

**CITY OF DANA POINT**  
**AGENDA REPORT**

<b>Reviewed By:</b>	
DH	<u>  X  </u>
CM	<u>  X  </u>
CA	<u>  x  </u>

**DATE: MARCH 12, 2003**

**TO: CITY MANAGER / HONORABLE MAYOR AND CITY COUNCIL**

**FROM SHERYL LINDSEY, DIRECTOR OF ADMINISTRATIVE SERVICES**

**SUBJECT: CONTRACT WITH MBIA MUNISERVICES COMPANY TO PROVIDE  
TRANSIENT OCCUPANCY TAX (TOT) AUDITING SERVICES**

**RECOMMENDED ACTION:**

That the City Council approve, and authorize the City Manager to sign, a two-year, renewable, Agreement and Addenda with MBIA MuniServices Company ("MMC") to undertake a routine Citywide audit of our Transient Occupancy Tax (TOT) revenue generators.

**ISSUES:**

Shall an independent audit of the City's TOT revenue generators be conducted?

**BACKGROUND:**

The last TOT audits were done seven years ago, in 1996, by KPMG Peat Marwick. KPMG were the City's general auditors at the time and these services were a supplemental service under their routine auditing contract. At that time, we only audited two hotels, the Ritz Carlton & Dana Point Resort. Previously, the work was done under an hourly rate, not as a percentage of recovery. Typically, these past services cost us approximately \$5,000-\$7,000 per year.

**DISCUSSION:**

It is typical for municipalities to audit tax revenues such as TOT on a regular basis. Although the City may not need these services annually, a routine cycle should be set-up for consistency. Staff recommends auditing TOT every two years. In the past, the City only focused on the largest lodging producers of TOT revenue. Staff recommends that all lodging establishments be audited for compliance with the City's TOT ordinance. This service not only identifies discrepancies in received revenues, but serves as an educational tool for the lodging industry. Staff has noted that the most turnover of lodging ownership (and therefore the most susceptible to inaccuracies) is in the smaller hotels and motels within the City.

### Audit Procedures

MMC's Transient Occupancy Tax (TOT) team reviews folios, daily and weekly reporting of receipts and occupancy, bank statements and other primary documentation of a lodging provider on-site, after having first analyzed the returns of that provider for the preceding thirty-six months. MMC then determines whether the City's Ordinance has been properly applied, and if the provider has properly documented and applied exemptions to the tax. When unreported, under-reported or otherwise delinquent revenue is identified, the amount of the deficiency is calculated and reported back to the City of Dana Point.

MMC's approach is to conduct its audits in a cooperative and informative manner. The focus of the audit is, first, to insure that the TOT is being properly collected, returned and paid-over to the City; but then to inform the lodging provider of accurate and correct application of the Tax and appropriate recordkeeping to prevent future under-reporting. Enhancing future compliance generates additional revenue as surely as detecting past non-compliance.

The TOT team also assists the City's staff by recommending ordinance, collection and other administrative improvement; preparing deficiency determinations, notices and other communication to lodging providers on behalf of the client; and even delivering expert testimony in court, if necessary.

### MMC Personnel

MMC proposes to utilize a highly experienced and qualified team. This team possesses a combined experience of more than thirty years in assisting governments in identifying under-reported or otherwise delinquent lodging tax revenue, in helping the hospitality industry to appropriately understand and comply with collection requirements, and in assisting clients in better administering this revenue source. MMC assures shared values and high ethical standards, an understanding of both local government and the hospitality industry, and pride in performance. They assure us that this team will deliver results in which we may place the utmost confidence.

### Cost

MMC shall be responsible for all costs and expenses incident to the performance of Services for the City of Dana Point, including but not limited to, all costs of equipment provided by MMC, all fees, fines, licenses, bonds or taxes required of or imposed against MMC and all other of MMC's costs of doing business.

MMC will execute its TOT Compliance Review Program for the City of Dana Point for a Contingency Fee of 35% of additional revenue generated by the program, with a minimum fee payable upon completion of the Compliance Review. The minimum fee shall be \$900 per lodging provider reviewed. The Contingency Fee is only payable on revenues actually received by the City and the City maintains control as to those fees to be collected.

**NOTIFICATION/FOLLOWUP:**

MBIA MuniServices will be notified of the Council's action.

**FISCAL IMPACT:**

Funding for the upfront fee (\$900 per audit) can be funded through the Reserve for Service Enhancement fund. It is estimated that a total cost would not exceed \$10,000 and it is certainly anticipated that much, if not all, of this upfront funding will be offset by new revenues. If new revenues are received from the City due to audit findings, the \$900 fee is deducted from the commission percentage allocated to the auditors. On the positive side, the City may receive additional revenue sources, both short-term and long-term, based on the audit findings.

**ALTERNATIVE ACTIONS:**

- 1. Do not award the TOT auditing services contract.

**ACTION DOCUMENTS:**

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**Action Document A****CONSULTANT SERVICES AGREEMENT**

This Consultant Services Agreement (hereinafter "Agreement") is made as of 2003, by and between MBIA MuniServices Company, a wholly owned subsidiary of MBIA Inc. with an office at 3433 W. Shaw Ave, Fresno, CA 93711 (hereinafter "MMC"), and the City of Dana Point, a municipal corporation of the State of California (hereinafter "CITY").

**SERVICES**

1.1 Services. Subject to the terms and conditions set forth herein, MMC shall provide to CITY those services set forth in Addenda attached hereto in exchange for the fees set forth in the Addenda. Upon mutual agreement, MMC and CITY may add services to be performed by MMC for CITY under this Agreement by executing additional Addenda. Such additional Addenda shall contain, at a minimum, a description of the services to be performed, the anticipated compensation for such services, and any additional terms required to give effect to the request for services (collectively "Services"). Such additional Addenda shall be signed by representatives of CITY and MMC having authority to so bind the parties. MMC shall provide the Services in the manner specified in each applicable Addenda. MMC shall not be required to perform, nor CITY be required to pay for, services not contained in an applicable Addenda.

**INDEPENDENT CONTRACTOR STATUS**

2.1 Independent Contractor. MMC is an independent contractor, and not an employee of CITY, who will be engaged in providing consulting services for CITY. Nothing in this Agreement shall be interpreted or construed as creating or establishing the relationship of employer and employee between CITY and MMC or between CITY and any employee or agent of MMC. Both parties acknowledge that MMC is not an employee for state or federal tax purposes. MMC shall retain the right to perform services for others during the term of this Agreement. Nothing in this Agreement shall be construed as creating a partnership, joint venture, or designating MMC as an agent of CITY. MMC shall have no authority to bind, contract, or obligate CITY, financially or otherwise. CITY shall not have any right to control the means by which MMC performs the Services including the facilities used, the employees, contractors, or agents assigned by MMC. MMC shall be responsible for any subcontracts entered into in the course of performance of the Services for CITY and MMC shall be solely responsible for payment to the subcontractors.

**COMPENSATION**

3.1 In consideration for the Services to be performed by MMC, CITY agrees to pay MMC the rates set forth in each applicable Addenda.

3.2 MMC shall submit timely invoices for all services rendered in accordance with each applicable Addenda. Payment will be made to MMC within thirty (30) days of receipt of MMC's invoice therefore. Any amounts which remain unpaid after thirty (30) days shall accrue interest at the rate of one and one-half percent (1.5%) per month, or the maximum amount permitted bylaw.

3.3 MMC shall be responsible for all costs and expenses incident to the performance of Services for CITY, including but not limited to, all costs of equipment provided by MMC, all fees, fines, licenses, bonds or taxes required of or imposed against MMC and all other of MMC's costs of doing business. CITY shall not be responsible for expenses incurred by MMC in performing Services for CITY, except as noted in an applicable Addenda, or such expenses that receive prior written approval from CITY.

### **CONFIDENTIALITY**

4.1 During the term of this Agreement, each party may have access to certain confidential information of the other including such party's products, services, technical data, trade secrets, inventions, processes, and constituent information. All such information shall be deemed "Confidential Information" whether or not identified as such. Each party shall use the Confidential Information of the other solely for performance of this Agreement, and all Confidential Information shall remain the sole property of the respective parties. With regard to Confidential Information, each party shall use the same care as it uses to maintain the confidentiality of its own confidential information, which shall be no less than reasonable care, and shall not make disclosure of the Confidential Information to any third party without the written consent of the Disclosing Party, except to employees, consultants or agents to whom disclosure is necessary to the performance of this Agreement and who are bound by a duty of confidentiality. However, MMC recognizes that City must comply with the California Public Records Act, Government Code § 6250 *et seq.*, and any disclosure of information pursuant to the Public Records Act shall not constitute the disclosure of Confidential Information or a breach of this Agreement. Information shall not be deemed confidential if it (i) is rightfully known to the receiving party prior to receipt from the disclosing party as reasonably evidenced by such party; (ii) becomes known to the receiving party from a source other than one who is under an obligation of confidentiality to the disclosing party; or (iii) becomes publicly known or otherwise ceases to be confidential other than by an unauthorized act. At all times, in accordance with Graham-Leach Bliley and other applicable State and Federal regulations, taxpayer information containing Personally Identifiable Information, as defined in applicable regulations, shall be held in the strictest confidence by MMC.

4.2 The parties agree that a breach of the terms of Section 4.1 would result in irreparable injury to the non-breaching party for which a remedy in damages would be inadequate. The parties agree that in the event of such breach or threatened breach, the non-breaching party shall be entitled to, in addition to any other remedies available at law or in equity, seek an injunction to prevent the breach or threatened breach. Furthermore, it is agreed that the City and its officers, employees, consultants, attorneys or agents shall not be liable for monetary damages for any disclosure of Confidential Information.

4.3 The obligation of confidentiality as set forth in Section 4.1 shall continue for a period of three (3) years from the date of disclosure of the information.

### **TERM AND TERMINATION**

5.1 Term. This Agreement shall be effective as of the date of the last signature hereto and shall continue in full force and effect for a period of two (2) years. Thereafter, the parties to

this Agreement may mutually agree to renew the Agreement for successive two (2) year periods.

5.2 City's Termination Without Cause. At any time and for any reason or no reason, CITY may terminate this Agreement and/or any Addenda effective on no less than thirty (30) days notice, subject to the provisions of Section 5.4 below.

5.3 Event of Default. Any of the following shall constitute an event of default ("Event of Default") under this Agreement or any applicable Addenda: (a) CITY fails to pay any amount when due hereunder (after fifteen (15) days prior written notice of such failure to pay), or (b) a material breach by either party of this Agreement. If an Event of Default occurs, the non-breaching party shall notify the breaching party of the Event of Default and provide the breaching party thirty (30) days to cure (except in the case of non-payment for which the cure period shall be fifteen (15) days) or such amount of time as is reasonable given the circumstances. If the breaching party fails to effect cure within the time allowed, then the non-breaching party may, at its option, terminate this Agreement effective immediately upon notice.

5.4 Effect of Termination. Notwithstanding non-renewal or termination of this Agreement pursuant to Sections 5.1, 5.2 or 5.3 above, CITY shall be obligated to pay MMC for services performed through the effective date of termination for which MMC has not been previously paid. In addition, because the services performed by MMC prior to termination may result in CITY's receipt of revenue after termination which are subject to MMC's fee in accordance with each applicable Addenda, CITY shall remain obligated after termination to provide to MMC such information as is necessary for MMC to calculate the compensation due as a result of this receipt of revenue by CITY and CITY shall remain obligated to pay MMC's invoices therefore in accordance with the terms of this Agreement.

### **EQUAL EMPLOYMENT OPPORTUNITY**

During performance of this Agreement, MMC, for itself, its assignees and successors in interest, agrees as follows:

6.1 Compliance With Regulations. MMC shall comply with Executive Order 11246, "Equal Employment Opportunity" and labor regulations (41 C.F.R. Part 60), hereinafter referred to as the "Regulations."

6.2 Nondiscrimination. MMC, with regard to any work performed pursuant to this Agreement, shall not discriminate on the ground of race, color, religion, sex, national origin, or veteran status in the selection and retention of employees, subcontractors, the procurements of materials or leases of equipment.

6.3 Solicitation for Subcontractor, Including Procurements of Materials and Equipment. In all solicitations either by competitive bidding or negotiations made by MMC for work to be performed under any subcontract, including procurements of materials or equipment, such potential subcontractor or supplier shall be notified by MMC of MMC's obligation under this Agreement and the Regulations relative to nondiscrimination on the ground of race, color, religion, sex, national origin, or veteran status.

6.4 Information and Reports. MMC shall provide all information and reports required by the Regulations, or orders and instructions issued pursuant thereto, and will permit access to its books, records, accounts, other sources of information and its facilities as may be determined by CITY to be pertinent to ascertain compliance with such Regulations, orders and instructions. Where any information required of MMC is in the exclusive possession of another who fails or refuses to furnish this information, MMC shall so certify to CITY and shall set forth what efforts it has made to obtain the information.

6.5 Incorporation of Provisions. MMC shall include the provisions of paragraphs 6.1 through 6.4 in every subcontract issued pursuant to this Agreement. MMC shall take such action with respect to any Regulations, order or instructions issued pursuant thereto. MMC shall take such action with respect to any subcontract or procurement as CITY may direct as a means of enforcing such provisions, including sanctions for noncompliance; provided, however, that in the event MMC becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of such direction, MMC may request CITY to voluntarily enter such litigation to protect the interests of CITY.

### **WARRANTIES, REPRESENTATIONS AND INDEMNIFICATION**

7.1 By MMC. MMC represents that all services shall be performed by persons with the skills and abilities necessary and consistent with the standards of professionalism prevalent in the industry. The services and deliverables shall be provided free and clear of the proprietary claims of third parties. All services shall be provided in accordance with applicable state and federal regulations, including, without limitation, the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and applicable state regulations. This represents the full and complete warranty statement of MMC hereunder.

7.2 Indemnification. MMC agrees to defend, indemnify, and hold harmless the City, its officers, employees, agents and affiliates, from any and all claims, suits, demands, losses, damages, liabilities, costs and expenses, including reasonable attorney's fees (collectively "losses") arising from or related to a claim of injury to person or property or death arising from or caused by MMC's performance of this Agreement. MMC's duty to indemnify shall not apply to losses arising or caused in whole by the acts, omissions, or errors of the City and/or City personnel and MMC shall only be required to indemnify, defend, and hold harmless the City its officers, employees, agents and affiliates to the extent City and or City personnel are not at fault if the losses arise in part by the acts, omissions, or errors of the City and/or City personnel.

**7.3 LIMITATION OF LIABILITY.** TO THE MAXIMUM EXTENT PERMITTED BY LAW, IN NO EVENT SHALL MMC, ITS EMPLOYEES, CONTRACTORS OR AGENTS BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, PUNITIVE OR CONSEQUENTIAL DAMAGES, LOST DATA OR COST OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES ARISING FROM OR RELATED TO THE SERVICES WHETHER FOR, AMONG OTHER THINGS, BREACH OF WARRANTY OR ANY OBLIGATION ARISING THEREFROM, AND WHETHER LIABILITY IS ASSERTED IN CONTRACT OR TORT (INCLUDING BUT NOT LIMITED TO NEGLIGENCE AND STRICT PRODUCT LIABILITY) WHETHER OR NOT MMC HAS BEEN ADVISED OF THE POSSIBILITY OF ANY SUCH LOSS OR DAMAGE. MMC'S LIABILITY

HEREUNDER SHALL IN NO EVENT EXCEED AN AMOUNT EQUAL TO THE FEES PAID BY CITY FOR THE AFFECTED SERVICE TO WHICH THE CLAIM PERTAINS. The foregoing sets forth CITY's exclusive remedy for claims arising from or out of this Agreement. The provisions of this section allocate the risks between MMC and CITY and MMC's pricing reflects the allocation of risk and limitation of liability specified herein.

### GENERAL PROVISIONS

8.1 Personnel. At any time, CITY may request removal or replacement of personnel assigned by MMC and MMC shall promptly replace such personnel. The time for any deliverables required or any increase in costs shall be adjusted to reflect any adverse impact resulting from the change in personnel.

8.2 Gratuities, Gifts, Conflict of Interest. MMC shall, at all times, comply with any CITY policies regarding gifts, gratuities, or conflicts of interest. At no time shall MMC, an employee, agent, director, or contractor offer or accept any gift or gratuity from a third party who may be subject to findings resulting from Services, to or from any CITY official, employee, contractor, or agent, or from any other party where such gift or gratuity could be construed as a conflict of interest. MMC, its officers, directors, employees, agents, and contractors shall avoid all conflicts of interest, financial or otherwise, or the appearance thereof, in the performance of this Agreement or the applicable Services.

8.3 Dispute Resolution. Any dispute relating to this Agreement shall be submitted for binding arbitration under the commercial arbitration rules of the American Arbitration Association and judgment on any award entered therein may be entered in any court of competent jurisdiction. The arbitrator's decision shall be final and binding on the parties. such arbitration shall be held in the state of California. In all cases, the prevailing party to such dispute shall be entitled to recover costs and expenses, including reasonable attorney's fees, as the arbitrator deems appropriate.

8.4 Ownership Of Work Product. MMC shall retain all right, title, and interest in and to the processes, procedures, models, inventions, software, ideas, know-how, and any and all other patentable or copyrightable material used, developed, or reduced to practice in the performance of this Agreement. Upon payment therefore, city shall be granted all right, title, and interest in and to the reports, charts, graphs, and other deliverables produced by MMC in the performance of this agreement.

8.5 Assignment. Neither party may assign this Agreement or any of its rights or obligations hereunder without the prior written consent of the other party, which consent shall not be unreasonably withheld. Any assignment without such prior written consent shall be void. notwithstanding the foregoing, the parties hereto may assign all or part of this Agreement immediately, without the prior written consent of the non-assigning party: (a) to any successor in interest to the assigning party who expressly assumes responsibility for the assigning party's obligations hereunder; or (b) if necessary to satisfy the rules, regulations and/or orders of any federal or state governmental agency or body. any violation of the provisions of this section shall render this Agreement voidable at the option of the non-assigning party.

8.6 Insurance. All policies, except for Worker's Compensation and professional errors and omissions insurance coverage, shall contain additional endorsements covering City and its officers, agents, employees and volunteers as insured under the policies with respect to liabilities arising out of this Agreement.

MMC shall procure and maintain for the duration of this Agreement insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder by the MMC, its agents, representatives, or employees. All Sections of this Agreement are subordinate to and superseded by the requirements contained in this Section to the extent that any provision or portion thereof conflicts with or impairs these requirements or any obligation to or right under or pursuant to these insurance requirements. These insurance requirements are intended to be separate and distinct from any other provision in this Agreement and are intended by the parties to be interpreted as such.

(a) Minimum Scope of Insurance. Coverage shall be at least as broad as:

(1) Commercial General Liability/Umbrella Insurance - ISO-CGL form No. 00 01 11 85 or 88 and shall include occurrence coverage for bodily injury, property damage and personal injury.

(2) Business Auto Liability/Umbrella Insurance - ISO Business Auto Coverage form CA 00 01 06 92 including symbol 1 (Any Auto). Starting and ending dates shall be concurrent. If MMC owns no automobiles, a non-owned auto endorsement to the General Liability policy described above is acceptable.

(3) Workers' Compensation/Employer's Liability Insurance - Written on a policy form providing workers' compensation statutory benefits as required by the State of California. Employer's Liability limits shall be no less than one millions dollars (\$1,000,000) per accident or disease. Employer's Liability coverage shall be scheduled under any umbrella policy described above. Unless otherwise agreed, this policy shall be endorsed to waive any right of subrogation as respects City, its officers, officials, employees, or agents.

(b) Minimum Limits of Insurance. MMC shall maintain limits no less than:

(1) General Liability: \$1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.

(2) Automobile Liability: \$1,000,000 per accident for bodily injury and property damage.

(3) Errors and Omissions Liability: \$1,000,000 per occurrence.

(c) Deductibles and Self-Insured Retention. Any deductibles in excess of ten percent (10%) or self-insured retention must be declared to and approved by the City Manager. At the option of the City Manager, either the insurer shall reduce or eliminate such deductibles or self-insured retentions as respect to the City, its officers, officials, employees, agents, and volunteers;

or MMC shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses.

(d) Other Insurance Provisions. The general liability, business auto liability, and any necessary umbrella liability policies are to contain, or be endorsed to contain, the following provisions:

(1) General liability and umbrella policies shall cover the City, its officers, officials, employees, agents, and volunteers are to be covered as insureds or additional insureds as respects: liability arising out of activities performed by or on behalf of MMC; products and completed operations of MMC; premises owned, occupied or used by MMC; or automobiles owned, leased, hired or borrowed by MMC. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officers, officials, employees, agents, or volunteers.

(2) For any claims related to this project, MMC's insurance coverage shall be primary insurance as respect to the City, its officers, officials, employees, agents, and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees, agents, or volunteers shall be excess of MMC's insurance and shall not contribute with it.

(3) Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to the City, its officers, officials, employees, agents, or volunteers.

(4) MMC's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability, and there shall be no cross liability exclusions that preclude coverage for suits between MMC and City or between City and any other insured. MMC expressly waives any claim against City for any covered act or event, and MMC's insurance policy shall not prevent such waiver. The limits of insurance required herein shall in no way limit the liability of the party providing the insurance. In addition, if the coverage or limits available to MMC exceed that required by this Agreement, and the loss incurred by the additional insured exceeds the amount required by this Agreement, it is the parties' intent that all such additional coverage and limits available will apply irrespective of the specific coverage or limits required herein.

(e) Acceptability of Insurers. Insurance is to be placed with insurers authorized and admitted to do business in California and with a current A.M. Best's rating of A or better and a financial size of VII or greater, unless otherwise acceptable to the City.

(f) Verification of Coverage and Notice of Cancellation.

(1) MMC shall immediately furnish to City certificates of insurance or endorsements, satisfactory to City, evidencing the insurance coverage above required prior to the commencement of performance of services hereunder. These certificates or endorsements shall provide that such insurance is the minimum, is in no way limited by any provision herein, and allows for the application of all coverage available to the additional insureds. Further, the certificates or endorsements shall require thirty (30) days written notice to additional insured City prior to any termination, suspension, cancellation, or non-renewal, or the reduction of

available coverage, or any change in the terms of coverage. Certificates of insurance and/or endorsements may not contain any exculpatory wording that mitigates the responsibilities of MMC or the insurer.

(2) MMC agrees that if MMC commences work under this Agreement without first providing City copies of the required insurance certificates or endorsements, that MMC does so at its own and sole risk. In the event MMC's insurance is not acceptable to City or copies of insurance certificates or endorsements are not provided, City shall have no obligations to compensate MMC for such work unless MMC possesses a notice to proceed from City for this work.

(3) Within sixty (60) days of the commencement of this Agreement, MMC shall furnish certified copies of the actual policies and endorsements. Failure to submit such policies shall constitute a material breach of this Agreement entitling City to any and all remedies at law or in equity, including summary termination of this Agreement. If proof of any insurance required under this Agreement is not delivered as required or if such insurance is canceled at any time and no replacement coverage is provided, City shall have the right but not the duty to obtain any insurance it deems necessary to protect its interests under this Agreement, express or implied, in any way relating to City. Any premium for such coverage shall be charged to and promptly paid by MMC or, at City's option, may be deducted from sums due to MMC.

(4) In the event of the premature termination of this Agreement for any reason, MMC agrees to maintain the required insurance coverage until City provides written authorization to terminate the coverage following a review and determination that all liability posed under this Agreement as to the party providing the insurance has been eliminated.

(g) Notice of Claim or Loss. MMC agrees to provide immediate notice to City of any claim or loss likely to involve City or its employees or agents which exceeds \$2,500 or is likely to exceed that amount.

8.7 Severability. In the event that any portion of this Agreement is held to be unenforceable, the unenforceable portion shall be construed as nearly as possible to reflect the original intent of the parties and the remainder of the provisions shall remain in full force and effect.

8.8 Waiver. Either party's failure to insist upon strict performance of any provision of this Agreement shall not be construed as a waiver of that or any other of its rights hereunder at any later date or time.

8.9 Force Majeure. Neither party shall be liable for failing to perform its obligations hereunder where delayed or hindered by war, riots, embargoes, strikes or acts of its vendors or suppliers, accidents, acts of god, or any other event beyond its reasonable control.

8.10 Notices. All notices, including notices of address changes, provided hereunder shall be deemed received on the third day after mailing if sent by mail, or immediately if sent by facsimile. Notices shall be sent to the following:

If to MMC:  
MBIA MuniServices Company  
3433 West Shaw Avenue  
Fresno, CA 93711  
Attn: Corporate Counsel

If to CITY:  
City of Dana Point  
33282 Golden Lantern  
Dana Point, CA 92629  
Attn: Douglas C. Chotkevys

8.11 Copies. This Agreement may be executed in separate counterparts including facsimile copies, each of which shall be deemed an original, and all of which shall be deemed one and the same instrument and legally binding upon the parties.

8.12 Entire Agreement. This Agreement, including the Addenda attached hereto and made part hereof, constitutes the entire agreement between MMC and CITY with respect to the Services provided. This Agreement supercedes and replaces any and all prior agreements, of whatever kind or nature, with respect to the Services provided hereunder and with respect to any Addendum to be added hereto at a later date. Any prior agreements, discussions, or representations not expressly set forth herein are of no force or effect.

8.13 No Oral Modification. No modification of this Agreement shall be effective unless set forth in writing and executed with the same formality as this Agreement. No waiver of the requirements of this Section shall be effective unless in writing and signed by the CEO for MMC.

8.14 Construction. This Agreement shall be construed in accordance with the laws of the State of California without regard to its conflict of laws principals.

8.15 Headings. The section headings herein are for convenience and reference purposes only and shall not serve as a basis for construction or interpretation.

8.16 Order of Precedence. In the event of any conflict between the terms of this Agreement and the terms of any Addenda, the terms of this Agreement shall prevail. No additional terms, PO Terms and Conditions, or oral or written representations of any kind shall be of any force and effect unless in writing and executed with the same formality as this Agreement.

EXECUTED as of the day and year last stated below.

**MBIA MuniServices Company/MMC**

By: \_\_\_\_\_  
**Marc Herman**  
Title: Chief Operating Officer  
Date: \_\_\_\_\_

By: \_\_\_\_\_  
**Kevin Cerutti**  
Title: Chief Financial Officer  
Date: \_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_  
**Neil Ackerman, Corporate Counsel**

**CITY OF Dana Point  
A Municipal Corporation**

By: \_\_\_\_\_  
**Douglas C. Chotkevys**  
City Manager  
Date: \_\_\_\_\_

ATTEST:

By: \_\_\_\_\_  
**Susan Ramos**  
City Clerk  
Date: \_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_  
**Patrick Munoz, City Attorney**

## **TRANSIENT OCCUPANCY TAX COMPLIANCE REVIEW SERVICES ADDENDUM**

### **OBJECTIVES AND METHODS**

The purpose of MMC's Transient Occupancy Tax Compliance Review Program is to assist the City in realizing all of the TOT revenue to which it is entitled; and to educate the third party collectors and remitters of TOT to ensure maximum future compliance with the City's related codes and ordinances. MMC's TOT audit service detects, documents and corrects tax return errors, thereby producing new revenue that would not otherwise have been realized by the City.

### **TOT COMPLIANCE REVIEW PROCEDURES**

MMC will review the daily and weekly reporting of receipts and occupancy, bank statements and other activity logs. MMC determines whether the ordinance has been properly applied and if the lodging provider has properly documented and applied exemptions to the tax. When misapplication is identified, the amount of the deficiency is calculated and reported back to the City.

MMC conducts its reviews in a cooperative and educational manner. The focus of the review will be, first, to document the reporting as compared to the actual activity, and then to inform the hotel's owner/operator of the accurate and correct application of the tax and to educate them in the requirements of the ordinance to prevent future errors.

In executing its TOT program, MMC follows these procedures:

- Coordinate with City's designated staff to review service objectives, scope, workplan schedule, public relations and logistical matters; MMC will also establish an appropriate liaison with the City's coordinator and logical checkpoints for reviewing progress.
- Review applicable provisions of the City's municipal code and ordinances adopted by the City and recommend changes, where applicable, to improve the program.
- Obtain from City the most recent three years' tax returns for each lodging property.
- Provide City staff with a detailed list of records to be made available by lodging providers for the reviews together with a draft engagement letter to be sent to each provider.
- Conduct unobtrusive on-site collection of information on each property, including number of rooms, occupancy rate, property's condition, business dynamics.
- Conduct analysis and clean up of all tax return data for each property.
- Verify accuracy of filed TOT returns with daily and monthly activity summaries;
- Review a random sample of the daily and monthly summaries to determine if the daily summaries reconcile to the monthly summaries.
- Review bank statements to verify that deposits reconcile with the reported revenue on the TOT returns.

- Review exempted revenue for proper qualifying documentation; review a random sample of exempted guest revenue and trace registration and/or other source documents to verify compliance with the City ordinance.
- Where possible, compare the state and federal tax filings with the TOT returns.
- For each error/omission identified and confirmed, submit substantiating documentation to designated staff in order to facilitate recovery of revenue due from prior periods.
- Coordinate with designated City official(s) as necessary to review findings and recommendations.
- Provide additional assistance as necessary to support the City in recovering and preventing tax deficiencies.
- Provide assistance to City in reviewing any matters submitted in extenuation and mitigation by lodging providers in contesting a deficiency determination.
- Prepare and document any changes to the review findings and provide revised tax, interest or penalty amounts due the City.

#### TIMING AND REPORTING

Unless instructed otherwise by the City, MMC shall commence the TOT Compliance Review Services within 60 working days of receipt of a fully executed agreement, authorization to commence and receipt of the necessary data. Compliance Review Reports will be delivered within 180 days. MMC shall conduct the review of all properties in the City subject to the TOT ordinance and applicable statutes.

The Compliance Review Report will contain the following information:

- Rent and TOT returned and found for the period of review; generally the most recent 36 months.
- Written explanations of findings.
- Revenue deficiency amounts identified for the City by MMC on a monthly or quarterly and cumulative basis, and written explanations thereof. Draft notices of deficiency determination, letters of commendation, and other correspondence to be sent by the City to lodging providers.

#### COST PROPOSAL

MMC will execute its TOT Compliance Review Program for City for a contingency fee of 35% of additional revenue generated by the program with a minimum fee payable upon completion of the Compliance Review. The minimum fee shall be \$900 per lodging provider reviewed and shall be invoiced immediately upon delivery of the Compliance Review Report and payable in accordance with the Agreement. The 35% contingency fee will apply to revenue received by the City as a result of deficiencies identified in the review and shall include any eligible prior period revenues. The contingency fee shall not apply until such time as the contingency fee, based on revenue received by the City, equals the minimum fee and City shall only be responsible for that increment of the contingency fee in excess of the minimum fee. City

agrees to notify MMC within ten (10) days of receipt of revenue from deficiencies identified by MMC. MMC shall invoice City quarterly based on revenue received by City from identified deficiency amounts.

In the event that MMC determines there are extraordinary circumstances that warrant more intensive and detailed services beyond those included in this Addendum for Transient Occupancy Tax Compliance Review Services, MMC shall provide notice to the City in writing and in advance of the reason for the additional services together with MMC's estimate of costs. MMC will not undertake to perform, nor will City be obligated to pay for, any additional services except those services that are agreed to in writing by City and MMC.

EXECUTED as of the day and year last stated below.

**MBIA MuniServices Company/MMC**

**CITY OF Dana Point  
A Municipal Corporation**

By: \_\_\_\_\_  
**Marc Herman**  
Title: Chief Operating Officer  
Date: \_\_\_\_\_

By: \_\_\_\_\_  
**Douglas C. Chotkevys**  
City Manager  
Date: \_\_\_\_\_

By: \_\_\_\_\_  
**Kevin Cerutti**  
Title: Chief Financial Officer  
Date: \_\_\_\_\_

ATTEST:  
By: \_\_\_\_\_  
**Susan Ramos**  
City Clerk  
Date: \_\_\_\_\_

APPROVED AS TO FORM:

APPROVED AS TO FORM:

\_\_\_\_\_  
**Neil Ackerman, Corporate Counsel**

\_\_\_\_\_  
**Patrick Munoz, City Attorney**