

VILLAGE OF LOMBARD  
REQUEST FOR BOARD OF TRUSTEES ACTION  
For Inclusion on Board Agenda

\_\_\_\_\_ Resolution or Ordinance (Blue) \_\_\_\_\_ *Waiver of First Requested*  
\_\_\_\_\_ Recommendations of Boards, Commissions & Committees (Green)  
  X   Other Business (Pink)

TO: PRESIDENT AND BOARD OF TRUSTEES

FROM: William T. Lichter, Village Manager

DATE: March 12, 2004 (B of T) Date: March 18, 2004

TITLE: Convention Center and Hotel - Consulting Agreement Award *QAH*

SUBMITTED BY: Department of Community Development

BACKGROUND/POLICY IMPLICATIONS:

The Department of Community Development requests Village Board to review, comment, amend a proposed Consulting Agreement between the Lombard Public Facilities Corporation and T&C Asset Management, LLC dba HREC Asset Management. (DISTRICT #3)

Please place this item on the March 18, 2004 Board of Trustees agenda.

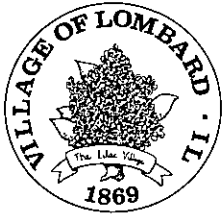
Fiscal Impact/Funding Source:

Review (as necessary):

Village Attorney X \_\_\_\_\_ Date \_\_\_\_\_  
Finance Director X \_\_\_\_\_ Date \_\_\_\_\_  
Village Manager X *W. T. Lichter* \_\_\_\_\_ Date 3/12/04

NOTE: All materials must be submitted to and approved by the Village Manager's Office by 12:00 noon, Wednesday, prior to the Agenda Distribution.





## MEMORANDUM

**TO:** William T. Lichter, Village Manager

**FROM:** David A. Hulseberg, AICP, Director of Community Development *DHA*

**DATE:** March 12, 2004

**SUBJECT: CONSTRUCTION HOSPITALITY AGREEMENT**

Staff solicited a request for proposals for hospitality services. As a result of that request, two (2) proposals were received. They included:

- Hospitality Real Estate Counselors (HREC)
- Johnson Consulting

A review team consisting of William Lichter, David Hulseberg, and Len Flood narrowed the proposals to two and then interviewed Hospitality Real Estate Counselors (HREC) and Johnson Consulting. After careful consideration, staff selected HREC. This firm had the greatest amount of experience and came with the highest recommendations. Staff has negotiated an agreement for services which provides for the following:

- Services not to exceed \$48,200
- Review of documents and agreements
- Assistance with bond document review/coordination

### **Overview of Services:**

These services shall be provided primarily for the purpose of assisting in the negotiation of operating documents related to the Transaction and the Project. These documents shall include, but may not be limited, the Hotel Operating Agreement, Hotel Pre-Opening Services Agreement, Hotel Technical Services Agreement, Restaurant Management Agreement, Asset Management Agreement and Master Development Agreement (collectively the "Operating Agreements"). It is understood by Consultant that Consultant may be directed to assist in the negotiation of other Agreements such as a Room Block Agreement and other agreements related but not identified herein. Consultant understands and agrees to review and assist with other agreements that may impact the Transaction or the Operating Agreements.

HREC can comment, provide recommended modifications, and assist in negotiations on operating documents or any related operating, development or transaction document for which the Lombard Public Facilities Corporation ("LPFC"), is a party in interest as evidenced by its

March 12, 2004  
Construction Hospitality Agreement

requirement to be a party to the execution of any said document. Harp and Walsh Construction will not be HREC's clients and, as such, they will not be able to provide any "formal" services or written comment regarding their agreement(s) to which the LPFC is not a party in interest. However, HREC can provide verbal comment to us or Piper Jaffray regarding the Design-Build Agreement and its impact on the operating documents or vice versa.

**Experience:**

HREC has been contracted to work on similar projects which include:

	<u># of Rooms</u>	<u>S.F. Meeting</u>
Denver Hyatt	1,100	85,000
Vancouver Hilton	226	29,000
Westin Diplomat, FL	1,000	215,000
Ritz Carlton, San Juan	414	25,000

**Payment:**

Piper Jaffray and the Harp Group have each agreed to pay 1/3 of the cost of this fee in the event that the bonds do not close. The Village's exposure is \$16,000. Payments will be structured in three equal amounts with the first payment due May 30<sup>th</sup> by Piper Jaffray, second payment due June 30<sup>th</sup> by the Harp Group and the third payment by the Village of July 30<sup>th</sup>. When the bonds close, the consultant will be paid with those proceeds.

**Recommendation:**

Staff recommends that the Village Board concur with staff's recommendation to the Lombard Public Facility Corporation to hire Hospitality Real Estate Counselors (HREC). Additional company information is available upon request.

DAH/jd

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## CONSULTING AGREEMENT

This Consulting Agreement ("Agreement"), is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2004, by and between the Lombard Public Facilities Corporation, an Illinois not – for-profit corporation, Illinois, hereinafter referred to as the ("LPFC"), and T&C Asset Management, LLC dba HREC Asset Management, operating under a license agreement with HREC Licensing, LLC; all of which are limited liability companies organized and existing under the laws of the State of Colorado and are authorized to do business in the State of Colorado; whose address is 6444 South Quebec Street, suite 212; Englewood, CO 80111, hereinafter referred to as the ("Consultant").

### RECITALS:

- A. The "LPFC", is seeking limited hospitality consulting services for its development of a conference center hotel (the "Project"). The proposed Project will be constructed at the location known as the Yorktown Center.
- B. The Project will consist of a 500 room conference center hotel approximately 50,000 square feet of conference center area and related parking. The "LPFC" intends to finance the construction of the Project through a transaction that includes the issuance of tax-exempt bonds ("Transaction"). Piper Jaffray has been chosen as the underwriter for the proposed Transaction.
- C. The "LPFC" desires to retain Consultant to assist in a consulting capacity in evaluating certain hospitality industry issues relative to the development and operation of the Project and in the LPFC's conduct of the business of that hotel, all as more specifically set out in this Agreement.
- D. The Consultant and the LPFC mutually agree, that the Consultant has the present capacity, is experienced and is qualified to provide such services;
- E. The LPFC and Consultant wish to set forth the terms and conditions of Consultant's engagement as Consultant to the LPFC.

Now, therefore, in consideration of the mutual agreements and promises contained herein and other good and valuable consideration, receipt of which is hereby acknowledged, the parties hereto agree as follows:

### ARTICLE 1 CERTAIN DEFINITIONS

**1.1 Defined Terms.** For all purposes of this Agreement, except as otherwise expressly provided herein or unless the context clearly requires,:

*"Affiliate"* means any Person controlled by a party, owning or controlling a party, or under common ownership and control with a party, with control meaning fifty (50%) percent or more ownership of any class of voting interests.

*"Agreement"*, means this Consulting Agreement, including the foregoing recitals and all exhibits hereto, as same may be amended from time to time.

"*Applicable Law*", means any law, statute, ordinance, rule, regulation, order or determination of any Governmental Authority, or any recorded restrictive covenant or deed restriction affecting the Hotel.

"*Authorized Representative*", means any Person designated by the LPFC or Consultant pursuant to Article 8 hereof to make decisions that require the approval of the LPFC or Consultant, as the case may be, pursuant to the terms hereof.

"*Confidential Information*", means any information obtained by Consultant from, or disclosed to Consultant by the ('LPFC or the Village of Lombard, Illinois') or their respective employees, contractors, consultants or agents which relates to the past, present and future business activities of the LPFC with respect to the Project and results from the provision of services to the LPFC hereunder by Consultant under this Agreement, including, without limitation: (i) any financial statements, projections, estimates on budgets or other financial data or information, (ii) any agreements, contracts, documents, books, records, photographs, logos, designs, models, business plans, promotions or marketing programs of the LPFC with respect to the Project and (iii) any other related matters that are clearly marked "Confidential" and that are disclosed by the LPFC or the Village to Consultant in connection with this Agreement.

"*Governmental Authority*", means the Government of the United States of America, the State of Illinois, the Village, and each and every agency, division, commission, subdivision, and instrumentality of the foregoing, any or all of which have jurisdiction over the Project or any part thereof.

"*Legal Requirements*", means federal, state and local laws, ordinances, and regulations and all orders and decrees of Governmental Authorities, which materially and adversely affect (i) the ability of Consultant to deliver Services provided under this Agreement, or (ii) the operation of the Project.

"*Person*", means any individual, firm, corporation, partnership, trust, unincorporated business association or Governmental Authority.

"*Reimbursables*" shall have the meaning set forth in Article 6.

"*Services*", means the services of Consultant described in Article 2 of this Agreement and any exhibits mentioned therein.

## **ARTICLE 2 CONSULTANT'S SERVICES**

**2.1.** Commencing on the Effective Date of this Agreement, Consultant agrees to furnish the Services described in Exhibit A attached hereto and made part of this Agreement to the LPFC.

**2.2** Consultant shall keep informed of all Legal Requirements which affect the Services to be performed by Consultant hereunder and shall advise the LPFC of any new or materially changed Legal Requirements. Consultant shall advise the LPFC as to violations of Legal Requirements, if any, which come to Consultant's attention in connection with the Project

**2.3.** Consultant shall, under the direction of the LPFC's Authorized Representative, provide certain consulting services to the LPFC as and when requested by said Authorized Representative. Such requests may include requests for services of the type described in Exhibit A attached hereto and made a part of this Agreement and such other services as LPFC may determine that it requires in connection with its interest in the, Project providing such services are of a type and duration as may be rendered by experienced consultants working for owners and developers in the hotel industry. Such services shall not

include engineering, legal or other services for which special qualifications or licenses are required, or services which require the engagement of other professionals unless specifically agreed between Consultant and the LPFC.

2.4. In the event of any conflict between the provisions of this Agreement and those of Exhibit A such that full effect cannot be given to both or all provisions, then the terms and conditions of the Agreement shall control.

2.5. All records, data, specifications and documentation prepared by the Consultant under this Agreement, when delivered to and accepted by the LPFC's Authorized Representative, shall become the property of the LPFC. The Consultant agrees to allow the LPFC to review any of the procedures used by it in doing the work under this Agreement and to make available for inspection all notes and other documents used in performing the work.

### **ARTICLE 3 LIMITATIONS ON AUTHORITY**

3.1. Consultant shall have no right or authority, express or implied, to commit or otherwise obligate the LPFC in any manner whatsoever except to the extent specifically provided herein or specifically authorized in writing by the LPFC. Consultant shall have no right or interest in the Project, nor any claim of lien with respect thereto, arising out of this Agreement of the performance of its services. The LPFC shall be the entity liable for all fees and other obligations owing to Consultant.

3.2. Consultant represents and warrants and the LPFC understands and acknowledges that neither Consultant nor any of its employees acts as a "fiduciary" as that term may be defined. LPFC further understands and acknowledges that (a) neither Consultant nor any of its employees will exercise any discretion or control over the Project or over any other assets of the LPFC; (b) any and all of the Services and information furnished by Consultant pursuant to this Agreement are consultative only; and (c) any and all Services and information furnished by Consultant pursuant to this Agreement do not constitute fiduciary investment advice by Consultant or any of its employees.

3.2. It is understood and agreed that the status of the Consultant shall be that of an independent contractor and of a person retained on a contractual basis to perform professional or technical services for limited periods of time as is or may be described in applicable law, charter, or other municipal document or administrative and/or legislative act, and it is not intended, nor shall it be construed, that the Consultant or its employees are employees or officers of the LPFC or the Village as the term employee may be described in any Village municipal code or LPFC by-laws, for any purpose whatsoever.

### **ARTICLE 4 TERM AND TERMINATION**

4.1. **Term.** The Term of this Agreement shall commence on the date of execution first hereinabove written hereof (Effective Date"), and proceed to the timely and expeditious completion of the services contemplated hereunder, but in any event, the services of the Consultant shall be completed and this Agreement shall terminate on June 1, 2004.

4.2. **Consultant's Termination.** Consultant may terminate this Agreement in the event that (a) LPFC has materially breached its payment obligations under this Agreement, and Consultant has given the LPFC written notice by certified or registered mail, thirty (30) calendar days before Consultant's proposed date of such termination; provided, however, that the LPFC may cure its breach at any time

prior to the proposed date of the termination, in which event the termination notice shall be deemed withdrawn and of no force or effect; or (b) the intended Transaction for which Consultant's services are being contracted is stopped for a period of ninety (90) days as a result of the order or the act of a court or Governmental Authority having jurisdiction.

**4.3. LPFC's Termination Without Cause.** This Agreement may be terminated by the LPFC, for any reason whatsoever, without cause, upon thirty (30) days prior written notice.

## **ARTICLE 5 COMPENSATION OF CONSULTANT**

**Method of Billing.** Consultant's fee for services hereunder shall be billed on a flat fee basis. However, the fee shall be payable in equal monthly increments, in arrears, upon presentation of a monthly invoice. The monthly billing amount shall be determined by dividing the Profession Billing Rate, described in Section 5.2, by the number of months between the date this Agreement is executed and the conclusion of the Term of this Agreement as described in Section 4.1.

**5.2. Professional Billing Rate.** Consultant's fee applicable to this Agreement shall be \$42,500 and shall be invoiced and payable as described in Section 5.1 above.

**5.3. Billing Rate Increases.** There shall be no billing increases during the Term of this Agreement.

**5.4. Compensation for Reimbursables.** Consultant shall be entitled to reimbursement of costs and expenses incurred on behalf of the LPFC as provided in Article 6 hereof upon presentation of a monthly invoice. Reimbursable expenses shall be reasonable, billed at actual cost to the Consultant and invoiced in reasonable detail. The LPFC agrees that any single expense item less than \$600 shall be deemed pre-approved and shall be subject further only to reasonableness, the determination of which shall not be unreasonably withheld. Consultant agrees that any single expense item of \$600 or more shall be subject to written approval, in advance, by the LPFC Authorized Representative. Consultant agrees that it shall not seek reimbursement of costs and expenses for an amount that is more than the lesser of: (a) actual Reimbursables incurred; or, (b) \$5,700 in total Reimbursables as that term is describe in Article 6 of this Agreement.

**5.5. Termination Compensation.** In the event of termination, Consultant shall receive all of the fees payable through the date of termination and all the reimbursable items reasonably incurred by Consultant prior to that date, whether or not the benefit of that reimbursable item was expected to be incurred before or after that date.



**ARTICLE 6**  
**REIMBURSEABLES**

**6.1. Reimbursables.** In accordance with the provisions of **Article 5.4.** of this Agreement, the LPFC shall pay to Consultant the amount of "Reimbursables" paid by or through Consultant as are required to perform Consultant's Services or those incurred at the LPFC's direction and/or request in connection with the performance of Services pursuant to this Agreement. Consultant shall use its best efforts to minimize the Reimbursables, consistent with the purpose of this Agreement, sound business practice, and the instructions of the Village. "Reimbursables" means and shall be limited to, the following direct expenses for Services, and all other ordinary and necessary actual expenditures submitted in writing to the LPFC for approval and approved by the LPFC, the approval of which shall not be unreasonably withheld or delayed:

- a) The actual cost of all expenditures incurred by Consultant that are pre-approved or are incurred at the written request of the LPFC;
- b) Long distance telephone calls, overnight delivery service, and postage;
- c) Handling, shipping and reproduction of materials and documents;
- d) Transportation and living expenses when traveling to and from Denver to the LPFC in connection with the Project;
- e) Costs other than those listed above which are approved by LPFC in writing specifically or as part of a budget submitted to and approved by the LPFC's Authorized Representative;
- f) third-party data secured specifically for the Project from outside sources such as lodging and construction industry data or competitive intelligence.

**6.2. Expenses Not Reimbursed.** The LPFC shall not bear the cost of, and the following shall be at the sole cost and expense of the Consultant:

- a) Salaries of any officers or employees of Consultant or any parent or affiliate thereof;
- b) Consultant's principal and branch offices expenses, but not including the costs of office space at or near the Project that may be made available to Consultant, and
- c) Overhead or general corporate expenses of any kind, except as may be expressly approved by the LPFC's Authorized Representative.
- d) Any other expense item not specifically provided for and approved as required hereinabove.

**6.3. LPFC's Payment Obligations.** Subject to Section 5.1 above, the LPFC agrees to pay the Consultant, and the Consultant agrees to accept as the total compensation for its complete costs incurred and for all services rendered during the term of this Agreement, an amount not to exceed Forty-Eight Thousand Two Hundred Dollars (\$48,200.00), payable in accordance with the progress of the work as fully documented by Consultant's monthly invoice. The Consultant acknowledges that this Agreement is not intended to create a multiple-fiscal year direct or indirect debt or financial obligation of the LPFC. Consultant also agrees that the LPFC shall not pay or be liable for any claimed interest, late charges, fees, taxes or penalties of any nature.

**ARTICLE 7  
CONFIDENTIALITY**

**Confidential Information.** From time to time, the LPFC may provide Confidential Information to Consultant, which Confidential Information will remain the property of LPFC and will not be published, reproduced, disclosed, distributed or released in whole or in part by Consultant to any third party except in the performance of the Services without the LPFC's prior written approval. Consultant will diligently protect the Confidential Information and will ensure that all of its employees, agents, contractors, subcontractors and representatives associated with the Project (collectively, "Consultant's Agents") understand and agree to be bound by the confidentiality provisions of this Agreement. Upon completion of its obligations under this Agreement, Consultant will return to the LPFC all original Confidential Information, including all derivatives or summaries, except as waived in writing by the LPFC. Consultant may elect to destroy duplicates if the originals are already in the hands of the LPFC.

**ARTICLE 8  
OBLIGATIONS OF THE PARTIES**

**8.1. Contract Documents.** The LPFC shall furnish or cause to be furnished to Consultant all documents and information related to the Project in LPFC's possession or control as may reasonably be requested by Consultant for the performance of Services hereunder.

**8.2. Responses to Submittals.** Whenever Consultant submits a reasonable request for information, clarification or decision, LPFC shall respond in a reasonable manner with such information, clarification, approval, rejection or other decision as may be required.

**8.3. Communications.** The LPFC and its Authorized Representatives shall use reasonable efforts to keep Consultant informed with respect to all material communications and developments related to the Project.

**8.4. Other Business Interests.** Nothing in this Agreement shall be construed to restrict the right of Consultant or its respective affiliates to provide any services for any other Person or entity, nor shall this Agreement be deemed to restrict in any way the freedom of Consultant or its affiliates to conduct any other business venture of any nature whatsoever.

**8.5. Conflicts of Interest.** Consultant agrees to promptly advise the LPFC if it has any reason to believe that it is in, or is about to be in, a position of conflict of interest with the LPFC as a result of any business activity.

**ARTICLE 9  
AUTHORIZED REPRESENTATIVES**

**9.1. Authorized Representative of the Consultant.** Consultant appoints Mark Tobin to be its Authorized Representative. He shall devote such time as is reasonably required in order to facilitate performance of the Services in an economical and expeditious manner.

**9.2. Authorized Representative of Village.** LPFC shall designate one or more Authorized Representative(s) who shall be fully acquainted with the LPFC's interests in the Project. Said initial Authorized Representative shall be the Village's finance director, Leonard Flood. The LPFC shall have the right to change any such Authorized Representatives from time to time in its sole discretion upon the delivery of written notice to Consultant.

## ARTICLE 10 INSURANCE

**10.1. Consultant Insurance Requirements.** The Consultant agrees, at no additional cost to the LPFC, to secure and deliver to the LPFC's risk management administrator (the "Risk Administrator") prior to the execution of this Agreement by Consultant, and to keep in force at all times during the term of this Agreement, as the same may be extended, the following insurance:

**(a). Professional Liability.** Professional Liability Insurance in the amount of \$1,000,000.00 with the deductible no greater than \$25,000.00. (The LPFC's Risk Administrator may later direct enrollment in a LPFC owned and paid, project specific, professional liability program.);

**(b). Commercial General Liability.** A Commercial General Liability Insurance policy, with the Village and the LPFC, and their respective officers, agents and employees endorsed as additional insureds, in form and company acceptable to and approved by the Risk Administrator, covering the scope of operations hereunder, with amounts of coverage not less than \$1,000,000.00 per occurrence and \$2,000,000.00 general aggregate; and

**(c). Automobile Liability.** Comprehensive Auto Liability insurance, in form and company acceptable to and approved by the Risk Administrator covering the scope of operations hereunder with limits of liability no less than \$1,000,000.00 The Village and the LPFC, and their respective its officers, agents and employees shall be additional insureds under the policy.

**10.2. Other Requirements.** The Consultant agrees to provide the LPFC's risk administrator with an original copy of certificates of insurance satisfactorily evidencing all of above described coverage at least three (3) days before work begins. The Consultant also agrees to provide to the risk administrator, certified copies of any or all such policies, if requested to do so by the LPFC.

In order to be acceptable to the LPFC, insurance companies utilized must be rated at least A VIII by the A.M. Best Company. All insurance required hereunder shall contain provisions wherein all rights of subrogation or recovery of any kind against the Village and the LPFC, and their respective agents, employees, officers, successors and assigns are specifically waived by the Consultant.

All subcontractors shall be included as insureds under Consultant's policies or separate certificates and endorsements shall be furnished for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein.

Professional errors and omissions insurance coverage, may be structured to provide coverage on a "claims made" basis; provided, however, that the Consultant shall be required to maintain and keep in effect said professional errors and omissions insurance coverage for at least five (5) years after termination date of this Agreement through the purchase of an extended reporting period.

Insurance coverage specified herein constitutes the minimum requirements and those requirements do not lessen or limit the liability of the Consultant under this Agreement. The Consultant shall obtain, at its own expense, any additional kinds and amounts of insurance that it may deem necessary. The insurance requirements above shall not be deemed to limit or define the obligations of the Consultant and it is solely responsible for payment of any deductibles.

## ARTICLE 11 CONSTRUCTION

11.1. All references in this Agreement to designated "Articles", "Sections" and other subdivisions are to the designated Articles, Sections and other subdivisions of this Agreement. The words "herein", "hereof", "hereto", "hereby" and "hereunder" and other words of similar import refer to this Agreement as a whole and not to any particular Article, Section or other subdivision.

11.2. The terms not defined in this Article 11 have the meanings assigned to them elsewhere in this Agreement, or as are used in the ordinary course of business, and all defined terms wherever set forth shall include the plural as well as the singular.

11.3. Unless specifically stated herein to the contrary, Consultant shall always mean Consultant and its Affiliates.

11.4. Whenever the context shall so require, all words herein in any gender shall be deemed to include the masculine, feminine, or neuter gender, and all singular words shall include the plural, and all plural words shall include the singular.

11.5. The Articles, Section and subsection headings in this Agreement are inserted only as a matter of convenience and reference, and such captions and headings are not intended and shall not be construed to define, limit, establish, interpret or describe the scope, intent or effect of any provision of this Agreement. The recitals in this Agreement shall constitute an operative part of the Agreement and are deemed incorporated by reference herein.

11.6. This Agreement shall be interpreted without regard to any presumption or other rule requiring interpretation against the party causing this Agreement or any part thereof to be drafted. Wherever used in this Agreement, "any" means "any and all"; "include" and "including" each are without limitation; "may not" and other negative forms of the verb "may" each are prohibitory; and "will", "must" and "should" each are mandatory. Unless this Agreement expressly or necessarily requires otherwise (a) any time period measured in "days" means consecutive calendar days, except that the expiration of any time period measured in days that expires on a Saturday, Sunday or legal holiday automatically will be extended to the next day so that it is not a Saturday, Sunday or legal holiday on which banks in Illinois are closed for business (collectively "Business Day"); (b) any action is at the sole expense of the party required to take it; (c) the scope of any indemnity includes any costs and expenses, including reasonable attorneys' fees through all levels of proceedings incurred in defending any indemnified claim, or in enforcing the indemnity, or both.

## ARTICLE 12 MISCELLANEOUS

12.1. **Assignment and Subcontracting:** The LPFC is not obligated or liable under this Agreement to any party other than the Consultant named herein. The Consultant shall not assign or subcontract with respect to any of its rights, benefits, obligations or duties under this Agreement except upon prior written consent and approval of the LPFC. In the event any assignment or subcontracting is approved, the Consultant shall nonetheless remain obligated to the LPFC in all respects for the work assigned or subcontracted.

12.2. **Examination of Records:** The Consultant agrees that any duly authorized representative of the Village or the LPFC shall, until the expiration of two (2) years after the final payment under this

Agreement, have access to and the right to examine any books, documents, papers and records of the Consultant, involving transactions related to this Agreement.

The Consultant shall keep true and complete records and shall annually furnish an accurate statement for the preceding calendar year, of all business transactions under this Agreement, which statement shall be certified by an authorized representative of the Consultant to be correct. The Consultant agrees to establish and maintain a system of bookkeeping satisfactory to the LPFC'S and Village's auditors and to give the Village's Authorized Representative access during reasonable hours to such books and records. The Consultant agrees that it will keep and preserve for at least two (2) years all evidence of business transacted under this Agreement for such period.

The Village's and the LPFC's auditor shall have the right at any time, and from time to time, to audit all of the books of account, bank statements, documents, records, returns, papers and files of the Consultant, related to this Agreement, and the Consultant, upon request, shall make all such matters available for such examination. The Village's and the LPFC's rights to have such audit made with respect to any year, and the Consultant's obligation to retain the above records, shall expire two (2) years after the Consultant's statement for any period has been delivered to the LPFC.

**12.3. No Waiver.** No failure by a party to exercise any right or enforce any provision of this Agreement in the event of a breach or default by the other party hereunder shall be deemed to be a waiver, or prevent or limit the subsequent exercise, of such party's right or enforcement of such provision for the same or any other breach or default unless a written waiver of such right is signed by the party having such right or, in the case of a breach or default, the party to whom the duty is owed. No consent or waiver, express or implied, by either party to or of any breach or default by the other party in the performance of any obligations hereunder shall be deemed or construed to be a consent or waiver to or of any other breach or default by such party.

**12.4. No Discrimination in Employment:** In connection with the performance of work under this Agreement, the Consultant agrees not to refuse to hire, discharge, promote or demote, or to discriminate in matters of compensation against any person otherwise qualified, solely because of race, color, religion, national origin, gender, age, military status, sexual orientation, marital status, or physical or mental disability; and the Consultant further agrees to insert the foregoing provision in all subcontracts hereunder.

**12.5. Indemnity:** The Consultant shall defend, release, indemnify and save and hold harmless the Village and the LPFC and their respective officers, agents and employees against any and all damages to property or injuries to or death of any person or persons, including property and employees or agents of the Village or the LPFC, and shall defend, release, indemnify, and save and hold harmless the Village and the LPFC and their respective officers, agents and employees from any and all claims, demands, suits, actions, liabilities, causes of action or legal or equitable proceedings of any kind or nature, including workers' compensation claims, of or by anyone whomsoever, in any way resulting from or arising out of and to the extent caused by the Consultant's or its officers, employees, representatives, suppliers, invitees, licensees, subconsultants, subcontractors, or agents' negligent acts, errors or omissions in performance of their services under this Agreement; provided, however, that the Consultant need not indemnify and save harmless the Village or the LPFC or their respective officers, agents, and employees from damages proximately resulting from the sole negligence of the Village's or LPFC's officers, agents, and employees. This indemnity clause shall also cover the Village's and LPFC'S defense costs, in the event that the Village or LPFC, in their respective sole discretion, elect to provide its own defense. Defense costs coverage must be included in the liability coverage provided for the Village and the LPFC and their respective officers, agents and employees as additional insureds.

**12.6. Survival.** The parties understand and agree that all terms and conditions of this Agreement, together with the exhibits and attachments hereto, which, by reasonable implication, contemplate continued performance or compliance beyond the termination of this Agreement, (by expiration of the term or otherwise), shall survive such termination and shall continue to be enforceable as provided herein. Without limiting the generality of the foregoing, the Contractor's obligations for the provision of insurance and to indemnify the Village and the LPFC shall survive for a period equal to any and all relevant statutes of limitation, plus the time necessary to fully resolve any claims, matters, or actions begun within that period.

**12.7. Agreement as Complete:** This Agreement is intended as the complete integration of all understandings between the parties. No prior or contemporaneous addition, deletion, or other amendment hereto shall have any force or effect whatsoever, unless embodied herein in writing. No subsequent notation, renewal, addition, deletion, or other amendment hereto shall have any force or effect unless embodied in a written amendatory or other Agreement properly executed by the parties. This Agreement and any amendments shall be binding upon the parties, their successors and assigns.

**12.7. Conflict of Interest:** The parties agree that no employee of the LPFC or the Village shall have any personal or beneficial interest whatsoever in the services or property described herein and the Consultant further agrees not to hire or contract for services any employee or officer of the LPFC or the Village.

**12.8. Litigation.** In the event of the institution of any proceeding relating to this Agreement, the parties agree that costs and expenses, including reasonable attorneys' fees and expenses as determined by a court of competent jurisdiction, incurred by the prevailing party (as defined herein) in connection with such proceeding (at trial and all appellate levels) will be paid or reimbursed by the non-prevailing party. For purposes of this Section, "prevailing party" shall be defined as (a) the party which ultimately is awarded an amount (net of any offsets or counterclaims awarded to the other party) in excess of the last settlement offer made in writing by the other party, or (b) the party which made the last settlement offer in writing, if the amount ultimately awarded (net of any offsets or counterclaims awarded to the other party) is less than such last settlement offer, or (c) the party which ultimately is awarded an amount, regardless of sum, if no settlement offer was ever made in writing by the other party, or (d) if no amount is awarded, but instead equitable relief is granted, the party in whose favor such equitable relief is granted. The parties agree that any dispute relating to this Agreement shall be submitted to mediation prior to the initiation of any legal proceeding.

**12.9. No Third Party Beneficiaries:** It is expressly understood and agreed that enforcement of the terms and conditions of this Agreement, and all rights of action relating to such enforcement, shall be strictly reserved to the LPFC and the Consultant, and their respective successors and permitted assigns, and nothing contained in this Agreement shall give or allow any such claim or right of action by any other or third person on such Agreements, except the Village, which shall be considered a third party beneficiary under this Agreement. It is the express intention of the LPFC and the Consultant that any person other than the LPFC, the Village or the Consultant receiving services or benefits under this Agreement shall be deemed to be an incidental beneficiary only.

**12.10. Counterparts:** This Agreement shall be executed in two (2) counterparts, each of which shall be deemed to be an original of this Agreement, and all of which, taken together, shall constitute one and the same instrument.

**12.11. Severability:** It is understood and agreed by the parties hereto that if any part, term, or provision of this Agreement is by the courts held to be illegal or in conflict with any law of the State of Illinois, the validity of the remaining portions or provisions shall not be affected, and the rights and obligations of the

parties shall be construed and enforced as if the Agreement did not contain the particular part, term, or provision held to be invalid.

**12.12. Legal Authority:** Consultant assures and guarantees that it possesses the legal authority, pursuant to any proper, appropriate and official motion, resolution or action passed or taken, to enter into this Agreement. The person or persons signing and executing the Agreement on behalf of Consultant, do hereby warrant and guarantee that he/she or they have been fully authorized by Consultant to execute this Agreement on behalf of Consultant and to validly and legally bind Consultant to all the terms, performances and provisions herein set forth.

**12.13. Governing Law, Venue:** This Agreement shall be construed and enforced in accordance with the laws of the State of Illinois, and the Village, without regard to any rule regarding choice of law. Venue for any legal action relating to this Agreement shall lie in the DuPage County, Illinois.

**12.14. Taxes, Permits And Licenses:** The Consultant agrees to pay promptly all taxes, excises, license fees and permit fees of whatever nature applicable to its operations, and to take out and keep current all required licenses, whether municipal, state or federal, required for the conduct of its business hereunder, and further agrees not to permit any of said taxes, excises or license fees to become delinquent. The Consultant further agrees to furnish the LPFC, upon request, duplicate receipts or other satisfactory evidence showing the prompt payment by Consultant of all required licenses and all taxes. The Consultant further agrees to pay promptly when due all bills, debts and obligations incurred by it in connection with its operations, and not to permit the same to become delinquent and to suffer no lien, mortgage, judgment or execution to be filed which will in any way impair or impede the rights of the LPFC under this Agreement.

**12.15 Time is of the Essence:** The parties agree that in the performance of the terms, conditions, and requirements of this Agreement, time is of the essence.

**12.16 Intellectual Property Rights:** The LPFC and Consultant intend that all property rights to any and all materials, text, logos, documents, booklets, manuals, references, guides, brochures, advertisements, music, sketches, drawings, photographs, specifications, software, data, products, ideas, inventions, and any other work or recorded information created by the Consultant and paid for by the LPFC pursuant to this Agreement, in preliminary and final forms and on any media whatsoever (collectively, "Materials"), shall belong to the LPFC. The Consultant shall disclose all such items to the LPFC. To the extent permitted by the U.S. Copyright Act, 17 USC § 101 et seq., the Materials are a "work made for hire," and all ownership of copyright in the Materials shall vest in the LPFC at the time the Materials are created. To the extent that the Materials are not a "work made for hire," the Consultant hereby sells, assigns and transfers all right, title and interest in and to the Materials to the LPFC, including the right to secure copyright, patent, trademark, and other intellectual property rights throughout the world and to have and to hold such copyright, patent, trademark, and other intellectual property rights in perpetuity.

**12.17 Reasonableness of Consent or Approval:** Whenever under this Agreement "reasonableness" is the standard for the granting or denial of the consent or approval of either party hereto, such party shall be entitled to consider public and governmental policy, moral and ethical standards as well as business and economic considerations.

**IN WITNESS WHEREOF,** the parties hereto have executed this Agreement as of the day and year first above written.

ATTEST:

**LOMBARD PUBLIC FACILITIES  
CORPORATION**

\_\_\_\_\_  
Toni Sherman  
Secretary

By \_\_\_\_\_  
Jeff Mills  
President

**T&C ASSET MANAGEMENT, LLC**  
Taxpayer (IRS) Id. No. 35-2177098

By: \_\_\_\_\_

Name: \_\_\_\_\_  
(Please Print)

Title: \_\_\_\_\_



**EXHIBIT A**  
**Overview of Services**

Consultant shall provide services at the direction of the LPFC on an “as-directed” and on an “as-needed” basis. The scope of services to be provided by Consultant shall include, but shall not necessarily be limited to, services relative to hospitality industry issues, lodging business practices & procedures, lodging trends, restaurant services and other considerations as these may collectively relate to hotel, restaurant and related facility design and development, debt and equity financing activities, as well as pre-opening, opening and ongoing operations issues. These services may include, but may not be limited to, consultation with regard to the following:

HREC can comment, provide recommended modifications, and assist in negotiations on operating documents or any related operating, development or transaction document for which the Lombard Public Facilities Corporation (“LPFC”), is a party in interest as evidenced by its requirement to be a party to the execution of any said document. Harp and Walsh Construction will not be HREC’s clients and, as such, they will not be able to provide any “formal” services or written comment regarding their agreement(s) to which the LPFC is not a party in interest. However, HREC can provide verbal comment to the Village of Lombard or Piper Jaffray regarding the Design-Build Agreement and its impact on the operating documents or vice versa.

These services shall be provided primarily for the purpose of assisting in the negotiation of operating documents related to the Transaction and the Project. These documents shall include, but may not be limited to, the Hotel Operating Agreement, Hotel Pre-Opening Services Agreement, Hotel Technical Services Agreement, Restaurant Management Agreement, Asset Management Agreement and Master Development Agreement(collectively the “Operating Agreements”). It is understood by Consultant that Consultant may be directed to assist in the negotiation of other Agreements such as a Room Block Agreement and other agreements related but not identified herein. Consultant understands and agrees to review and assist with other agreements that may impact the Transaction or the Operating Agreements.

Specific to the Operating Agreements, the business terms for which Consultant shall assist with negotiations include the following:

**Hotel Operating Agreement**

General Management	Duties and Responsibilities of the Manager
Engagement	Operating Standards
Establishing Pricing	Contracts related to the Project
Maintenance of Project & F,F&E	Purchase of Inventories, Supplies
Supervision/Coordination of Renovations	Internal Controls
Approval of Budgets	F,F&E and Capital Expenses
Books & Records	Chain Services/System Services
Environmental Matters	Cooperation with Asset Manager
Profit/Indirect Profit Representations	Executive Committee Personnel
Fees & Expenses	Base Management Fee
Allocable Chain Expenses	Incentive Management Fee
Payment of Operating Expenses	Clearing Bank Accounts
Operating Cost Set Aside	Operating Reserve Fund
Funds, Accounts, Disbursements	Limitations on Authority
Transfers from Lockbox Fund	Term & Termination
Events of Default	Rights and Remedies
Performance Termination	Termination upon Sale

Termination Upon Foreclosure  
Insurance  
Business Interruption  
Dispute Resolution

Other Matters  
Mortgages  
Assignments  
Proprietary Materials

**Hotel Pre-Opening Services Agreement (POA)**

Engagement  
Management Fees  
Term  
Limitations on Budget Uses  
Pre-Opening Schedule/Services  
Reporting Requirements  
Required Insurance  
Opening and Operation of Hotel  
Events of Default  
Limitation on Scope  
Relationship to TSA

Pre-Opening Budget  
Reimbursable Expenses  
Termination  
Cost Definitions  
Human Resource Matters  
Pre-Opening Marketing  
Construction Monitor / Asset Manager  
Delay Events & Damages  
Default Remedies  
Permitted Assignments  
Miscellaneous

**Hotel Technical Services Agreement (TSA)**

Responsibilities of: Technical Services Provider, Design/Builder, Corporation  
Plan Approval Process  
Acceptance of Project  
Design/Construction Disclaimers  
Term  
Limitation on Liability  
Dispute Resolution

Change Orders  
Compensation/Reimbursable Expenses  
Schedules, Budgets, Cost Projections  
Termination  
Indemnifications  
Miscellaneous

Add specifics for Restaurant Management Agreement, Asset Management Agreement and Master Development Agreement

END