MAINTENANCE AGREEMENT FOR A
TEMPORARY STREET SEATS PLATFORM

THIS AGREEMENT, dated and effective as of ___________, 20__ between and among the City of New York (the “City”) acting by and through the New York City Department of Transportation (“DOT”) with offices at 55 Water Street, New York, NY 10041, and the _______________ (“MAINTENANCE ENTITY”), a _______________ with offices located at ___________________________________.

WITNESSETH

WHEREAS, streetscape improvements are being installed at ________________________________________ in the Borough of ___________ (the “Project Area”) as more fully described in Exhibit A; and

WHEREAS, the MAINTENANCE ENTITY or its agents, employees, contractors shall install a DOT pre-approved temporary Street Seats platform in the Project Area (the “Platform”) as more fully described in Exhibit B; and

WHEREAS, MAINTENANCE ENTITY has agreed to purchase and assume responsibility for maintaining, repairing and removing the Platform.

NOW THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, the parties agree as follows:

ARTICLE 1
MAINTENANCE AND USAGE

1.0 MAINTENANCE ENTITY shall provide, maintain, repair and/or replace the Platform located in the Project Area as set forth below:

1.0.1 All maintenance, repair and/or replacement shall be performed in a safe, good and workmanlike manner to the reasonable satisfaction of DOT.

1.0.2 Dirt, litter and obstructions shall be removed so as to maintain the Project Area (including the surface of drains and catch basin) in a clean, neat and good condition.

1.0.3 Graffiti shall be regularly painted over or removed, within a reasonable timely manner after its appearance on the Platform.

1.0.4 Any folding tables, chairs and umbrellas (“Moveable Street Furniture”) shall be cleaned and maintained as reasonably necessary.

1.0.5 Snow and ice shall be removed from all walkways within a reasonable period of time after each snowfall or accumulation of ice, so as not to
interfere with safe passage. If necessary, Moveable Street Furniture shall be removed or protected and secured from the Project Area due to snow and/or ice conditions. Sand or snow melting agents shall be spread on all walkways, as needed, to minimize slippery conditions which may arise from the thawing and refreezing of snow and/or ice. Signs shall be posted cautioning users of dangerous conditions due to snow and/or ice.

1.0.6 Any planters and planting beds shall be kept reasonably free of litter and debris.

1.0.7 Any plants shall be kept in planted areas at all times and they shall be watered and maintained in a reasonably clean and attractive condition.

1.0.8 To the extent that MAINTENANCE ENTITY applies pesticides to any plants, MAINTENANCE ENTITY or its agents, employees, contractors, shall comply with Chapter 12 of the New York City Administrative Code.

1.0.9 All required repairs and/or replacement will, in all respects, conform to the original installation of the Platform, unless prior written approval is obtained from DOT.

1.0.10 Any and all required repairs and/or replacements will be performed promptly and all costs thereof shall be borne by MAINTENANCE ENTITY.

1.0.11 In the event that any material originally installed is no longer available at the time of such repairs and/or replacement, MAINTENANCE ENTITY may substitute comparable material provided prior written approval is obtained from DOT.

1.1 In the event that DOT determines, at its sole discretion, that an emergency condition for which MAINTENANCE ENTITY is responsible under the terms of this Agreement, MAINTENANCE ENTITY shall promptly take all steps necessary to alleviate the emergency condition as may be directed by DOT, which may include but not be limited to performing repair and/or replacement work on the Platform.

1.2 The MAINTENANCE ENTITY shall solely purchase and retain ownership of the Platform.

1.3 The MAINTENANCE ENTITY shall install the Platform in a safe, appropriate manner and in full compliance with the approved design illustrated in Exhibit B.

1.4 The MAINTENANCE ENTITY shall oversee and ensure pedestrian traffic is appropriately managed during the installation and operation of the Platform.

1.5 The MAINTENANCE ENTITY shall oversee and ensure that the installation and removal of the Platform shall be completed in a safe and appropriate manner.
1.6 The MAINTENANCE ENTITY shall provide and maintain, throughout the term of this Agreement, a twenty-four (24) hour, seven days a week emergency contact telephone number on file with DOT.

1.7 The MAINTENANCE ENTITY shall, on or before the termination of the initial installation period, remove the Platform from the Project Area.

1.8 Upon appropriate notification by DOT, the MAINTENANCE ENTITY shall reinstall the Platform, on or after the commencement of the renewal period and remove the Platform and on or before the termination of the renewal period.

1.9 The maximum seating the Platform shall accommodate at any one time is ____ adults. Moveable Street Furniture may include both chairs and benches. In addition, the MAINTENANCE ENTITY may provide an appropriate amount of shade structures and tables for the Platform. Moveable Street Furniture shall be of a safe, sturdy construction and be pre-approved by DOT.

1.10 The MAINTENANCE ENTITY shall remove or secure on a daily basis the Moveable Street Furniture from the Platform at the end of the hours of operation specified in Article 1.15 below.

1.11 The MAINTENANCE ENTITY expressly acknowledges and agrees that the Platform is a public space and is solely maintained for the benefit of the public and not for the benefit of any business including the MAINTENANCE ENTITY. Accordingly, the MAINTENANCE ENTITY acknowledges that it cannot and will not assert any claims or commence any actions against any party including, but not limited to, the City, DOT its agents, employees, officers, or directors by reason of, either directly or indirectly, interruption to business or loss of business.

1.12 As the Platform is a public space, the MAINTENANCE ENTITY shall not prevent or restrict, in anyway, the general public from utilizing the Platform during hours of operation specified in Article 1.15 below.

1.13 The MAINTENANCE ENTITY shall not provide waiter/waitress service, or take orders or provide any services or sales on the Platform or at the chairs, benches and tables thereon. Employees of MAINTENANCE ENTITY shall be permitted to bring pre-paid food or beverages to the Platform. Such pre-paid transactions shall be wholly performed within the MAINTENANCE ENTITY’S establishment.

1.14 The sale of alcohol or tobacco products on the Platform shall be strictly prohibited and result in the immediate termination of this Agreement. Smoking shall be strictly prohibited on the Platform during hours of operation specified in Article 1.15 below.

1.15 The MAINTENANCE ENTITY shall strictly adhere to the maximum hours of operation:
1.15.1 Monday - TBD as per location;
1.15.2 Tuesday - TBD as per location;
1.15.3 Wednesday - TBD as per location;
1.15.4 Thursday - TBD as per location;
1.15.5 Friday - TBD as per location;
1.15.6 Saturday - TBD as per location; and
1.15.7 Sunday - TBD as per location.

1.16 Upon prior written approval of DOT, the MAINTENANCE ENTITY may reduce the maximum hours of operation.

1.17 The MAINTENANCE ENTITY shall clean the Platform on a daily basis. Such cleaning shall include, but not be limited to, chewing gum removal.

1.18 DOT retains the unequivocal and exclusive right to immediately suspend, for a period of time and without prior notice, the Platform usage at the Project Area for any reason whatsoever and at any time whatsoever.

1.19 The MAINTENANCE ENTITY, at its sole cost and expense, shall provide appropriate signage for the Platform. Such signage shall be affixed in prominent locations and read: “This platform is public space and is not restricted to patrons of any particular business. Smoking is prohibited on this platform”. The MAINTENANCE ENTITY shall not, at any time, alter or remove such signage from the Platform. In addition, DOT reserves the exclusive right, at its sole discretion, to add further signage to the Platform at any time throughout the term of this Agreement.

1.20 Upon review and approval of the Platform design by DOT and its Traffic Division, the design and proposed installation methodology of the Platform shall be subject to an engineering review and certification by a New York State licensed engineer paid for by the MAINTENANCE ENTITY.

ARTICLE 2
TERM

2.0 This Agreement shall be for an initial term commencing on May 1, 2012 and terminating on October 30, 2012 seasonal curbside seating platform, unless terminated earlier as provided herein.

2.2 In order to effectuate the renewal period, DOT shall provide the MAINTENANCE ENTITY with written notice of its intent to renew this Agreement.

ARTICLE 3
TERMINATION

3.0 The MAINTENANCE ENTITY expressly agrees that DOT shall have the unconditional right to terminate this Agreement for any reason whatsoever upon twenty-
four (24) hours notice to the MAINTENANCE ENTITY via a Notice of Termination which shall specify a specific termination date and time.

3.1 If the Platform is already completed, the MAINTENANCE ENTITY expressly agrees that DOT shall have the unconditional right to immediately remove the Platform at its sole discretion and notify the MAINTENANCE ENTITY that Platform has been removed.

3.2 If this Agreement expires or is terminated, as provided herein, all rights of the MAINTENANCE ENTITY herein shall be terminated without any claim for damages against the City, DOT or its agents, employees, officers, or directors by reason of such expiration or termination.

ARTICLE 4
RECORDS

4.0 MAINTENANCE ENTITY shall maintain separate and accurate books, records, documents and other evidence and accounting procedures and practices which sufficiently and properly reflect all direct and indirect costs of any nature expended in the performance of this Agreement.

4.1 MAINTENANCE ENTITY shall retain all books, records, and other documents relevant to this Agreement for six (6) years after expiration or termination of this Agreement. City, State and Federal auditors or any other persons duly authorized by the DOT shall have full access to and the right to examine any of said materials during said period.

4.2 MAINTENANCE ENTITY shall provide to DOT notification that the Platform is installed, maintained, repaired and/or replaced. Such notification shall be sent to DOT pursuant to Article 12 or by email as directed by DOT.

4.3 The records for all installations, repairs, maintenance and replacements or removals subject to this Agreement, shall be provided to DOT by MAINTENANCE ENTITY by January 15th of the year following the year for which the records are created, or at any other time upon request of DOT.

ARTICLE 5
INDEMNIFICATION

5.0 To the fullest extent permitted by law, MAINTENANCE ENTITY shall indemnify, defend and hold the City and its officials and employees (“Indemnites”) harmless against any and all claims, liabilities, settlements, damages, costs and expenses of whatever kind or nature (including, without limitation, attorneys’ fees and disbursements) arising out of or related to any of the MAINTENANCE ENTITY’s obligations under this Agreement and/or the MAINTENANCE ENTITY’s failure to comply with the law or any of the requirements of this Agreement. Insofar as the facts or
law relating to any of the foregoing would preclude the Indemnitees from being completely indemnified by the MAINTENANCE ENTITY, the Indemnitees shall be partially indemnified by the MAINTENANCE ENTITY to the fullest extent permitted by law.

**ARTICLE 6**

**INSURANCE**

6.0 MAINTENANCE ENTITY shall at all times maintain, at its sole cost and expense:

6.0.1 Commercial General Liability Insurance (“CGL”) in the amount of at least One Million Dollars ($1,000,000) combined single limit per occurrence, and Two Million Dollars ($2,000,000) aggregate limit. This insurance shall protect the insured from claims for property damage and/or bodily injury, including death, that may arise from any of the operations under this Agreement. Coverage shall be at least as broad as that provided by the most recently issued Insurance Services Office (“ISO”) Form CG 0001. Such CGL insurance shall name the City, together with its officials and employees, as an Additional Insured with coverage at least as broad as the most recent edition of ISO Form CG 2026. Such CGL insurance shall be primary and non-contributing to any insurance or self-insurance maintained by the City. A certified copy of this CGL policy or a Certificate of Insurance (evidencing the CGL insurance and the City’s status as additional insured) must be submitted to and accepted by the Commissioner prior to or upon execution of this Agreement; and

6.0.2 Business Automobile Liability insurance in the amount of at least One Million Dollars ($1,000,000) each accident (combined single limit) for liability arising out of the ownership, maintenance or use of any owned, non-owned or hired vehicles. Coverage shall be at least as broad as the latest editions of ISO Form CA0001.

6.0.3 Workers’ Compensation, Employer’s Liability, and Disability Benefits insurance as required by New York law. Documentation evidencing such insurance, in a form reasonably satisfactory to the Commissioner, must be submitted to and accepted by the Commissioner prior to or upon execution of this Agreement.

6.1 Said insurance policies shall provide that no cancellation, termination, or alteration shall be made without thirty (30) days advance written notice to DOT. MAINTENANCE ENTITY shall submit to DOT annual proof of required insurance coverage. Such certificate and proof shall be sent to DOT at the address provided in Article 12. Failure to maintain or renew the required insurance coverages shall be deemed a material breach of this Agreement.
ARTICLE 7
ASSIGNMENT

7.0 MAINTENANCE ENTITY shall not assign, transfer, convey or otherwise dispose of this Agreement, or the right to execute it, or the right, title or interest in or to it or any part thereof, or assign, by power of attorney or otherwise any of the monies due or to become due under this Agreement, unless the previous written consent of the Commissioner of DOT shall first be obtained thereto, and the giving of any such consent to a particular assignment shall not dispense with the necessity of such consent to any further or other assignments.

7.1 Notwithstanding any provisions contained herein to the contrary, it is specifically understood and agreed that in the performance of the terms, covenants, and conditions of this Agreement, MAINTENANCE ENTITY or any subsequent mutually agreed upon assignee and any of its employees, agents, independent contractors, and sub-contractors, successors and assigns shall not be deemed to be acting as agents, servants, or employees of DOT or the City by virtue of this Agreement or by virtue of any approval, permit, license, grant, right or other authorization given by the DOT or the City or any of its officers, agents or employees pursuant to this Agreement, but shall be deemed to be performing services for MAINTENANCE ENTITY, and MAINTENANCE ENTITY shall be deemed solely responsible for all acts taken by them pursuant to this Agreement.

ARTICLE 8
NO ADVERTISING

8.0 MAINTENCE ENTITY shall be prohibited from placing or causing to be placed any advertising in the Project Area.

ARTICLE 9
NO MODIFICATION

9.0 No modification, amendment, waiver, or release of any provision of this Agreement or of any right, obligation, claim or cause of action arising hereunder shall be valid or binding for any purpose, unless in writing and duly executed by the party against whom same is asserted.

ARTICLE 10
INVESTIGATION CLAUSE

10.0 The Investigation Clause, is annexed hereto as Exhibit C, and incorporated herein.

ARTICLE 11
ENTIRE AGREEMENT

11.0 This Agreement contains all the terms and conditions agreed upon by the parties hereto, and no other agreement, oral or otherwise, regarding the subject matter of this
Agreement shall be deemed to exist, or to bind any of the parties hereto, or to vary any of the terms contained herein.

**ARTICLE 12  
NOTICES**

12.0 Each written notice, demand, request or other communication in connection with this Agreement shall be either served in person, with delivery of service acknowledged in writing by the party receiving the same, or by registered mail, return receipt requested to:

To DOT:

Name: __________________________________
Title: ___________________________ Borough Commissioner
Address: __________________________
Address: __________________________

cc: General Counsel
New York City Department of Transportation
55 Water Street, 9th Floor
New York, NY 10041

To MAINTENANCE ENTITY:

Name: _______________________________
Title: ________________________________
Address: ____________________________
Address: ____________________________

Or to such other address as may be specified by written notice sent in accordance herewith.

12.1 Every notice, demand, request or other communication hereunder shall be deemed to have been given at the time of mailing of the aforesaid.

**ARTICLE 13  
CITY’S RIGHTS**

13.0 Nothing in this Agreement shall be construed so as to limit in any way the City’s or any public utility or any other DOT approved entity’s right to perform any work or provide any service in connection with the Project Area which it may deem necessary or proper, including, but not limited to, permanent removal.

**ARTICLE 14  
COMPLIANCE WITH LAWS**

14.0 MAINTENANCE ENTITY shall comply with all applicable provisions of federal, state and local laws, rules, and regulations, and DOT specifications, standards and policies.
ARTICLE 15
COUNTERPARTS

15.0 This Agreement may be executed in one or more counterparts which, when taken together, shall constitute one and the same.

ARTICLE 16
REPRESENTATIONS

16.0 MAINTENANCE ENTITY makes the following representations:

16.0.1 MAINTENANCE ENTITY has neither been asked to pay, offered to pay, nor paid any illegal consideration, whether monetary or otherwise, in connection with obtaining this Agreement.

16.0.2 MAINTENANCE ENTITY has not employed any person to solicit or procure this Agreement, and has not made and shall not make any payment of any commission, percentage, brokerage, contingent fee or any other compensation in connection with obtaining the Agreement.

ARTICLE 17
WAIVER OF JURY TRIAL

17.0 MAINTENANCE ENTITY hereby expressly waives all rights to trial by jury in any lawsuit or summary proceeding hereafter instituted by the City against the MAINTENANCE ENTITY or any counterclaim or cause of action directly or indirectly arising out of the terms, covenants or conditions of this Agreement with regard to any matter whatsoever in any way connected with this Agreement including, but not limited to, the relationship between the City and the MAINTENANCE ENTITY. This provision relating to the waiver of jury trial rights shall survive the expiration or termination of this Agreement or any terms hereof.

ARTICLE 18
CHOICE OF LAW/CONSENT TO JURISDICTION AND VENUE

18.0 This Agreement shall be deemed to be executed in the City of New York, State of New York, regardless of the domicile of the MAINTENANCE ENTITY and shall be governed by and construed in accordance with the internal laws of the State of New York. Any and all claims asserted by or against the City arising under this Agreement or related hereto shall be heard and determined either in the courts of the United States (“Federal Courts”) located within New York City or in the courts of the State of New York (“New York State Courts”) located in the City and County of New York. To effect this Agreement and intent, it is understood that:
18.0.1 If the City initiates any action arising out of this Agreement against MAINTENANCE ENTITY in Federal Court or in New York State Court, service of process may be made on MAINTENANCE ENTITY either by personal service upon an officer or authorized agent of MAINTENANCE ENTITY, wherever MAINTENANCE ENTITY may be found, or by registered mail addressed to MAINTENANCE ENTITY at the address set forth in this Agreement, or to such other address as MAINTENANCE ENTITY may provide to DOT or the City in writing;

18.0.2 With respect to any action arising out of this Agreement between the City and MAINTENANCE ENTITY in New York State Courts, MAINTENANCE expressly waives and relinquishes any rights it might otherwise have to move to dismiss on the ground of forum non conveniens, to remove the action to Federal Court; and to move for change of venue to a New York State Court located outside of New York County;

18.0.3 With respect to any action arising out of this Agreement between the City and MAINTENANCE ENTITY in Federal Court located in New York City, MAINTENANCE ENTITY expressly waives and relinquishes any right it might otherwise have to move for a transfer of the action to a Federal Court outside of New York City; and

18.0.4 If MAINTENANCE ENTITY commences any action arising out of this Agreement against the City in a court located other than in the County, City and State of New York, upon request of the City, MAINTENANCE ENTITY shall consent to a transfer of the action to a court of competent jurisdiction located in the County, City and State of New York, or if the court where the action is commenced cannot or will not transfer the action, MAINTENANCE ENTITY shall consent to the dismissal of such action without prejudice and may thereafter reinstitute the action in a court of competent jurisdiction within New York City.

18.1 All disputes arising out of this Agreement shall be interpreted and decided in accordance with the laws of the State of New York.

ARTICLE 19
CLAIMS AND ACTIONS THEREON

19.0 No action at law or proceeding in equity against the City or DOT shall lie or be maintained upon any claim based upon this Agreement or arising out of this Agreement or in any way connected with this Agreement unless MAINTENANCE ENTITY shall have strictly complied with all requirements relating to the giving of notice and of information with respect to such claims, all as herein provided.

19.1 No action shall lie or be maintained against the City by MAINTENANCE ENTITY upon any claims based upon this Agreement unless such action shall be
commenced within six months after the date of filing with the Comptroller of the certificate for the final payment hereunder, or within six months of the termination or conclusion of this Agreement, or within six months after the accrual of the cause of action, whichever first occurs.

19.2 In the event any claim is made or any action brought in any way relating to the Agreement herein, MAINTENANCE ENTITY shall diligently render to DOT and/or the City without additional compensation any and all assistance which DOT and/or the City may require of MAINTENANCE ENTITY.

**ARTICLE 20**

**CLAIM AGAINST OFFICERS OR EMPLOYEES**

20.0 No claim whatsoever shall be made by MAINTENANCE ENTITY against any officer, agent, employee or volunteer of the City for, or on account of, anything done or omitted in connection with this Agreement.

**ARTICLE 21**

**SEVERABILITY**

21.0 Should any provision of this Agreement be deemed to be invalid or unenforceable by any Court of competent jurisdiction, such provision shall be severed from this Agreement and the remainder of this Agreement shall continue in full force and effect.

**ARTICLE 22**

**ALL LEGAL PROVISIONS DEEMED INCLUDED**

22.0 It is the intent and understanding of the parties to this Agreement that each and every provision of law required to be inserted in the Agreement shall be and is inserted herein. Furthermore, it is hereby stipulated that every such provision is to be deemed to be inserted herein, and if, through mistake or otherwise, any such provision is not inserted, or is not inserted in correct form, then this Agreement shall forthwith upon the application of either party be amended by such insertion so as to comply strictly with the law and without prejudice to the rights of either party hereunder.

**ARTICLE 23**

**LIMITATION**

23.0 Nothing in this Agreement shall be construed so as to limit in any way the DOT’s right to perform any work or provide any service in connection with the Project Area which DOT may deem necessary or proper.
ARTICLE 24
CONFLICT OF INTEREST

24.0 No officer, agent, employee, or representative of the City, DOT, the MAINTENANCE ENTITY received any payment or other consideration for the making of this Agreement nor has any legal interest, directly or indirectly, in this Agreement.

ARTICLE 25
MODIFICATION

25.0 This Agreement may not be modified or amended except by written amendments executed by all the parties hereto.

ARTICLE 26
EFFECTIVE DATE

26.0 The provisions of this Agreement shall be effective upon the complete execution of this Agreement.

ARTICLE 27
BINDING

27.0 The provisions herein shall be binding on heirs, successors and assigns of the parties hereto.
IN WITNESS WHEREOF, the City, acting by and through the Commissioner of the Department of Transportation, and the MAINTENANCE ENTITY, acting by and through its ____________, have executed this Agreement as of the date and year first above written.

NEW YORK CITY
DEPARTMENT OF TRANSPORTATION

_________________________________
BY:_____________________________
TITLE:__________________________
DATE:___________________________

MAINTENANCE ENTITY

__________________________________
BY:______________________________
TITLE:___________________________
DATE:____________________________
APPROVAL AS TO FORM OF A CONTRACT BY STANDARD TYPE OF CLASS

AGENCY: Transportation

CONTRACT: Maintenance Agreement for a Seasonal Curbside Seating Platform

I hereby approve as to form the annexed contract by standard type of class. This approval is valid for one year and for a maximum of 100 agreements.

The above approval is made on the express understanding that the substantive language of the subject agreements will not be altered or changed in any way without prior submission to the Office of the Corporation Counsel for approval, provided, however, the blank spaces in the contracts requiring names, dates, dollar amounts or other similar details may be completed.

ACTING CORPORATION COUNSEL

Date: JUL 25 2012

2012-020321
EXHIB IT A
[Map of Project Area]
EXHIBIT B
[Design/Description of Platform]
EXHIBIT C
INVESTIGATION CLAUSE

1. The parties to this Agreement agree to cooperate fully and faithfully with any investigation, audit or inquiry conducted by a State of New York (the “State”) or City of New York (the “City”) governmental agency or authority that is empowered directly or by designation, to compel the attendance of witnesses and to examine witnesses under oath, or conducted by the Inspector General of a governmental agency that is a party in interest to the transaction, submitted bid, submitted proposal, contract, lease, permit, or license that is the subject of the investigation, audit or inquiry;

2. If any person who has been advised that his or her statement, and any information from such statement, will not be used against him or her in any subsequent criminal proceeding refuses to testify before a grand jury or other governmental agency or authority empowered directly or by designation to compel the attendance of witnesses and to examine witnesses under oath concerning the award of or performance under any transaction, agreement, lease, permit, contract, or license entered into with the City, the State, or any political subdivision or public authority thereof, or the Port Authority of New York and New Jersey, or any local development corporation within the City, or any public benefit corporation organized under the laws of the State of New York or;

3. If any person refused to testify for a reason other than the assertion of his or her privilege against self-incrimination in an investigation, audit or inquiry conducted by a City or State governmental agency or authority empowered directly or by designation to compel the attendance of witnesses and to take testimony under oath, or by the Inspector General of the governmental agency that is an interested party in, and is seeking testimony concerning the award of, or performance under, any transaction, agreement, lease, permit, contract, or license entered into with the City, the State, or any political subdivision thereof or any local development corporation with the City, then;

4. The Commissioner or Agency Head whose agency is a party in interest to the transaction, submitted bid, submitted proposal, contract, lease, permit, or license shall convene a hearing, upon not less than five (5) days’ written notice to the parties involved to determine if any penalties should attach for the failure of a person to testify.

5. If any non-governmental party to the hearing requests an adjournment, the Commissioner or Agency Head who convened the hearing may, upon granting the adjournment, suspend any contract, lease, permit, or license pending the final determination pursuant to paragraph (23.7) below without the City incurring any penalty or damages for delay or otherwise.

6. The penalties which may attach after a final determination by the Commissioner or Agency Head may include but shall not exceed:
a. The disqualification for a period not to exceed five (5) years from the date of an adverse determination for any person, or entity of which such person was a member at the time the testimony was sought, from submitting bids for, or transacting business with, or entering into or obtaining any contract, lease, permit or license with or from the City; and/or

b. The cancellation or termination of any and all such existing City contracts, leases, permits or licenses that the refusal to testify concerns and that have not been assigned as permitted under this Agreement, nor the proceeds of which pledged, to an unaffiliated and unrelated institutional lender for fair value prior to the issuance of the notice scheduling the hearing, without the City incurring any penalty or damages on account of such cancellation of termination; monies lawfully due for goods delivered, work done, rentals, or fees accrued prior to the cancellation or termination shall be paid by the City.

7. The Commissioner or Agency Head shall consider and address, in reaching his or her determination and in assessing an appropriate penalty, the factors listed in paragraphs (23.1) and (23.2) above. He or she may also consider, if relevant and appropriate, the criteria established in paragraph (23.3) and (23.4) above in addition to any other information which may be relevant and appropriate:

a. The party’s good faith endeavors or lack thereof to cooperate fully and faithfully with any governmental investigation or audit, including but not limited to the discipline, discharge, or disassociation of any person failing to testify, the production of accurate and complete books and records, and the forthcoming testimony of all other members, agents, assignees or fiduciaries whose testimony is sought.

b. The relationship of the person who refused to testify to any entity that is a party to the hearing, including but not limited to, whether the person whose testimony is sought has an ownership interest in the entity and/or the degree of authority and responsibility the person has within the entity.

c. The nexus of the testimony sought to the subject entity and its contracts, leases, permits or licenses with the City.

d. The effect a penalty may have on an unaffiliated and unrelated party or entity that has a significant interest in an entity subject to penalties under (23.6) above, provided that the party or entity has given actual notice to the Commissioner or Agency Head upon the acquisition of the interest, or at the hearing called for in (23.4) above gives notice and proves that such interest was previously acquired. Under either circumstance the party or entity must present evidence at the hearing demonstrating the potential adverse impact a penalty will have on such person or entity.
8. Definitions.

a. The term “license” or “permit” as read herein shall be defined as a license, permit, franchise or concession not granted as a matter of right.

b. The term “person” as used herein shall be defined as any natural person doing business alone or associated with another person or entity as a partner, director, officer, principal, or employee.

c. The term “entity” as used herein shall be defined as any firm, the Maintenance Partner, corporation, association, or person that receives monies, benefits, licenses, or permits from or through the City or otherwise transacts business with the City.

   i. The term “member” as used herein shall be defined as any person associated with another person or entity as a partner, director, officer, principal or employee.

d. In addition to and notwithstanding any other provision of this Agreement the Commissioner or Agency Head may in his or her sole discretion terminate this Agreement upon not less than three (3) days’ written notice in the event the Maintenance Partner fails to promptly report in writing to the Commissioner of Investigation of the City of New York any solicitation of money, goods, requests for future employment or other benefit or thing of value, by or on behalf of any employee of the City or other person, firm, corporation or entity for any purpose which may be related to the procurement or obtaining of this Agreement by the Maintenance Partner, or affecting the performance of this Contract.