all applicable state and federal laws, regulations and rules related to the use and operation of Premises, including but not limited to, laws, regulations and rules applicable to health, safety and equal opportunity employment.



### **3) Land Use Practices and Use Plan(s)**

- a) CITY is providing the Premises for the described agricultural practices and activities. As such, CONTRACTOR will be actively engaged in planting, growing, tilling, sowing, and otherwise actively utilizing the Premises for the intended purpose. Areas that are not in active agricultural production will be kept free of weeds taller than two (2) feet in height by CONTRACTOR. Weeds that are on the margins and not in areas of active production and are not otherwise landscaped (i.e.: native wildflowers) will be maintained in a manner that is in line with CITY maintenance standards and/or do not present a fire hazard or safety hazard as determined by CITY.
- b) Livestock, Poultry, and Bees. CONTRACTOR may engage in raising Livestock, Poultry, and Bees when such plans are included in an Annual Use Plan that has been reviewed and approved by the CITY. The final location of animal projects will be determined by the CITY and may include use of facilities outside of the CONTRACTOR's premises such as use of the Livestock Barn. CONTRACTOR may be required to pay fees for use of the Prusch Park facilities such as the Livestock Barn or other areas. CONTRACTOR understands that the primary purpose of such projects is educational and will provide information to the public about each project. Upon approval of CITY, and as set forth in the Annual Use Plan, CONTRACTOR may sell food produced from approved projects, such as but not limited to honey and eggs. CONTRACTOR must be knowledgeable and adhere to any applicable CITY, State, Federal, or other laws and regulations, including but not limited to all health and safety regulations, and is solely responsible for obtaining any permits and paying any and all permit fees.
- c) An 'Initial Use Plan' for the first year will be provided by CONTRACTOR within sixty (60) days after execution of this AGREEMENT. Thereafter, by February 15<sup>th</sup> of each year the CONTRACTOR shall provide an 'Annual Use Plan' for the following year. Seasonal 'use' plans may be submitted to record changes in the Annual Use Plan.

### **4) Water Use**

- a) CONTRACTOR agrees to use water conservation methods and to adhere to CITY watering and irrigation guidelines when relevant. Drip irrigation systems should be favored for use. CONTRACTOR is responsible for installation costs of irrigation systems. For those areas where irrigation is supplied from the existing PRUSCH PARK water main line, the CONTRACTOR agrees that timing of irrigation is dependant on CITY needs and that use and timing is under the direction of CITY. Times in which CONTRACTOR will not have the main water line available for use include but is not limited to overnight (CITY waters the lawn during this time) and when the water is turned off for repairs. CONTRACTOR agrees to meet any current and future directives on water use as issued by the CITY, Santa Clara Valley Water District, or other regulating agency.

### **5) Composting**

- a) CONTRACTOR may establish and maintain an area for Composting and Vermiculture practices. CITY shall have final authority in determining the location of Composting and

Vermiculture facilities. These facilities shall be operated so as to not attract rodents or insects. Composting and Vermiculture projects shall include informational signs as to the purpose of Composting. CONTRACTOR agrees to utilize hay and manure from the Livestock Barn in its composting program.

6) **Hazardous Materials/Hazardous Waste**

- a) **Hazardous Materials.** Hazardous Materials shall consist of chemicals, in original containers, used for cleaning purposes, such as kitchen cleaners, bleach, soap, etc. and shall also include gasoline contained in a CITY Department of Transportation approved container. CONTRACTOR may store and use Hazardous Material only in a safe and prudent manner and in compliance with all applicable environmental and governmental regulations and according to OSHA standards. A Material Safety Data Sheet (MSDS) binder with a listing of all Hazardous Materials used or stored shall be maintained and available at all times to CONTRACTOR's staff and CITY Staff. Duplicate MSDS's shall be provided to CITY at the time Hazardous Materials are first on site.
- b) **Hazardous Waste.** Hazardous Waste storage is not permitted at the PARK and disposal of any Hazardous Waste shall be in compliance with applicable federal, state, and local regulations.
- c) **Clean Up and Disposal.** CONTRACTOR is responsible for clean up and disposal of all spills and other contamination resulting from use or storage of Hazardous Materials or Waste. Any such cleaning and disposal will be done in a safe and prudent manner and in compliance with all applicable environmental and governmental regulations, according to OSHA standards, and according to manufacturer's labels and recommendations. For spills and contaminations that require emergency response, CONTRACTOR must contact the San Jose Fire Department for response. CONTRACTOR is solely liable for any such cost incurred for clean up including disposal. CONTRACTOR must comply with CITY directives immediately without delay when CITY determines that clean up, disposal, or emergency response is required and CONTRACTOR will be solely responsible for such clean ups, disposal, and response.

7) **Use Of Equipment**

- a) The CITY authorizes the CONTRACTOR to use any of CONTRACTOR's tools, equipment and vehicles that are powered by gas, diesel, electricity, or otherwise powered ("Equipment"). The allowed Equipment needed for operations of the approved agriculture project include the following: Tractor, roto-tiller, hand drill, hand saw, router, sander, street legal vehicles, agricultural vehicles, loading vehicles such as fork lifts, and powered landscaping equipment such as blowers, line trimmers, etc.
- b) CONTRACTOR agrees that its Equipment will be in good operating condition, with all factory installed parts, shields, guards, and other safety devices and shall not be altered in such a way as to subvert safety measures.
- c) CONTRACTOR agrees to work collaboratively and will consult with CITY before purchasing, at CONTRACTOR's own cost and expense, any additional Equipment.

- d) CONTRACTOR shall store Equipment in this category in a manner that is safe and away from public access. All hydraulic and other attachments will be stored in a 'down' or safe position when parked or not actively being operated.
- e) CONTRACTOR is solely responsible for use and storage of all Equipment and agrees that all persons moving or using such Equipment shall have appropriate licenses (if required), be fully trained and authorized to do so.
- f) CONTRACTOR agrees that persons using Equipment be provided with and use any and all appropriate Personal Protective Equipment.
- g) CITY has final authority on type of Equipment used, condition of Equipment, use of Equipment by CONTRACTOR, and may prohibit or revoke use at any time.
- h) CONTRACTOR agrees that any and all insurance and Workers Compensation related issues are the sole responsibility and liability of CONTRACTOR and that CONTRACTOR shall carry insurance coverage related to such use.

#### **8) Agricultural Enterprise**

- a) CONTRACTOR shall be granted permission to conduct on-site sales of agricultural produce at a temporary or permanent location to be approved in advance by the CITY subject. Any revenue accrued by CONTRACTOR will be reinvested into programs and facilities conducted on the Premises. CONTRACTOR will provide a plan to the CITY for reinvestment upon CITY request.
- b) CONTRACTOR will obtain CITY's approval for operating hours and location for On-Premises sales. Donations of product shall be treated the same as sales for the purpose of this AGREEMENT and for compliance with regulatory requirements.
- c) CONTRACTOR On-Premises sales may include produce and/or value added products, started plants in pots, seeds, and other products where the origin of the product is from On-Premises gardens.
- d) CONTRACTOR may also be granted permission to conduct On-Premises sales of eggs and honey when the products are produced on the Premises and from CITY approved projects.
- e) CONTRACTOR may conduct On-Premises sales of other merchandise and retail products as listed in the Initial Use Plan and Annual Use Plan and approved in advance by the CITY. The nature of approved products are such that they are related to agriculture, farming, country life, history, food industry, natural or cultural history, the environment and other similar topics as mutually agreed on by CITY and CONTRACTOR.
- f) CONTRACTOR agrees that all sales will be in compliance with all City, county, state, and federal laws that apply to such sales. Best practices that are common to food handling and fresh food distribution must be employed.
- g) The Director may grant CITY departments and other organizations the right to sell products at the PARK during special events and special programs but shall use

reasonable efforts to notify CONTRACTOR. CONTRACTOR also recognizes that the Prusch Park Foundation may also conduct sales at a Park gift shop.

- h) CONTRACTOR shall also be granted permission to conduct sales of produce, food, plants, seeds, and value added products by directly selling to stores, restaurants, and other similar venues, and also to sell directly to the public at Off-Premises Farmers Markets, outdoor markets, events, and other similar venues. Any revenue accrued by CONTRACTOR will be reinvested into programs and facilities conducted on the Premises. CONTRACTOR will provide a plan to the CITY for reinvestment upon CITY request.
- i) No alcoholic or tobacco products shall be offered for sale.
- j) CONTRACTOR agrees not to dispense any beverages or food in any container other than a container pre-approved by the Director.
- k) CONTRACTOR shall comply with CITY's Ordinance No. 28877, banning single-use carryout bags and prohibiting the free distribution of recycled paper bags by retail establishments, which Ordinance became effective January 1, 2012.
- l) CONTRACTOR agrees that the sale of all items shall be at prices as previously approved in writing by the Director. CONTRACTOR shall provide a list of sale items and prices to Director for approval upon execution of this AGREEMENT by including such list in the Initial Use Plan and subsequently in the Annual Use Plan.
- m) The Director may permit CONTRACTOR to increase the selling price of any item authorized to be sold under this AGREEMENT; provided, however, that the established selling price of any item shall not be increased unless the Director finds that such increase is necessary to prevent the CONTRACTOR from suffering a financial hardship. In making such finding of financial hardship, the Director shall consider the margin of profit of each unit sold, the total volume of such sales and the prevailing prices charged in the community for like articles.
- n) Except for alcohol or tobacco products, the Director may on request of CONTRACTOR authorize the sale of additional food and beverage items not initially included in CONTRACTOR's list. In order to be effective, the Director's approval must be in writing.
- o) The Director may direct in writing that the CONTRACTOR discontinue the sale of any food or beverage item, if in Director's sole discretion it is determined that such discontinuance is in the best interest of the public.
- p) CONTRACTOR shall make no sale within the PARK of any goods not specified in this AGREEMENT or in the Initial Use Plan or Annual Use Plan or as approved in writing by the Director.

- q) CONTRACTOR shall place orders for food, beverages, merchandise and supplies as an independent CONTRACTOR, and shall make no representation that such food, beverages, merchandise and supplies are ordered or purchased for, or on behalf of, CITY.
- r) CONTRACTOR shall not sublease any portion of the PARK to other groups.
- s) CONTRACTOR agrees to operate any sales stand in a good and businesslike manner and to render good, efficient and courteous service to the public. The Director may investigate and inquire into the quality of the service rendered by CONTRACTOR, and if Director should find that such service and privilege are not as herein required, or are detrimental to the public, Director may proceed with termination of this AGREEMENT.

**9) Compliance with Environmental and Agricultural Code**

When selling or distributing approved products, CONTRACTOR shall be responsible for maintaining compliance with any and all applicable laws, regulations, codes, and best practices as it relates to producing, growing, harvesting, handling, storing, and/or documenting food, produce, plants and other products that CONTRACTOR intends to sell or donate.

**10) Fees And Charges for Park Facilities**

CONTRACTOR has the exclusive use of the six (6) acres of land as described and set forth in EXHIBIT A of this Agreement. The other facilities at the Park include, but are not limited to the Livestock Barn, Multicultural Arts Center, meeting halls, indoor classrooms, and outdoor spaces (collectively "Park Facilities"), which facilities may be used by CONTRACTOR, subject to reservation and payment of any applicable fees or charges. CITY's standard fees and charges for use of any of the Park Facilities are set forth in the Parks, Recreation and Neighborhood Services Schedule of Fees and Charges, and may be changed by CITY from time to time. Director shall notify CONTRACTOR when fees and charges have been modified. CONTRACTOR and CITY agree to the following:

- b. CONTRACTOR shall be charged for use of the space at a reduced rate of up to 50%, throughout the duration of the term of agreement. If use of the space requires use of City staff, CONTRACTOR will pay for associated fees. CONTRACTOR must submit CITY application forms for use of any Park Facility.
- c. CONTRACTOR may not transfer any fee, discount, or assigned use to other users or parties.
- d. For CONTRACTOR's use of Park Facilities that does not conform to CITY sponsored or Co-sponsored use and/or use not in an approved Initial Use Plan or Annual Use Plan, the fees for use will be on the same terms as those for any public group; including payment of CITY's standard fees and charges and subject to existing PRNS booking and use policies.

## **11) Parking**

Parking at Prusch Park consists of a large parking lot, and a small parking lot consisting of twenty (20) parking spaces near the six (6) acres of land, as depicted on EXHIBIT A of this Agreement. CONTRACTOR shall not have exclusive use of any spaces in any of the parking lots. Currently, there is no charge for parking in any parking lots at Prusch Park. However, in the event the CITY revises its parking fee policy, CONTRACTOR and its employees, students, teachers, volunteers, vendors and guests shall not be exempt from any future parking fee policies or charges. CONTRACTOR and CITY reserve the right to negotiate any future compliance costs such as, but not limited to, hang tags, placards, or stickers that identify CONTRACTOR's vehicles.

## **12) Deposit**

CONTRACTOR agrees to pay a refundable deposit of One Thousand Dollars (\$1,000) upon execution of this Agreement, which CITY may draw upon to set off any repairs or cleaning required by CITY due to damage caused by CONTRACTOR or from CONTRACTOR's use. CONTRACTOR shall replenish any funds expended each year during the term of this Agreement. CONTRACTOR shall promptly reimburse CITY for any costs incurred by CITY for such damage or cleaning in excess of the outstanding amount of the damage deposit. CITY shall document all funds expended from this deposit and return any unused balance to CONTRACTOR within sixty (60) days of termination of this AGREEMENT.

## **14) Additional Fees And Charges**

The CONTRACTOR is subject to the PRNS Fees and Charges for any use not directly related to the Education Services covered by this AGREEMENT. For the purposes of this section, uses described and approved in the Initial Use Plan and Annual Use Plan are not subject to the fees as listed below unless identified as such by CITY.

- a Staffing: CONTRACTOR shall pay actual costs for CITY staffing.
- b Building Use: CONTRACTOR shall pay the current PRNS-approved fees. CITY will provide a current list of fees when requested by CONTRACTOR.
- c Extended Hours: CONTRACTOR will pay actual costs for CITY staffing and other costs as determined by CITY when CONTRACTOR's activities do not align with park operating hours.

## **15) Special Events**

- a Special Events: CONTRACTOR will coordinate any planned Special Events with Parks Staff and the Special Events Parks Use office.

- b. Small Events: In recognition of fundraising and community education opportunities, no special event facility permit cost will be charged to CONTRACTOR and it may host up to three (3) events annually where attendance is under 200 people, duration is under four (4) hours, and no alcohol is served. Events in this category must be identified and approved in the Initial Use Plan and/or Annual Use Plan. CONTRACTOR shall pay any and all fees for additional CITY staffing costs, or other fees such as but not limited to Fire Permits/Inspections and County Health Permits/Inspections. CONTRACTOR will be required to complete applications, requests, etc. and permits as directed by CITY or other regulating agency.
- c. Horse Demonstration: To support historic farming practices, CONTRACTOR may employ the use of a horse drawn plow, trailer, till, disc, or other farming implement for the purposes of a public demonstration, class, or other show. CONTRACTOR must provide proof to CITY that their insurance coverage allows for such activity. Such activity must be included and approved in the Initial Use Plan and/or Annual Use Plan.

**EXHIBIT C**  
**MAINTENANCE**

1. The CONTRACTOR shall be responsible for the overall physical and aesthetic condition of the PREMISES. Minimally this will include maintaining the PREMISES in such a manner as to provide a clean and sanitary condition that is free of hazards, pests, insects, rodents, weeds, and other vectors, smells, and/or blights. Upon receipt of notice of violation from CITY or any other regulating agency, CONTRACTOR shall remedy the violation immediately or no later than seven (7) days from receipt of notice.

2. CONTRACTOR agrees that maintenance and repair to PREMISES made necessary by reasonable wear and tear shall be performed at the expense of CONTRACTOR. CONTRACTOR agrees to reimburse CITY for any costs to CITY for repairs made necessary to PREMISES damaged through CONTRACTOR's use or misuse within thirty (30) days of CITY's invoice.

3. CONTRACTOR shall, at CONTRACTOR's cost and expense, reimburse CITY for the cost of any and all additional services expended by CITY at the PREMISES due to CONTRACTOR's use of the PREMISES, including without limitation, custodial services arising from CONTRACTOR's performances or other events.

4. CONTRACTOR agrees that daily maintenance of both the Men's and Women's restrooms at the LeFevre Barn is the responsibility of CONTRACTOR. Maintenance services include, at a minimum, daily cleaning after use. For the purposes of this section, "daily cleaning" shall mean the daily removal of litter and debris from the floor and other surfaces, sweeping of floors to remove loose dirt, mopping of floors to remove dried or wet dirt, cleaning of sinks, cleaning of toilets, and cleaning and removal of soap debris from the floors of both the Men's and Women's restrooms. CONTRACTOR is not responsible for stocking of consumable supplies in the restrooms. CITY will allow CONTRACTOR access to CITY's custodial storage area for the purposes of using CITY's tools, equipment, and supplies for daily cleaning of the restrooms.



**EXHIBIT D**  
**INSURANCE**

**INSURANCE REQUIREMENTS.** Contractor shall procure and maintain for the duration of the contract insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the work hereunder by the Contractor, his agents, representatives, employees or subcontractors. The cost of such insurance shall be included in the Contractor's bid.

**D-1    Minimum Scope of Insurance**

**Coverage shall be at least as broad as:**

1. The coverage provided by Insurance Services Office Commercial General Liability coverage ("occurrence" form CG 0001); and
2. The coverage provided by Insurance Services Office form number CA 0001 covering Automobile Liability. Coverage shall be included for all owned, non-owned and hired automobiles; and
3. Workers' Compensation insurance as required by the Labor Code of the State of California and Employers Liability insurance;
4. Professional Liability Errors and Omissions insurance for all Professional Services and.
5. Contractor's Pollution Liability Insurance including coverage for all operations and completed operations.

**There shall be no endorsement reducing the scope of coverage required above unless approved by the City's Risk Manager.**

**D-2    Minimum Limits of Insurance**

**Contractor shall maintain limits no less than:**

1. Commercial General Liability: \$1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.
2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage.
3. Workers' Compensation and Employers Liability: Workers' Compensation limits as required by the Labor Code of the State of California and Employers Liability limits of \$1,000,000 per accident.
4. Professional Liability Errors and Omissions: \$1,000,000 per claim and \$1,000,000 aggregate, coverage to be maintained following completion of work on project for 3

- years or, if policy is canceled, extended reporting period to equal the same.
5. Contractor's Pollution Liability Insurance: \$1,000,000 per contamination incident. Policy shall at a minimum cover on-site and off-site liability including third-party injury and property damage claims, transportation, clean-up costs, as a result of pollution conditions arising from Contractor's or its contractor's operations and completed operations

D-3 Deductibles and Self-Insured Retentions

**Any deductibles or self-insured retentions must be declared to, and approved by, the City.**

D-4 Other Insurance Provisions

**The policies are to contain, or be endorsed to contain, the following provisions:**

1. General Liability and Automobile Liability Coverages
  - a. The City, its officials, employees, agents and contractors are to be covered as additional insureds as respects: liability arising out of activities performed by, or on behalf of, the Contractor; products and completed operations of the Contractor; premises owned, leased or used by the Contractor; or automobiles owned, leased, hired or borrowed by the Contractor. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officials, employees, agents and contractors.
  - b. The Contractor's insurance coverage shall be primary insurance as respects the City, its officials, employees, agents and contractors. Any insurance or self-insurance maintained by the City, its officials, employees, agents or contractors shall be excess of the contractor's insurance and shall not contribute with it.
  - c. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City, its officials, employees, agents, or contractors.
  - d. Coverage shall state that the Contractor's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
  - e. Coverage shall contain a waiver of subrogation in favor of the City, its officials, employees, agents and contractors.
2. Workers' Compensation and Employers' Liability

Coverage shall contain a waiver of subrogation in favor of the City, its officials, employees, agents and contractors.
3. All Coverages

Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled, reduced in coverage or in limits except

after thirty (30) days' prior written notice has been given to the City; except that ten (10) days' prior written notice shall apply in the event of cancellation for non-payment of premium.

Acceptability of Insurance

D-5 Insurance is to be placed with insurers acceptable to the City's Risk Manager.

D-6 Verification of Coverage

Contractor shall furnish the City with certificates of insurance and with copies of endorsements affecting coverage required by this clause. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Copies of all the required ENDORSEMENTS shall be attached to the CERTIFICATE OF INSURANCE which shall be provided by the Contractor's insurance company as evidence of the stipulated coverages. This proof of insurance shall provide the Contractor's email and phone number to contact in case of insurance notifications or inquiries.

Proof of insurance shall be emailed in pdf format to: [Riskmgmt@sanjoseca.gov](mailto:Riskmgmt@sanjoseca.gov):

**Certificate Holder**  
**City of San José –**  
**Finance Department Risk**  
**Management**  
**200 East Santa Clara St., 13<sup>th</sup>**  
**Floor Tower San Jose, CA**  
**95113-1905**

D-7 Subcontractors

**Contractors shall include all subcontractors as insureds under its policies or shall obtain separate certificates and endorsements for each subcontractor.**

EXHIBIT E  
EMPLOYEE/VOLUNTEER CLEARANCE VERIFICATION AND COMPLIANCE WITH  
THE CHILD ABUSE AND NEGLECT REPORTING ACT

If CONTRACTOR provides services involving minors, and as a CITY-approved method of complying with the provisions contained in this AGREEMENT, CONTRACTOR shall conduct a criminal background check through the database of the California Department of Justice, **and** an FBI criminal database or equivalent national database as approved in writing by CONTRACTOR's liability insurance provider, on each of its employees and volunteers who have supervisory or disciplinary authority over minors.

1. CONTRACTOR shall also comply with the provisions of the Child Abuse and Neglect Reporting Act, California Penal Code Section 11164 *et. seq.* Additionally, CONTRACTOR certifies to the following:

Any and all personnel employed or retained by CONTRACTOR in conducting the operations of CONTRACTOR's program shall be qualified to perform the duties assigned to them by CONTRACTOR. CONTRACTOR agrees that CONTRACTOR shall not at any time allow its employees or volunteers to be in any position with supervisory or disciplinary authority over minors, if they have been convicted of any offense identified in California Public Resources Code Section 5164 (copy attached).

CITY and CONTRACTOR understand that results of background checks on minors may be confidential under state law. Therefore, all employees or volunteers must be at least 18 years of age if they are to be in a position having supervisory or disciplinary authority over any minor.

If CONTRACTOR intends to have employees or volunteers under the age of 18 providing services under this AGREEMENT, CONTRACTOR shall maintain and make available to CITY, if requested, guidelines, procedures or policies, that safeguard and ensure that no employees or volunteers under the age of 18 will be providing services under this AGREEMENT unsupervised, and further, CONTRACTOR shall ensure that none of its employees or volunteers under 18 years of age have any supervisory or disciplinary authority over any minor, as such term is used in California Public Resources Code Section 5164.

2. CONTRACTOR shall be responsible for ensuring that no person paid or unpaid by CONTRACTOR shall be permitted to provide services unless appropriate background checks, including fingerprints, have been performed prior to the beginning of services under this AGREEMENT, and the person meets the standards set forth above. If requested by CITY, and to the extent allowed by law, CONTRACTOR shall promptly provide documentation listing each person that has provided or is providing services hereunder involving supervision or disciplinary authority over minors, and certifying that the CONTRACTOR has conducted the proper background check on such person or persons, and each of the named persons is legally permitted to perform the services described in this AGREEMENT. Regardless of whether such documentation is requested or delivered by CONTRACTOR, CONTRACTOR shall be solely responsible for compliance with the provisions of this Section.

3. That no person paid or unpaid by CONTRACTOR shall be permitted to provide services requiring contact with children or providing food concessionaire services or other licensed concessionaire services in that area, unless CONTRACTOR has complied with the TB testing requirements set forth in Section 5163 of the California Public Resources Code (copy attached), verifying that the person or persons has provided evidence/verification of a negative TB skin test reading less than 2 (two) years old (if newly hired) or within 4 (four) years (if current employee) of the date of execution of this AGREEMENT and every 4 years thereafter, if the term of this AGREEMENT exceeds 4 years. For persons with a positive TB skin test reading, a physician's medical clearance must be obtained prior to services being provided as specified above. CONTRACTOR shall keep on file each "Certificate" of clearance for the persons described above, and shall also make available a copy of each Certificate to CITY, if requested and allowed by law. "Certificate" means a document signed by a licensed examining physician and surgeon or a notice from a public health agency or unit of the tuberculosis association which indicates freedom from active tuberculosis.
4. CONTRACTOR understands that if services are rendered on a school site, there may be additional requirements that may apply including without limitation, requirements under the California Education Code. CONTRACTOR, acknowledges that it is CONTRACTOR's sole responsibility to comply with all applicable laws, regulations and licensing requirements in CONTRACTOR's provision of services hereunder.

I, the CONTRACTOR by signing below verify that I have read and agree to the above:

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Signature

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Date

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(Please print or type name of organization)

## **CALIFORNIA PUBLIC RESOURCES CODE SECTION 5164**

**5164.** (a) (1) A county or city or city and county or special district shall not hire a person for employment, or hire a volunteer to perform services, at a county or city or city and county or special district operated park, playground, recreational center, or beach used for recreational purposes, in a position having supervisory or disciplinary authority over any minor, if that person has been convicted of any offense specified in paragraph (2).

(2) (A) Violations or attempted violations of Section 220, 261.5, 262, 273a, 273d, or 273.5 of the Penal Code, or any sex offense listed in Section 290 of the Penal Code, except for the offense specified in subdivision (d) of Section 243.4 of the Penal Code. (B) Any felony or misdemeanor conviction specified in subparagraph (C) within 10 years of the date of the employer's request

(C) Any felony conviction that is over 10 years old, if the subject of the request was incarcerated within 10 years of the employer's request, for a violation or attempted violation of any of the offenses specified in Chapter 3 (commencing with Section 207) of Title 8 of Part 1 of the Penal Code, Section 211 or 215 of the Penal Code, wherein it is charged and proved that the defendant personally used a deadly or dangerous weapon, as provided in subdivision (b) of Section 12022 of the Penal Code, in the commission of that offense, Section 217.1 of the Penal Code, Section 236 of the Penal Code, any of the offenses specified in Chapter 9 (commencing with Section 240) of Title 8 of Part 1 of the Penal Code, or any of the offenses specified in subdivision (c) of Section 667.5 of the Penal Code, provided that no record of a misdemeanor conviction shall be transmitted to the requester unless the subject of the request has a total of three or more misdemeanor convictions, or a combined total of three or more misdemeanor and felony convictions, for violations listed in this section within the 10-year period immediately preceding the employer's request or has been incarcerated for any of those convictions within the preceding 10 years. (b) (1) To give effect to this section, a county or city or city and county or special district shall require each such prospective employee or volunteer to complete an application that inquires as to whether or not that individual has been convicted of any offense specified in subdivision (a). The county or city or city and county or special district shall screen, pursuant to Section 11105.3 of the Penal Code, any such prospective employee or volunteer, having supervisory or disciplinary authority over any minor, for that person's criminal background. (2) Any local agency requests for Department of Justice records pursuant to this subdivision shall include the prospective employee's or volunteer's fingerprints, which may be taken by the local agency, and any other data specified by the Department of Justice. The request shall be made on a form approved by the Department of Justice. No fee shall be charged to the local agency for requesting the records of a prospective volunteer pursuant to this subdivision.

## **CALIFORNIA PUBLIC RESOURCES CODE SECTION 5163**

**5163.** (a) No person shall initially be employed in connection with a park, playground, recreational center, or beach used for recreational purposes by a city or county in a position requiring contact with children, or as a food concessionaire or other licensed concessionaire in that area, unless the person produces or has on file with the city or county a certificate showing that within the last two years the person has been examined and has been found to be free of communicable tuberculosis.

(b) Thereafter, those employees who are skin test negative shall be required to undergo the foregoing examination at least once each four years for so long as the employee remains skin test negative. Once an employee has a documented positive skin test which has been followed by an X-ray, the foregoing examination is no longer required and a referral shall be made within 30 days of the examination to the local health officer to determine the need for follow-up care.

"Certificate" means a document signed by the examining physician and surgeon who is licensed under Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code, or a notice from a public health agency or unit of the tuberculosis association which indicates freedom from active tuberculosis.

**5163.1.** The examination shall consist of an approved intradermal tuberculosis test, which, if positive, shall be followed by an X-ray of the lungs.

Nothing in Sections 5163 to 5163.2, inclusive, shall prevent the governing body of any city or county, upon recommendation of the local health officer, from establishing a rule requiring a more extensive or more frequent examination than required by Section 5163 and this section.

**5163.2.** The X-ray film may be taken by a competent and qualified X-ray technician if the X-ray film is subsequently interpreted by a licensed physician and surgeon.

**5163.3.** The city or county shall maintain a file containing an up-to-date certificate for each person covered by Section 5163.

**5163.4.** Nothing in Sections 5163 to 5163.3, inclusive, shall prevent the city or county from requiring more extensive or more frequent examinations.