

ORDINANCE NO. 7,262–N.S.

LEASE AGREEMENT WITH 100 BLACK MEN OF THE BAY AREA COMMUNITY SCHOOL TO LEASE CITY VAN

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. The Council finds as follows: The leasing of a City-owned surplus vehicle to 100 Black Men of the Bay Area Community School will help provide additional educational opportunities for Berkeley youth.

The Council further finds that the estimated revenue for the nine-month lease term is \$100 per month.

Section 2. The City Manager is hereby authorized to enter into a nine-month lease agreement with 100 Black Men of the Bay Area Community School for the use of one City-owned 2000 Dodge Ram Van 3500. Such lease shall be on substantially the terms set forth in Exhibit A.

Section 3. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of Council Chambers, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

At a regular meeting of the Council of the City of Berkeley held on October 30, 2012, this Ordinance was passed to print and ordered published by posting by the following vote:

Ayes: Anderson, Arreguin, Capitelli, Maio, Moore, Wengraf, Worthington, Wozniak and Bates.

Noes: None.

Absent: None.

VEHICLE LEASE AGREEMENT

THIS VEHICLE LEASE is entered into on _____, 2012 between the CITY OF BERKELEY ("City"), a Charter City organized and existing under the laws of the State of California, and 100 BLACK MEN OF THE BAY AREA COMMUNITY SCHOOL ("Lessee"), doing business at 3400 Malcolm Avenue, Oakland California, 94605.

WHEREAS, the City Council approved the item by Ord # _____. Now therefore, City agrees as follows:

1. SCOPE

a. City agrees to lease to Lessee one 2000 Dodge Ram Van 3500 upon the terms and conditions set forth below. City will not charge mileage for the leased vehicle.

b. Lessee agrees and understands that the vehicle is intended to be used only for activities officially sanctioned by Lessee and that are part of Lessee's business purpose, and shall not be utilized for personal or general transportation by Lessee's employees, officials, or students. The vehicle is for operations solely related to official school activities and operations.

c. Lessee agrees that prior to taking possession of the vehicle, Lessee will cause to have removed, at its sole cost, any City logo or identifying markings from the body of the vehicle.

d. At the termination of this Lease, Lessee agrees to return the vehicle to City in substantially the same condition as it was provided to Lessee, normal wear and tear excepted.

2. MAINTENANCE AND REPAIRS

a. Lessee agrees to provide all regular maintenance on the vehicle, including fuel, oil, water/coolant or flat tires as the result of normal operation.

b. In the event of vehicle failure, not the result of abuse or accident, this Lease shall terminate and Lessee will be reimbursed any money prepaid on a pro-rata basis. City will be under no obligation to provide Lessee with another vehicle or enter into a new lease with Lessee.

c. Lessee agrees to repair any leased vehicles for body damage or mechanical repair necessitated by vehicle abuse or accident, while under the care, custody and control of the Lessee and continue to pay rental on said vehicle during any period wherein the vehicle is not in service.

d. Lessee will not undertake any repairs, modifications, additions, or deletions to vehicles without prior authorization of City, and understands these repairs, modifications, additions or deletions will not be considered for reimbursement.

e. Lessee will be responsible for towing expenses and for any parking tickets on the vehicle during the term of this Lease.

3. PAYMENT

Lessee will pay City \$100 per month, payable on the first day of each month, and prorated for any partial month. Payment will be made to City of Berkeley, Finance Department, 1947 Center Street, Berkeley, CA 94704, and shall reference Contract No. _____.

4. TERM

a. This Lease shall begin on January 1, 2013 and end on August 31, 2013. The City Manager of the City may extend the term of this lease by giving written notice.

b. Either party may terminate this Lease for default upon five (5) days' written notice to the other if the other party has substantially failed to fulfill any of its obligations under this Lease in a timely manner. City may terminate this Lease at its convenience and without cause upon seven (7) days written notice to Lessee.

5. NOTICES

a. All notices that are required or allowed under this Lease shall be provided in the manner set forth herein, unless specified otherwise. Notice to a party shall be delivered to the attention of the person listed below, or to such other person or persons as may hereafter be designated by that party in writing. Notice shall be in writing sent by e-mail, facsimile, or regular first class mail. In the case of e-mail and facsimile communications, valid notice shall be deemed to have been delivered upon sending, providing the sender obtained an electronic confirmation of delivery. E-mail and facsimile communications shall be deemed to have been received on the date of such transmission, provided such date was a business day and delivered prior to 4:00 p.m. PST. Otherwise, receipt of e-mail and facsimile communications shall be deemed to have occurred on the following business day. In the case of regular mail notice, notice shall be deemed to have been delivered on the post-marked date and received five (5) days after the date of post-marking. For purposes of this Lease, all notices to City shall be addressed as follows:

City of Berkeley
City Manager's Office
2180 Milvia Street, Fifth Floor
Berkeley, California 94704
Attn: William Rogers, Deputy City Manager

b. For purposes of this Lease, all notices to Lessee shall be addressed as follows:

100 Black Men of the Bay Area Community School
3400 Malcolm Avenue
Oakland, CA 94605
Attn: _____
[insert fax number]
[insert email address for school, not an individual]

c. If City terminates this Lease for convenience, City shall reimburse Lessee any amount paid by Lessee for use of the vehicle prior to the date of termination, but no other loss, cost, damage, expense or liability may be claimed, requested or recovered by Lessee.

6. INDEMNIFICATION

(a) To the fullest extent permitted by law, Lessee shall (1) immediately defend and (2) indemnify City, and its directors, officers, and employees from and against all liabilities regardless of nature, type, or cause, arising out of or resulting from or in connection with the Lease. Liabilities subject to the duties to defend and indemnify include, without limitation, all claims, losses, damages, penalties, fines, and judgments; associated investigation and administrative expenses; defense costs, including but not limited to reasonable attorneys' fees; court costs; and costs of alternative dispute resolution. The Lessee's obligation to indemnify applies regardless of whether a liability is a result of the negligence of any other person, unless it is adjudicated that the liability is caused by the sole active negligence or sole willful misconduct of an indemnified party.

(b) The duty to defend is a separate and distinct obligation from the Lessee's duty to indemnify. The Lessee shall be obligated to defend, in all legal, equitable, administrative, or special proceedings, with counsel approved by the City, the City and its directors, officers, and employees, immediately upon submittal to the Lessee of the claim in any form or at any stage of an action or proceeding, whether or not liability is established. A determination of comparative active negligence or willful misconduct by an indemnified party does not relieve the Lessee from its separate and distinct obligation to defend City. The obligation to defend extends through final judgment, including exhaustion of any appeals. The defense obligation includes an obligation to provide independent defense counsel if Lessee asserts that liability is caused in whole or in part by the negligence or willful misconduct of the indemnified party. If it is finally adjudicated that liability was caused by the sole active negligence or sole willful misconduct of an indemnified party, Lessee may submit a claim to the City for reimbursement of reasonable attorneys' fees and defense costs.

(c) This Section survives the termination of this Lease. The provisions of this Section are not limited by and do not affect the provisions of this Lease relating to insurance.

(d) Liabilities subject to this Section include any claim of discrimination or harassment, including but not limited to sexual harassment, arising from the conduct of the Lessee or any of the Lessee's officers, employees, students, agents, licensees, or subcontractors.

7. INSURANCE

(a) Lessee shall maintain at all times during the performance of this Lease: (1) a general liability insurance policy with a minimum occurrence coverage in the amount of \$1,000,000 (one-million dollars); (2) an automobile liability insurance policy in the minimum amount of \$500,000 (five-hundred thousand dollars), including comprehensive and collision coverage with a deductible amount no greater than \$500; and, (3) if any licensed professional performs services under this Lease, a professional liability insurance policy in the minimum amount of \$1,000,000 to cover any claims arising out of Lessee's use of the vehicle under this Lease. All insurance, except professional liability, shall name the City, its officers, agents, volunteers and employees as additional insureds and shall provide primary coverage with respect to the City.

All insurance policies shall: 1) provide that the insurance carrier shall not cancel, terminate or otherwise modify the terms and conditions of said policies except upon thirty (30) days written notice to the City's; 2) be evidenced by the original Certificate of Insurance, specifying the required coverage and the insurance carrier's standard additional insured form endorsement; and 3) be approved as to form and sufficiency by the City. **The original insurance certificates and all extensions to the insurance certificates should be sent to the address identified above and include the CMS # WGCS5.**

(b) If the commercial general liability insurance referred to above is written on a Claims Made Form then, following termination of this Lease, coverage shall survive for a period of not less than five years. Coverage shall also provide for a retroactive date of placement coinciding with the effective date of this Lease.

(c) If Lessee employs any person, it shall carry workers' compensation and employer's liability insurance and shall provide a certificate of insurance to the City. The workers' compensation insurance shall: 1) provide that the insurance carrier shall not cancel, terminate or otherwise modify the terms and conditions of said insurance except upon thirty (30) days written notice to the City; 2) provide for a waiver of any right of subrogation against City to the extent permitted by law; and 3) shall be approved as to form and sufficiency by the City.

(d) Proceeds of any automobile insurance policy covering total destruction or theft of the vehicle shall be directly payable to City by the insurer.

(e) Lessor shall forward all insurance documents to:

Department Name: City Manager's Office

CMS#: WGCS5

Department Address: 2180 Milvia Street, Fifth Floor, Berkeley, CA 94704

8. CONFORMITY WITH LAW AND SAFETY

a. Lessee shall observe and comply with all applicable laws, ordinances, codes and regulations of governmental agencies, including federal, state, municipal and local governing bodies, including all provisions of the Occupational Safety and Health Act of 1979 as amended, all California Occupational Safety and Health Regulations, and all other applicable federal, state, municipal and local safety regulations. All activities performed by Lessee must be in accordance with these laws, ordinances, codes and regulations. Lessee shall release, defend, indemnify and hold harmless City, its officers, agents, volunteers and employees from any and all damages, liability, fines, penalties and consequences from any noncompliance or violation of any laws, ordinances, codes or regulations.

b. If a death, serious personal injury or substantial property damage occurs in connection with this Lease, Lessee shall immediately notify the City's Risk Manager by telephone. If any accident occurs in connection with this Lease, Lessee shall promptly submit a written report to City, in such form as the City may require. This report shall include the following information: 1) name and address of the injured or deceased person(s); 2) name and address of Lessee's subcontractor, if any; 3) name and address of Lessee's liability insurance carrier; and 4) a detailed description of the accident, including whether any of City's equipment, tools or vehicles were involved.

9. OWNERSHIP OF VEHICLE

a. When this Lease is terminated, Lessee agrees to return to City all leased vehicles it received from City, its contractors or agents, in connection with this Lease.

10. ON-DISCRIMINATION

Lessee hereby agrees to comply with the provisions of Berkeley Municipal Code ("B.M.C.") Chapter 13.26 as amended from time to time. In the performance of this Lease, Lessee agrees as follows:

a. Lessee shall not discriminate against any employee or applicant for employment because of race, color, religion, ancestry, national origin, age (over 40), sex, pregnancy, marital status, disability, sexual orientation or AIDS.

b. Lessee shall permit the City access to records of employment, employment advertisements, application forms, EEO-1 forms, affirmative action plans and any other documents which, in the opinion of the City, are necessary to monitor compliance with this non-discrimination provision. In addition, Lessee shall fill-out, in a timely fashion, forms supplied by the City to monitor this non-discrimination provision.

11. CONFLICT OF INTEREST PROHIBITED

a. In accordance with Government Code section 1090, Berkeley City Charter section 36 and B.M.C. Chapter 3.64, neither Lessee nor any employee, officer, director, partner or member of Lessee, or immediate family member of any of the preceding, shall have served as an elected officer, an employee, or a City board, committee or commission member, who has directly or indirectly influenced the making of this Lease.

b. In accordance with Government Code section 1090 and the Political Reform Act, Government Code section 87100 *et seq.*, no person who is a director, officer, partner, trustee, employee or consultant of the Lessee, or immediate family member of

any of the preceding, shall make or participate in a decision made by the City or a City board, commission or committee, if it is reasonably foreseeable that the decision will have a material effect on any source of income, investment or interest in real property of that person or Lessee.

c. Interpretation of this section shall be governed by the definitions and provisions used in the Political Reform Act, Government Code section 87100 *et seq.*, its implementing regulations, manuals and codes, Government Code section 1090, Berkeley City Charter section 36 and B.M.C. Chapter 3.64.

12. NUCLEAR FREE BERKELEY

Lessee agrees to comply with B.M.C. Chapter 12.90, the Nuclear Free Berkeley Act, as amended from time to time.

13. OPPRESSIVE STATES LEASING PROHIBITION

a. In accordance with Resolution No. 59,853-N.S., Lessee certifies that it has no contractual relations with, and agrees during the term of this Lease to forego contractual relations to provide personal services to, the following entities:

- (1) The governing regime in any Oppressive State.
- (2) Any business or corporation organized under the authority of the governing regime of any Oppressive State.
- (3) Any individual, firm, partnership, corporation, association, or any other commercial organization, and including parent-entities and wholly-owned subsidiaries (to the extent that their operations are related to the purpose of its Lease with the City), for the express purpose of assisting in business operations or trading with any public or private entity located in any Oppressive State.

b. For purposes of this Lease, the Tibet Autonomous Region and the provinces of Abo, Kham, and U-Tsang shall be deemed oppressive states.

c. Lessee's failure to comply with this section shall constitute a default of this Lease and City may terminate this Lease pursuant to Section 3. In the event that the City terminates Lessee due to a default under this provision, City may deem Lessee a non-responsible bidder for not more than five (5) years from the date this Lease is terminated.

14. BERKELEY LIVING WAGE ORDINANCE

a. Lessee hereby agrees to comply with the provisions of the Berkeley Living Wage Ordinance, B.M.C. Chapter 13.27. If Lessee is currently subject to the Berkeley Living Wage Ordinance, as indicated by the Living Wage Certification form, attached hereto, Lessee will be required to provide all eligible employees with City mandated minimum compensation during the term of this Lease, as defined in B.M.C. Chapter 13.27, as well as comply with the terms enumerated herein. Lessee expressly acknowledges that, even if Lessee is not currently subject to the Living Wage Ordinance, cumulative Leases with City may subject Lessee to the requirements under B.M.C. Chapter 13.27 in subsequent Leases.

b. If Lessee is currently subject to the Berkeley Living Wage Ordinance, Lessee shall be required to maintain monthly records of those employees providing service under the Lease. These records shall include the total number of hours worked,

the number of hours spent providing service under this Lease, the hourly rate paid, and the amount paid by Lessee for health benefits, if any, for each of its employees providing services under the Lease. These records are expressly subject to the auditing terms as described in this document.

c. If Lessee is currently subject to the Berkeley Living Wage Ordinance, Lessee shall include the requirements thereof, as defined in B.M.C. Chapter 13.27, in any and all subcontracts in which Lessee engages to execute its responsibilities under this Lease. All subcontractor employees who spend 25% or more of their compensated time engaged in work directly related to this Lease shall be entitled to a living wage, as described in B.M.C. Chapter 13.27 and herein.

d. If Lessee fails to comply with the requirements of this Section, the City shall have the rights and remedies described in this Section, in addition to any rights and remedies provided by law or equity.

Lessee's failure to comply with this Section shall constitute a material breach of the Lease, upon which City may terminate this Lease pursuant to Section 3. In the event that City terminates Lessee due to a default under this provision, City may deem Lessee a non-responsible bidder for not more than five (5) years from the date this Lease is terminated.

In addition, at City's sole discretion, Lessee may be responsible for liquidated damage in the amount of \$50 per employee per day for each and every instance of an underpayment to an employee. It is mutually understood and agreed that Lessee's failure to pay any of its eligible employees at least the applicable living wage rate will result in damages being sustained by the City; that the nature and amount of the damages will be extremely difficult and impractical to fix; that the liquidated damage set forth herein is the nearest and most exact measure of damage for such breach that can be fixed at this time; and that the liquidated damage amount is not intended as a penalty or forfeiture for Lessee's breach. City may deduct any assessed liquidated damages from any payments otherwise due Lessee.

15. BERKELEY EQUAL BENEFITS ORDINANCE

a. Lessee hereby agrees to comply with the provisions of the Berkeley Equal Benefits Ordinance, B.M.C. Chapter 13.29. If Lessee is currently subject to the Berkeley Equal Benefits Ordinance, as indicated by the Equal Benefits Certification form, attached hereto, Lessee will be required to provide all eligible employees with City mandated equal benefits, as defined in B.M.C. Chapter 13.29, during the term of this Lease, as well as comply with the terms enumerated herein.

b. If Lessee is currently or becomes subject to the Berkeley Equal Benefits Ordinance, Lessee agrees to provide the City with all records the City deems necessary to determine compliance with this provision. These records are expressly subject to the auditing terms described in this Lease.

c. If Lessee fails to comply with the requirements of this Section, City shall have the rights and remedies described in this Section, in addition to any rights and remedies provided by law or equity.

Lessee's failure to comply with this Section shall constitute a material breach of the Lease, upon which City may terminate this Lease pursuant to Section _____. In the event

the City terminates this Lease due to a default by Lessee under this provision, the City may deem Lessee a non-responsible bidder for not more than five (5) years from the date this Lease is terminated.

In addition, at City's sole discretion, Lessee may be responsible for liquidated damages in the amount of \$50.00 per employee per day for each and every instance of violation of this Section. It is mutually understood and agreed that Lessee's failure to provide its employees with equal benefits will result in damages being sustained by City; that the nature and amount of these damages will be extremely difficult and impractical to fix; that the liquidated damages set forth herein is the nearest and most exact measure of damages for such breach that can be fixed at this time; and that the liquidated damage amount is not intended as a penalty or forfeiture for Lessee's breach. City may deduct any assessed liquidated damages from any payments otherwise due Lessee.

16. AUDIT

Pursuant to Section 61 of the Berkeley City Charter, the City Auditor's Office may conduct an audit of Lessee's financial, performance and compliance records maintained in connection with the operations and services performed under this Lease. In the event of such audit, Lessee agrees to provide the City Auditor with reasonable access to Lessee's employees and make all such financial, performance and compliance records available to the Auditor's Office. City agrees to provide Lessee an opportunity to discuss and respond to any findings before a final audit report is filed.

17. GOVERNING LAW

This Lease shall be deemed to have been executed in Alameda County. The formation, interpretation and performance of this Lease shall be governed by the laws of the State of California, excluding its conflict of laws rules.

18. AMENDMENTS

The terms and conditions of this Lease shall not be altered or otherwise modified except by a written amendment to this Lease executed by City and Lessee.

19. ENTIRE AGREEMENT

a. The terms and conditions of this Lease, any documents expressly incorporated by reference represent the entire Lease between the parties with respect to the subject matter of this Lease. This Lease shall supersede any and all prior Leases, oral or written, regarding the subject matter between City and Lessee. No other Lease, statement, or promise relating to the subject matter of this Lease shall be valid or binding except by a written amendment to this Lease.

b. If any conflicts arise between the terms and conditions of this Lease and the terms and conditions of the attached exhibits or any documents expressly incorporated, the terms and conditions of this Lease shall control.

20. SEVERABILITY

If any part of this Lease or the application thereof is declared invalid for any reason, such invalidity shall not affect the other provisions of this Lease which can be

given effect without the invalid provision or application, and to this end the provisions of this Lease are declared to be severable.

21. WAIVER

Failure of City to insist on strict performance shall not constitute a waiver of any of the provisions of this Lease or a waiver of any other default of Lessee.

22. ASSIGNMENT

Lessee may not assign this Lease without the prior written consent of the City.

23. EFFECT ON SUCCESSORS AND ASSIGNS

This Lease shall be binding on and inure to the benefit of the heirs, executors, administrators, successors, and assigns of the parties hereto.

24. SECTION HEADINGS

The sections and other headings of this Lease are for convenience of reference only and shall be disregarded in the interpretation of this Lease.

IN WITNESS WHEREOF, City and Lessee have executed this Lease as of the date written on the first paragraph of this Lease.

FOR CITY OF BERKELEY

Signed by:

Countersigned by:

City Manager

City Auditor

Approved by:

Attested by:

City Attorney for City of Berkeley

City Clerk

LESSEE

Lessee Name (print or type)

Signature

Print Name

Tax Identification # _____

Berkeley Business License # _____

Incorporated: Yes No

Certified Woman Business Enterprise: Yes No

Certified Minority Business Enterprise: Yes No

If yes, state ethnicity:

Certified Disadvantaged Business Enterprise: Yes No