

TAX SHARING AGREEMENT

This Tax Sharing Agreement ("Agreement") is entered into by and between the City of Tracy ("City"), a California municipal corporation, and HOME DEPOT U.S.A., INC., a Delaware corporation ("Home Depot"). City and Home Depot are sometimes referred to individually as "Party" and collectively as "Parties" herein.

RECITALS

This Agreement is made in reference to the following matters to which the Parties mutually agree and adopt as a statement of mutual understanding and intent.

A. Home Depot, a company with its principal executive offices in Atlanta, Georgia, sells products into the retail market and other goods and services to its customers in California and elsewhere.

B. Home Depot has evaluated several locations for a new distribution center and determined that the City best suited its needs because of its geographical location and its labor force. Therefore, Home Depot has entered into a lease agreement with the owner of the selected site in the City pursuant to which the property owner will construct a new distribution center on such site which will be leased to Home Depot.

C. Home Depot has requested assistance from City in return for establishing, locating and operating such distribution center in the City.

D. The City has evaluated the costs and benefits of entering into this Agreement with Home Depot and has determined that it is in the City's interests because of the community benefits, including increased capital investment, job creation, and receipt of new net sales tax.

NOW, THEREFORE, City and Home Depot enter into this Agreement to accomplish their respective and mutual purposes as set forth above.

1. DEFINITIONS.

Unless the context otherwise requires, the terms defined in this Section will have the meanings defined herein.

1.1 "City" means the City of Tracy, a California municipal corporation.

1.2 "City Payment" means, as to a particular Fiscal Quarter during the Term, the obligation of City to pay to Home Depot for such Fiscal Quarter a payment equaling fifty percent (50%) of the Local Sales Tax Revenues attributable to E-Commerce Retail Sales for that Fiscal Quarter.

1.3 "Business Day" means a day which is not a Saturday, Sunday or legal holiday on

which banking institutions in the State of California or City are closed.

1.4 “CDTFA” means the California Department of Tax and Fee Administration and any successor agency.

1.5 “Data and Documentation” has the meaning set forth in Section 2.7.

1.6 “Designated Sales Territory” means the geographical boundaries of the distribution area served by the Distribution Center which is located within the jurisdiction of City. Except as otherwise provided in this Agreement, Home Depot will have the right in its business discretion to adjust or modify the Designated Sales Territory to correspond to its business needs and requirements.

1.7 “Dispute Notice” has the meaning set forth in Section 22.1.

1.8 “Distribution Center” means the distribution center and/or sales/administrative office operated by Home Depot within the City at which E-Commerce Retail Sales and other sales transactions are consummated pursuant to the Sales Tax Law.

1.9 “E-Commerce Retail Sales” means all sales of Material conducted electronically on the internet to any person or entity consummated at the Distribution Center, which is subject to the Sales Tax Law and which generates Local Sales Tax Revenues.

1.10 “E-Commerce Retail Sales Threshold” means E-Commerce Retail Sales in the amount of \$10 million dollars or more in a calendar year during the Term of this Agreement.

1.11 “Effective Date” has the meaning set forth in Section 4.

1.12 “Enforced Delays” has the meaning set forth in Section 19.

1.13 “Event of Default” has the meaning set forth in Section 2.14.

1.14 “Fiscal Quarter” means one three-month period, or portion thereof, within the Term and commencing on February 1, May 1, August 1, or November 1, and ending on, as applicable, the immediately following April 30, July 31, October 31, or January 31.

1.15 “Local Sales Tax Revenues” means that portion of the Sales Tax paid by Home Depot and which is allocated and paid to the City pursuant to the Sales Tax Law. Local Sales Tax Revenues will not include: (i) Penalty Assessments, (ii) any Sales Tax levied by, collected for or allocated to the State of California, the County of San Joaquin, or a district or any entity (including an allocation to a statewide or countywide pool) other than City, (iii) any administrative fee charged by the CDTFA, (iv) any Sales Tax subject to any sharing, rebate, offset or other charge imposed pursuant to any applicable provision of federal, state or local (except City’s) law, rule or regulation, (v) any Sales Tax attributable to any transaction other than E-Commerce Retail Sales, (vi) any Sales Tax attributable to any transaction not consummated within the Term, (vii) any Sales Tax (or other funds measured by Sales Tax) required by the State of California to be paid

over to another public entity (including the State) or set aside and/or pledged to a specific use other than for deposit into or payment from the City's general fund, or (viii) any Sales Tax paid in error or which is subject to correction, adjustment or offset pursuant to an amended return or otherwise where the effect of the error, adjustment or amendment is to change the amount of Sales Tax attributable to Taxable Sales and allocated to the City.

1.16 "Material" means any and all tangible personal property which is offered for sale or lease by Home Depot which is subject to the Sales Tax Law.

1.17 "Penalty Assessments" means penalties, assessments, collection costs and other costs, fees or charges resulting from late or delinquent payments of Sales Tax and which are levied, assessed or otherwise collected from Home Depot.

1.18 "Prohibited Financial Assistance" means any direct or indirect payment, subsidy, rebate or other similar or dissimilar monetary or non-monetary benefit, including, without implied limitation, payment of land subsidies, relocation expenses, financial incentives, public financings, property or sales tax relief or rebates, relief from public improvement obligations, payment for public improvements to or for the benefit of Home Depot, and any action contrary to any applicable laws.

1.19 "Sales Tax" means all sales and use taxes levied under the authority of the Sales Tax Law attributable to E-Commerce Retail Sales, excluding Sales Tax which is to be refunded to Home Depot because of an overpayment of Sales Tax.

1.20 "Sales Tax Law" means (i) California Revenue and Taxation Code Section 6001 et seq., and any successor law thereto, including the Bradley-Burns Uniform Local Sales and Use Tax Law (Rev. Tax Code § 7200 et seq.), and any successor law thereto, (ii) any legislation allowing other public agency with jurisdiction in the City to levy any form of Sales Tax on the operations of Home Depot and/or the Distribution Center, and (iii) regulations of the CDTFA and other binding rulings and interpretations relating to (i) and (ii) hereof.

1.21 "Term" means the period commencing on the Effective Date, and ending 20 years after the Effective Date, unless otherwise extended or terminated in accordance with this Agreement.

2. LOCATION AND OPERATION; APPLICABILITY TO LOCAL SALES AND USE TAXES.

2.1 Location and Operation Covenant. Home Depot hereby represents, warrants and covenants that it shall establish a Distribution Center within the jurisdictional boundaries of the City and, for the Term, conduct any E-Commerce Retail Sales operations for the Designated Sales Territory through the Distribution Center in accordance with this Agreement, the Sales Tax Law, and all other applicable provisions of local, state and federal law.

2.2 Distribution Center Covenant Not Exclusive: Waiver and Release of Claims. City understands, acknowledges and agrees that Home Depot has established and may establish other Distribution Centers (“Additional Offices”) outside the City. With the exception of Prohibited Financial Assistance, nothing in this Agreement limits Home Depot’s right to conduct sales and other business and operations at or from the other locations. In consideration of the mutual promises, conditions and covenants of this Agreement, City hereby waives and releases any objections, claims or demands of any kind with respect to (i) the Additional Offices, (ii) the payment of taxes for sales conducted by or through the Additional Offices, (iii) the existence of or course of performance by Home Depot under Tax Sharing Agreements that comply with all applicable laws, including without limitation Cal. Govt. Code. Section 53084.5, and are similar in concept to this Agreement entered into by Home Depot with any of the cities in which such Additional Offices are located, or (iv) the allocation of taxable activity to those cities by Home Depot in the course of its business and operations in California. City likewise covenants not to sue, and not to commence arbitration proceedings under this Agreement or to commence administrative proceedings of any nature before the CDTFA or otherwise, or to challenge such allocations or activities in any way to the extent of objections, claims or demands of any kind which are waived or released by this Section 2.2. The waivers and releases provided in this Section 2.2 do not limit City’s right to enforce this Agreement under Section 22 and any other provision of this Agreement related to the enforcement of rights created by this Agreement.

2.3 No Prohibited Financial Assistance. Notwithstanding anything in Section 2.2, Home Depot covenants and agrees for the Term that Home Depot will not directly or indirectly solicit, accept or enter into any agreement concerning any Prohibited Financial Assistance from any other public or private person or entity, to the extent such Prohibited Financial Assistance is given for the purpose of causing or would result in either Home Depot’s relocation from the City or an Event of Default by Home Depot.

2.4 City as Point-of-Sale. Without limiting the generality of the foregoing, Home Depot will maintain a retail sales tax permit from the CDTFA. Home Depot agrees to conduct its business so that the place of sale for all E-Commerce Retail Sales consummated at or occurring through the Distribution Center during the Term will be the City pursuant to the Sales Tax Law. In all sales reports filed by Home Depot with the CDTFA relating to E-Commerce Retail Sales consummated at or through the Distribution Center, where such a designation is permitted or required under the Sales Tax Law, Home Depot will specify the City as the place of sale.

2.5 Payment of City Payment. In consideration of the promises, covenants, terms and conditions of this Agreement, City will make the City Payment to Home Depot as follows:

2.5.1 Consistent with the definition set forth in Section 1.2 of this Agreement, City will pay Home Depot, for each Fiscal Quarter during the Term, a payment equaling fifty percent (50%) of the Local Sales Tax Revenues received by the City and attributable to Home Depot’s E-Commerce Retail Sales reported for that Fiscal Quarter.

2.5.2 Within thirty (30) days following the later of: (i) City’s receipt of final reconciliation reports from the CDTFA for a Fiscal Quarter occurring within the Term, and (ii) City’s receipt from Home Depot of any and all Data and Documentation applicable to such Fiscal

Quarter, City will determine and pay to Home Depot the City Payment due for such Fiscal Quarter.

2.6 Conditions Precedent to City Payments. City's obligations under Section 2.6 hereof are contingent upon Home Depot meeting the E-Commerce Retail Sales Threshold in a calendar year. For clarity, upon Home Depot meeting the E-Commerce Retail Sales Threshold in a calendar year, the City Payment shall be calculated from dollar-one of the Local Sales Tax Revenues for that year. In addition, City's obligations under Section 2.5 hereof are contingent on a Fiscal Quarter-to-Fiscal Quarter basis upon the satisfaction of the following conditions precedent in each Fiscal Quarter after Home Depot has commenced E-Commerce Retail Sales in the City:

2.6.1 Home Depot having, for the entirety of such Fiscal Quarter, completely fulfilled its material obligations under this Agreement; and

2.6.2 The City's receipt of the Local Sales Tax Revenues attributable to the Fiscal Quarter and the City's receipt and reasonable approval of the Data and Documentation, certified as complete and accurate by an authorized Home Depot officer (or its authorized designee).

Should any one or more of the foregoing conditions precedent not be satisfied for each Fiscal Quarter, then City will have no obligation to make any City Payment to Home Depot for such Fiscal Quarter until such conditions precedent are met. If City elects to delay any payment on account of any such purported noncompliance by Home Depot, City must promptly give Home Depot written notice pursuant to Section 15 of all such material obligations that City alleges have not been fulfilled and cooperate with Home Depot's efforts to effect a cure or remedy with respect thereto.

2.7 Data and Documentation. For the purposes of this Agreement, the term "Data and Documentation" means copies of Home Depot's quarterly reports to the CDTFA for the applicable Fiscal Quarter which sets forth the amount of Sales Taxes paid to the CDTFA during the Fiscal Quarter arising from E-Commerce Retail Sales during such Fiscal Quarter.

2.8 No Other Compensation. Both City and Home Depot expressly acknowledge and agree that Home Depot will receive no compensation under this Agreement other than the City Payment. Home Depot will not be entitled to any reimbursement or other compensation from City for any costs incurred by Home Depot in performing or preparing to perform its obligations under this Agreement. The City Payments shall not be reduced or offset for any costs or expenses incurred by City in performing or preparing to perform its duties under this Agreement.

2.9 Source of City Payment. City Payments shall be payable from any source of legally available funds of City. City covenants to reasonably consider such actions as may be necessary to include all City Payments owed hereunder in each of its annual budgets during the Term and to reasonably consider the necessary annual budgetary appropriations for all such City Payments.

2.10 Recapture of City Payments. If, at any time during or after the Term of this Agreement, CDTFA or any court makes a final determination that all or any portion of the Local

Sales Tax Revenues received by City were improperly allocated and/or paid to City, and if CDTFA or any court requires repayment of or offsets against any future Sales Tax payments, or otherwise recaptures from City any such Local Sales Tax Revenues finally determined by CDTFA or the court to have been improperly allocated and/or paid, then Home Depot will, within thirty (30) days after written demand from City, together with reasonable documentation, repay all City Payments (or applicable portions thereof) theretofore paid to Home Depot which are attributable to such repaid, offset, or recaptured Local Sales Tax Revenues. If Home Depot fails to make such repayment within thirty (30) days after City's written demand, together with reasonable documentation, then such obligation will accrue interest from the date of City's original written demand at the then-maximum legal rate imposed by the California Code of Civil Procedure on prejudgment monetary obligations, compounded monthly, until paid. Nothing in this Section 2.10 will require repayment by Home Depot of any City Payments made or received with respect to Local Sales Tax Revenues for any periods other than those periods for which the CDTFA or the court has required redistribution, repayment, offset, or recapture by or against City. The City will promptly contact Home Depot regarding any communication from the CDTFA pertaining to Sales Tax allocations associated with Home Depot's Distribution Center.

2.11 Underpayment by CDTFA. In order to further the goals of this Agreement, City hereby allows Home Depot, upon reasonable notice and within the limits of the California Public Records Act, to review records regarding the receipt of Local Sales Tax Revenues by City from CDTFA relating to Home Depot. City and Home Depot agree that, in the event of an underpayment of Local Sales Tax Revenues by CDTFA, City will (at the request of Home Depot) engage legal counsel to use his or her best efforts to defend such allocation in all CDTFA administrative proceedings. Costs associated for such efforts will be borne by both City and Home Depot in proportion to their respective percentage interests in the Local Sales Tax Revenue. For purposes of this paragraph, administrative proceedings include all CDTFA meetings, conferences and appeals before CDTFA Board members.

2.12 Authorization to Release Information. Home Depot, to the extent such consent is required by any applicable legal provision, consents to the City's review and use of the information contained in the Data and Documentation and as otherwise required by this Agreement to the extent necessary for the City to fulfill its obligations under this Agreement and any applicable laws.

2.13 CDTFA Determination; Reconciliation.

2.13.1 Each Party agrees that, for purposes of accounting and reconciliation of E-Commerce Retail Sales, to rely upon the CDTFA's determination of E-Commerce Retail Sales and the corresponding sales tax allocation. Either Party may rely on the CDTFA accounting or record keeping for a determination of the amount of E-Commerce Retail Sales made or sales tax distributed. This provision in no way limits either Party's ability to challenge CDTFA discretionary decision making.

2.13.2 Each City Payment will be accompanied by a statement setting forth the calculations made to determine the amount of such disbursement and setting forth all disbursements made to date. Each Party will have the right to contest any of the calculations or

information contained in said statement or the determined amount of payment upon written notice to the other Party within sixty (60) calendar days of the date of the statement or City Payment. If the challenging Party can show to the reasonable satisfaction of the other Party, within sixty (60) calendar days of receiving such notice, that the amount of a City Payment was incorrect, either City will disburse to Home Depot the correct amount due, or Home Depot will reimburse City for any amount received in excess of the correct amount due, as applicable.

2.14 Default. Each of the following will constitute an “Event of Default”:

2.14.1 Failure by either Party to comply with and observe any of the conditions, terms, or covenants set forth in this Agreement, if such failure remains uncured within thirty (30) days after written notice of such failure from the non-defaulting Party to the defaulting Party in the manner provided herein or, with respect to a default that cannot be cured within thirty (30) days, if the defaulting Party fails to commence such cure within such thirty (30) day period or thereafter fails to diligently and continuously proceed with such cure to completion. However, if a different period or notice requirement is specified under any other section of this Agreement, then the specific provision shall control. Notwithstanding the foregoing, any failure to comply with and/or observe any of the conditions, terms or covenants set forth in Section 5.1 or Section 5.2 of this Agreement shall not be an Event of Default hereunder.

2.14.2 Any representation or warranty contained in this Agreement or in any application, financial statement invoice, certificate, or report submitted pursuant to this Agreement proves to have been incorrect in any material respect when made.

3. REPRESENTATIONS AND WARRANTIES.

3.1 City’s Representations and Warranties. City represents and warrants to Home Depot that, to City’s actual current knowledge:

3.1.1 City is a public agency and political subdivision of the State of California, exercising governmental functions and powers as granted or delegated by the Constitution and laws of the State of California;

3.1.2 City has taken all actions required by law to approve the execution of this Agreement;

3.1.3 City’s entry into this Agreement and the performance of City’s obligations under this Agreement do not violate any contract, agreement, or other legal obligation of City;

3.1.4 There are no pending lawsuits or other actions or proceedings which would prevent or impair the timely performance of City’s obligations under this Agreement; and

3.1.5 City has the legal right, power and authority to enter into this Agreement and to consummate the transactions contemplated hereby, and the execution, delivery and performance

of this Agreement has been duly authorized and no other action by City is requisite to the valid and binding execution, delivery and performance of this Agreement, except as otherwise expressly set forth herein.

3.2 Material Consideration. The representations and warranties set forth above are of material consideration to Home Depot and City acknowledges that Home Depot is relying upon the representations set forth above in undertaking Home Depot's obligations set forth in this Agreement.

3.3 Binding. All of the terms, covenants and conditions of this Agreement will be binding on and will inure to the benefit of City and its nominees, successors and assigns.

3.4 Home Depot's Representations and Warranties. Home Depot represents and warrants to City that, to Home Depot's actual current knowledge:

3.4.1 Home Depot is a duly formed corporation under the laws of the State of Delaware, and is in good standing and qualified to do business under the laws of the State of California;

3.4.2 Home Depot has taken all actions required by law to approve this Agreement;

3.4.3 Home Depot's entry into this Agreement and the performance of Home Depot's obligations under this Agreement do not violate any contract, agreement or other legal obligation of Home Depot;

3.4.4 There are no pending lawsuits or other actions or proceedings which would prevent or impair the timely performance of Home Depot's obligations under this Agreement; and

3.4.5 Home Depot has the legal right, power and authority to enter into this Agreement and to consummate the transactions contemplated hereby, and the execution, delivery and performance of this Agreement have been duly authorized and no other action by Home Depot is requisite to the valid and binding execution, delivery and performance of this Agreement, except as otherwise expressly set forth herein.

3.5 Material Consideration. The representations and warranties set forth herein are material consideration to City and Home Depot acknowledges that City is relying upon the representations set forth above in undertaking City's obligations set forth above.

3.6 Binding. All of the terms, covenants and conditions of this Agreement will be binding on and will inure to the benefit of Home Depot and its permitted nominees, successors and assigns. Wherever the term "Home Depot" is used herein or therein, such term will include any permitted nominee, assignee or successor of Home Depot.

4. EFFECTIVE DATE.

This Agreement will become effective ("Effective Date") at the earliest when all of the following are true: (i) this Agreement has been approved by the City Council of City following all legally required notices and hearings; (ii) this Agreement has been executed by the appropriate authorities of City and Home Depot; and (iii) Home Depot has commenced operations at the Distribution Center.

5. PUBLIC BENEFITS.

5.1 Community Participation. As additional consideration for the benefits conferred under this Agreement, Home Depot further agrees to participate in supporting community benefit events and activities consistent with Home Depot's practices and policies.

5.2 Employment Outreach for Local Residents. A goal of the City in entering into this Agreement is to foster employment opportunities for Tracy residents. To that end, Home Depot will use commercially reasonable efforts to recruit and hire local residents for any full and part time employment opportunities as determined by Home Depot in its sole discretion. To the extent Home Depot conducts any local on-site and/or off-site Job Recruitment Fairs, which are defined as Home Depot's pre-scheduled events open to the public with the purpose of filling 20 or more job positions at Home Depot's Distribution Center, Home Depot will notify the City's Economic Development Department of the location, dates and times for such Job Recruitment Fairs prior to the date of accepting applications. Any such notice shall not be subject to the requirements of Section 15 of this Agreement and may be provided by any reasonable means, including but not limited to, by e-mail to econdev@cityoftracy.org, by telephone (209-831-6400) or by delivery of a written notice to the City's address set forth in Section 15. Job Recruitment Fairs exclude any recruitment activities or events hosted by Home Depot's staffing agencies or third-party vendors which may be used to fill temporary job positions at Home Depot's Distribution Center. The City shall be authorized to post and advertise the job recruitment information provided to the City on the City's website and other jobs available and job recruitment sites within the region. Any offers of employment will be at Home Depot's sole discretion and all employment will be at-will employment. Nothing in this paragraph will require Home Depot to offer employment to individuals who are not otherwise qualified for such employment. Without limiting the generality of the foregoing, the provisions of this Section 5.2 are not intended, and will not be construed, to benefit or be enforceable by any person whatsoever other than City.

6. TERMINATION.

6.1 Event of Default. This Agreement may be terminated by a Party at its option in the event of the other Party's Event of Default. Such termination will not limit or otherwise modify the rights and remedies available to the non-defaulting Party. Termination will be effective thirty (30) days after a notice of termination is received.

6.2 Reserved.

6.3 Home Depot Termination. Notwithstanding any other provision of this Agreement, but subject to Section 2.3, Home Depot may, at its option, upon written notice to City, terminate this Agreement and/or relocate the Distribution Center to any other city or county in California or elsewhere and reallocate E-Commerce Retail Sales accordingly and in conformance with applicable Sales Tax Law.

7. OPTION TO RENEW.

This Agreement and the Term hereof is subject to renewal for one additional 20-year term at the option of Home Depot upon notice given to City not later than six months prior to the expiration of the original term.

8. AMENDMENT; MODIFICATION.

At any time, City and Home Depot may determine that this Agreement should be amended for the mutual benefit of the Parties, or for any other reason. Any such amendment to this Agreement will only be by written agreement between City and Home Depot. City and Home Depot agree to consider reasonable requests for amendments to this Agreement which may be made by any of the Parties hereto, lending institutions, bond counselor financial consultants, although neither Party will be obligated to approve any such amendment. Any amendments to this Agreement must be in writing and signed by the appropriate authorities of both City and Home Depot.

9. CALIFORNIA LAW.

This Agreement will be construed and governed in accordance with the procedural and substantive laws of the State of California, without regard to conflict of laws principles.

10. EXECUTION IN COUNTERPARTS.

This Agreement may be executed in two (2) or more counterparts, each of which will be deemed an original, and all of which will constitute but one (1) and the same instrument.

11. BUSINESS DAYS.

Any act or thing required to be done or exist on any date set forth herein which does not constitute a Business Day in any year will be deemed to be done or to exist on such date if such act or thing is done or exists on the next date which constitutes a Business Day.

12. TAX CONSEQUENCES.

Home Depot will be responsible for federal, state and/or local income taxes resulting from its receipt of City Payments.

13. RIGHTS NOT GRANTED.

This Agreement is not, and will not be construed to be, a statutory development agreement under

California Government Code Section 65864 et seq. or a disposition and development agreement under California Health and Safety Code Section 33000 et seq. This Agreement is not, and will not be construed to be, an approval of or an agreement to issue permits or a granting of any right or entitlement by City concerning any project, development, or construction by Home Depot in the City. This Agreement does not, and will not be construed to, exempt Home Depot in any way from the requirement to obtain permits and/or other discretionary or non-discretionary approvals as may be necessary for the development, construction, maintenance and operation of any project by Home Depot within the City. This Agreement does not, and will not be construed to, exempt Home Depot from the application and/or exercise of City's or City's power of eminent domain or its police power, including, but not limited to, the regulation of land uses and the taking of any actions necessary to protect the health, safety and welfare of its citizenry.

14. CONSENT.

Whenever consent or approval of any Party is required under this Agreement, that Party will not unreasonably withhold, delay, or condition such consent or approval unless a different standard is otherwise provided by a specific provision of this Agreement.

15. NOTICES AND DEMANDS.

All notices or other communications required or permitted between City and Home Depot under this Agreement will be in writing, and may be (i) personally delivered, (ii) sent by United States registered or certified mail, postage prepaid, return receipt requested, or (iii) sent by nationally recognized overnight courier service (e.g., Federal Express), and addressed to the Parties at the following addresses, subject to the right of either Party to designate a different address for itself by notice similarly given:

To City:

City Clerk's Office
333 Civic Center
Plaza Tracy, CA
95376

With a copy to:

City Attorney's Office
333 Civic Center
Plaza Tracy, CA
95376

To Home Depot:

Home Depot U.S.A., Inc.
2455 Paces Ferry Road, N.W.
Atlanta, Georgia 30339

Attn: Property Manager

With a copy to:

Home Depot U.S.A., Inc.
2455 Paces Ferry Road, N.W.
Atlanta, Georgia 30339
Attn: Jessica Borgert, Esq.

Any notice so given by registered or certified United States mail will be deemed to have been received on the fourth Business Day after the same is deposited in the United States mail. Any notice not so given by registered or certified mail, such as notices delivered by courier service (e.g., Federal Express), will be deemed received upon actual receipt of the same by the Party to whom the notice is given.

16. NONLIABILITY OF PARTIES' OFFICIALS AND EMPLOYEES.

16.1 No officer, elected official, contractor, consultant attorney or employee of City will be personally liable to Home Depot, any voluntary or involuntary successors or assignees of Home Depot, or any lender or other party holding an interest in Home Depot's property, in the event of any default or breach by City, or for any amount which may become due to Home Depot or to its successors or assignees, or on any obligations arising under this Agreement.

16.2 No officer, official, contractor, consultant, attorney or employee of Home Depot will be personally liable to City, any voluntary or involuntary successors or assignees of City in the event of any default or breach by Home Depot, or for any amount which may become due to City or to its successors or assignees, or on any obligations arising under this Agreement.

17. CONFLICT OF INTERESTS.

No officer, elected official, contractor, consultant, attorney or employee of City will have any personal interest, direct or indirect, in this Agreement nor will any such officer, elected official, contractor, consultant, attorney or employee participate in any decision relating to this Agreement which unlawfully affects his/her personal interests or the interests of any corporation, partnership or association in which he/she is directly or indirectly interested.

18. ENTIRE AGREEMENT.

This Agreement contains all of the terms and conditions agreed upon by the Parties. No other understanding, oral or otherwise, in direct conflict with this Agreement will be deemed to exist or to bind any of the parties hereto. All prior written or oral offers, counteroffers, memoranda of understanding, proposals and the like are superseded by this Agreement.

19. EXTENSIONS AND DELAYS; NO EXCUSE DUE TO ECONOMIC CHANGES.

Time is of the essence in the performance of the obligations of City and Home Depot under this

Agreement. In addition to specific provisions of this Agreement, providing for extensions of time, times for performance hereunder will be extended where delays in performance are due to war, insurrection; any form of labor dispute; lockouts; riots; floods; earthquakes; fires; acts of God or of third parties; third party litigation or orders and judgments of courts of competent jurisdiction; acts of a public enemy; acts of governmental authorities; epidemics; quarantine restrictions; and freight embargoes (collectively, "Enforced Delays") provided, however, that the Party claiming the extension notify the other Party of the nature of the matter causing the default; and, provided further, that the extension of time will be only for the period of the Enforced Delays; and provided further, that the obligations of both Parties are equally suspended during the Enforced Delay. In no event will either Party be deemed in default of this Agreement because of an Enforced Delay event.

20. THIRD PARTY CHALLENGES.

The Parties will work in good faith with each other to beneficially resolve any third party demands, suits, proceedings, causes of action or claims of any kind arising under the Sales Tax Law or any other alleged ground or basis to the extent arising from this Agreement or the Parties' performance thereof, including, without limitation, the payment or reporting of City Payments by City to Home Depot ("Third Party Challenge").

21. ATTORNEYS' FEES.

In the event of the bringing of an arbitration, action or suit by a Party hereto against another Party hereunder by reason of any breach of any of the covenants or agreements or any intentional inaccuracies in any of the representations and warranties on the part of the other Party arising out of this Agreement or any other dispute between the Parties concerning this Agreement, each Party will be responsible for all of its own costs and expenses, including attorneys' fees and expert witness fees.

22. INFORMAL DISPUTE RESOLUTION.

22.1 The Parties will attempt in good faith to resolve any differences, controversy or claim arising out of or relating to this Agreement promptly by negotiations between senior officials of the Parties who have authority to settle the difference or controversy, in accordance with state law and Tracy Municipal Code. The disputing Party may give the other Party written notice that a dispute exists between them so that the provision of this Sections 22 will apply ("Dispute Notice").

22.2 Within twenty (20) days after receipt of a Dispute Notice, the receiving Party will submit to the disputing Party a written response. The Dispute Notice and response will include (a) a statement of each Party's position and a summary of the evidence and arguments supporting its position, and (b) the name and title of the official who will represent that Party. The senior officials will meet at a mutually acceptable time and place or by telephone conference within thirty (30) days of the date of the Dispute Notice, and thereafter as often as they reasonably deem necessary to exchange relevant information and to attempt to resolve the dispute. In the event any Party fails to provide a response to a Dispute Notice in accordance with this section or fails to

cooperate in the scheduling of, or to attend, the meetings, described above, to resolve the dispute, then, with respect to that Party, the dispute may immediately be subject to legal action.

23. JURISDICTION AND VENUE.

Any legal action or proceeding concerning this Agreement will be filed and prosecuted in the appropriate State of California court in the County of San Joaquin, California. Both Parties irrevocably consent to the personal jurisdiction of that court.

24. INTERPRETATION.

City and Home Depot acknowledge that this Agreement is the product of mutual arms-length negotiation and drafting and that both Parties have been represented by legal counsel in the negotiation and drafting of this Agreement. Accordingly, the rule of construction which provides that ambiguities in a document will be construed against the drafter of that document will have no application to the interpretation and enforcement of this Agreement. In any action or proceeding to interpret or enforce this Agreement, the finder of fact may refer to any extrinsic evidence not in direct conflict with any specific provision of this Agreement to determine and give effect to the intention of the Parties with respect to any ambiguities in this Agreement.

25. NO WAIVER.

Failure to insist on any occasion upon strict compliance with any of the terms, covenants or conditions hereof will not be deemed a waiver by any Party of such term, covenant or condition, nor will any waiver or relinquishment of any rights or powers hereunder at any one time or more times be deemed a waiver or relinquishment by any Party of such other right or power at any other time or times.

26. SUCCESSORS AND ASSIGNS.

The terms, covenants and conditions of this Agreement will be binding upon and inure to the benefit of the Parties hereto and their voluntary and involuntary successors and assigns.

27. NO THIRD PARTY BENEFICIARIES.

The performance of the respective obligations of City and Home Depot under this Agreement are not intended to benefit any party other than City or Home Depot. No person or entity not a signatory to this Agreement will have any rights or causes of action against any Party to this Agreement as a result of that Party's performance or non-performance under this Agreement.

28. WARRANTY AGAINST PAYMENT OF CONSIDERATION.

Home Depot warrants that it has not paid or given, and will not pay or give, any third party any money or other consideration for obtaining this Agreement. Third parties, for the purposes of this Section 28, will not include persons to whom fees are paid for professional services if rendered by attorneys, financial consultants, accountants, engineers, architects and the like when such fees are

considered necessary by Home Depot.

29. SEVERABILITY.

City and Home Depot declare that the provisions of this Agreement are severable. If it is determined by a court of competent jurisdiction that any term, condition or provision hereof is void, voidable, or unenforceable for any reason whatsoever, then such term, condition or provision will be severed from this Agreement and the remainder of the Agreement enforced in accordance with its terms.

30. FURTHER ACTS.

City and Home Depot each agree to take such additional acts and execute such other documents as may be reasonable and necessary in the performance of their obligations hereunder. The foregoing will not, however, be deemed to require City to exercise its discretion in any particular fashion or to provide to Home Depot any remedy or claim for damages against City based on the lawful exercise of City's discretion.

31. NO ASSIGNMENT, TRANSFER, PLEDGE OR HYPOTHECATION.

Home Depot may not assign, transfer, encumber or hypothecate its rights or obligations under this Agreement without the express written consent of City, which may be withheld in City's sole and absolute discretion. Any unpermitted assignment, transfer, pledge, encumbrance, or hypothecation, or any attempt to do so, will not confer any rights upon the purported assignee or transferee and will constitute Home Depot's immediate and incurable material default of this Agreement, and City may, without providing Home Depot notice or opportunity to cure, exercise those remedies available to City pursuant to Section 6.1. Notwithstanding the foregoing, Home Depot shall have the right to assign this Agreement or any right or obligation hereunder to its immediate or ultimate parent, or to an affiliate, by providing advance written notice to City. An "affiliate" shall mean any legal entity that, at the applicable time, directly or indirectly controls, is controlled with or by, or is under common control with, Home Depot.

32. RELATIONSHIP OF PARTIES.

The Parties will not be deemed in a relationship of partners or joint ventures by virtue of this Agreement, nor will either Party be an agent, representative, trustee or fiduciary of the other. Neither Party will have any authority to bind the other to any agreement.

33. NON-DEDICATION OF PROPERTY.

The execution of this Agreement by Home Depot does not result in the dedication of any Home Depot property for public use.

34. INDEMNIFICATION FOR POTENTIAL CLAIMS

Home Depot will defend (with counsel approved by City), fully indemnify, and hold harmless

City, any agency or instrumentality thereof, and its/their respective agents, officers, officials, attorneys, consultants, employees, and volunteers (each, a "City Party") from and against any and all administrative and/or legal claims, actions, or proceedings arising out this Agreement (a) made by a city or other taxing authority, provided such actions include at least one (1) claim under California Government Code Section 53084.5, or (b) made by any other claimant to the extent, and only to the extent, that such claims, actions or proceedings arise under California Government Code Section 53084.5 ("Covered Claims"). Home Depot's indemnity obligations will not be limited by any coverage exclusions or other provisions in any policy of insurance.

City will promptly notify Home Depot of any Covered Claims, will cooperate fully in the defense thereof, and will have the right to pre-approve any material decision involved in defending any Covered Claims, including settlement, which approval shall not unreasonably be withheld or delayed. If Home Depot does not promptly defend any such Covered Claims, City may (but is not obligated to) defend and/or settle such Covered Claims in the time and manner that City, in its sole discretion, determines appropriate. Home Depot will bear any and all losses, damages, injuries, liabilities, costs, and expenses (including fees, costs, and expenses for attorneys, consultants, expert witnesses, court costs, litigation and alternative dispute resolution) arising out of or related to any Covered Claims, whether incurred or payable by Home Depot, City, or awarded to any third party, and Home Depot will pay to City, within ten days after City's written demand therefor, any such costs incurred or payable by City.

The provisions of this Section 34 will survive expiration or termination of this Agreement.

35. COMPLIANCE WITH APPLICABLE LAW

Each Party shall comply with all applicable laws, regulations and final court orders.

The individual(s) executing this Agreement is or are authorized to execute this Agreement on behalf of the respective Party.

WHEREFORE the Parties have entered into this Agreement as of the date of approval by the City Council of City as attested to by its authorized officer below.

CITY OF TRACY


AS APPROVED _____

Attested and agreed:

Approved as to Form:




[Name and Title]



City Attorney
[Name and Title]

HOME DEPOT U.S.A., INC.,
a Delaware corporation

By: 
Jessica Borgert
Assistant General Counsel

Dated: 11/15/2019