

**EXECUTION COPY**

**MAYO CIVIC CENTER OPERATIONS, SALES, BOOKING AND  
DESTINATION MARKETING SERVICES AGREEMENT**

**THIS AGREEMENT** (this “Agreement”) is made and entered into as of the \_\_\_ day of August, 2019 (the “Effective Date”), by and between and the **CITY OF ROCHESTER**, and existing under and by virtue of the laws of the State of Minnesota, (“CITY”) and **MINNESOTA’S ROCHESTER CONVENTION & VISITORS BUREAU**, a Minnesota non-profit corporation (“CORPORATION”). CORPORATION and CITY are sometimes referred to hereinafter individually as a “Party” and collectively as the “Parties.”

**RECITALS**

**WHEREAS**, under the City Charter of the City, the provisions contained in Minn. Stat. §§ 471.15-191, 412.511, and 412.521, (collectively, the “Statutory Authority”), the CITY is authorized to operate a program of public recreation and to acquire lease, equip and maintain land, buildings or other recreational facilities, including without limit, concert halls, facilities for cultural participation and exhibitions such as the Mayo Civic Center (MCC) (the “Facility”) and which includes the authority to expend funds for such program and to perform whatever other acts are reasonable, necessary and proper to carry out the powers granted by law and the Charter including the implied authority to enter into leases that further a governmental program (the “Governmental Program”); and

**WHEREAS**, under the provisions contained in [Minnesota Laws 2008, Chapter 179, Sec. 21, Subd. 12, and Minnesota Laws 2014, Chapter 295, Sec. 10, Subd. 9](#) [**this is labeled as a general fund grant, not GO Bonds so we might not need to list this**], (collectively, the “G.O. Bonding Legislation”) the State of Minnesota has allocated \$3,500,000 and \$35,000,000 (collectively, the “G.O. Grants”), to the CITY as a grant to design, construct, furnish and equip the renovation and expansion of the Facility; and

**WHEREAS**, in the interest of promoting the economic well-being of its residents, CITY desires to sell, market and promote Rochester as a premier destination for visitors attending meetings, conventions, cultural events, retail, restaurants and athletic competitions; and

**WHEREAS**, the CORPORATION is a local convention or tourism bureau that received municipal funding for the purpose of marketing and promoting the CITY as a tourist or convention center pursuant to Minn. Stat. §469.190; and

**WHEREAS**, CITY owns the MCC and desires to maximize the economic impact, financial results and community access by optimizing the management, operations, sales and marketing of the Facility; and

**WHEREAS**, CITY is authorized by law to expend public funds for such purposes, and the Common Council of CITY has determined that a program to provide sales, marketing, management and promotion of the MCC and destination marketing services will serve a public purpose and create a return on investment and serve as an economic catalyst for Rochester; and

**WHEREAS**, the CORPORATION has a new Board of Directors currently comprised of five (5) Board Members and new bylaws have been instituted encompassing a broader set of oversight and responsibility including the operation of the MCC; and

**WHEREAS**, the Corporation recognizes the investment in the MCC and the importance of achieving the desired financial and community results for the MCC; and

**WHEREAS**, the CORPORATION is capable of providing CITY with independent professional services for sales, management, marketing and promotion for the purposes set forth above and as hereinafter provided, and desires to enter into an agreement with CITY to provide such services; and

**WHEREAS**, the principal activities of the CORPORATION are to manage all aspects of the MCC, increase the convention business in Rochester through direct sales and promotional marketing efforts, including but not limited to booking convention space, booking groups in hotels, off-site venues, providing ancillary services such as convention-related support services, including high quality food and beverage services and raising awareness of Rochester as a visitor destination; and

**WHEREAS**, this Agreement and the performance by the CORPORATION of the services hereunder will provide direct benefit to the CITY and improve the common economic interests of the businesses throughout the community and region; and

**NOW, THEREFORE**, in consideration of the mutual promises, covenants and agreements contained herein, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, do hereby agree as follows:

## **SECTION 1. TERM**

1.1 **Initial term.** The initial term of this Agreement shall commence on the Effective Date and shall continue until December 31, 2024) (the “Initial Term”), unless earlier terminated pursuant to Sections 8.2 hereof, or extended pursuant to Section 8.1(b) hereof. The Initial Term is less than 50% of the useful life of the Facility.

1.2 **Renewal terms.** At the expiration of the Initial Term, this Agreement may be renewed at the sole option of the CITY for additional three (3) year periods commencing at the expiration of the Initial Term or any renewal term then in effect. If the CITY wishes to renew this Agreement as set forth above, it shall provide

written notice to CORPORATION of its intent to renew no earlier than six (6) months prior to the expiration of the term then in effect. As a condition precedent to such renewal, the CITY shall have determined that the CORPORATION has demonstrated that such renewal continues to carry out the Governmental Program and that CORPORATION is suited and able to perform the functions contained in this Agreement.

## **SECTION 2. ENGAGEMENT OF CORPORATION - SCOPE OF SERVICES**

2.1 Engagement. The CITY hereby engages CORPORATION as its exclusive service provider to manage, maintain, market, sell and book the MCC and market Rochester as the destination to national, regional and local organizations as a premium destination for conventions, meetings, trade shows, athletics, and group leisure events. CORPORATION shall perform and provide such services as are appropriate and necessary in a first-class manner, consistent with the terms of this Agreement, and in collaboration with the CITY and community partners, which are engaged in, and support, the mission of the CITY.

2.2 Specific services. Without limiting the generality of the foregoing, CORPORATION shall have the right, authority and obligation to perform the services set forth below and hereafter referred to as the “Services”:

(a) Operate, manage and maintain the MCC including management and oversight of any related vendor contracts at the MCC; and

(b) Manage all financials including all expenses to an agreed upon budget and prepare financial statements and the quantitative and qualitative results as outlined in Agreement; and

(c) Promote and market the MCC and its surrounding complex, as a premier destination for conventions, meetings, trade shows and group leisure events. Conduct coordinated advertising, publicity and promotion campaigns emphasizing attractions offered in the City for meetings and groups;

(d) Sell and coordinate the booking and reservation of convention, meeting and/or trade show space, hotel rooms and other off-site venues as necessary in connection with such convention, meeting, trade show or other group leisure events at the MCC and Rochester hotels in order to provide seamless booking processes for space, food and beverage, audio/visual, and other group needs;

(e) Conduct coordinated advertising, publicity and promotion campaigns emphasizing attractions offered in the City for meetings, conventions groups and leisure travel;

(f) Participate in appropriate convention and destination marketing association's events and trade shows to assure that favorable and targeted publicity about the City and the MCC is continued and expanded;

(g) Solicit convention, tradeshow and meeting organizations to use the MCC and other venues throughout the City;

(h) Provide event-planning services to associations, businesses, organizations and groups convening or holding conventions, meetings or events in the City;

(i) Prepare, publish and update during the term of this Agreement and any renewals thereof, materials providing specific information on the MCC, and hotels, restaurants, entertainment and other amenities located in the City, and distribute said materials to event planners or coordinators;

(j) Coordinate with City hotels, restaurants and entertainment venues the cross-selling and booking of said Facility in connection with the booking of a convention, tradeshow or other meeting events at the MCC;

(k) Maintain a master set of bookings and schedules (and other related books and records) for conventions, tradeshows and leisure group events at the MCC, consistent with those books and records previously maintained by the CITY;

(l) Create and maintain strategic relationships for the coordination of services with the CITY and its business partners, including but not limited to the CITY'S Civic Music Department, Rochester Sports, Mayo Clinic, Art Center, Civic Theatre, Library, among others.

(m) Engage in such other sales, marketing and promotion activities as CORPORATION deems appropriate and necessary to increase sales activity for conventions, meetings, trade shows and group leisure events at the MCC.

(n) Develop a plan and execute said plan to raise awareness of Rochester as a visitor destination.

(o) Develop a comprehensive MCC community access strategy to increase use of the MCC while balancing the financial needs of the Facility. This includes ensuring community rates for rentals and food and beverage services assist with enhancing access.

### 2.3 Sales and marketing plan.

(a) On an annual basis, CORPORATION shall be responsible for preparing a comprehensive convention sales and marketing plan as well as marketing

approaches for all event types at MCC and any amendments thereto (such plan and amendments hereinafter referred to singly and collectively as the “Convention Sales and Marketing Plan” or “Plan”) which shall: (a) formulate a strategy for acquiring new and maintaining existing desirable convention, trade show and group leisure clients of the MCC, (b) identify: (i) ideal customers, by industry, type of business, and other appropriate factors as determined by CORPORATION, and (ii) customers that should not be targeted for development, (c) describe, with sufficient specificity, the unique selling proposition that sets Rochester and the MCC apart from competing destinations and venues, (d) define the sales territory(ies) and, or market segment(s) that will be targeted and the rationale for such delineation, (e) address competitive factors, including venues, and define the value proposition of the destination and MCC relative to such competition and all targeted markets, and (f) articulate a forecast of sales and expenses by month, quarter and year, and include sales head count, sales activity and revenue, with the understanding that sales expectations (as enumerated in the Plan) will be elastic, and require on-going reexamination and adjustment to reflect market factors and related conditions.

(b) CORPORATION shall measure and report success against agreed upon metrics, and key performance indicators (“KPIs”) of the Parties. Such metrics will measure Plan Performance and shall include: (i) fiscal performance of the MCC (against budget) (ii) net operating income of the MCC (iii) actual room nights consumed and booked annually at Rochester hotels generated from bookings directly tied to the MCC against goals, (iv) number of weeks annually impacted by MCC bookings (v) direct spending impact of bookings at the MCC, (vi) sales activity against goals (prospecting sales funnel) (vii) customer satisfaction and service (with customers including meeting and travel planners and conventioners using the MCC), and (viii) civic engagement and use of the MCC by the Rochester community and milestones that CORPORATION intends to use to measure performance against the Plan (the collectively, the “Performance Metrics”). The CORPORATION will be required to present to the CITY quarterly with updates against these KPIs for year to date (YTD) and a rolling future five (5) years to provide insight on where the plan is today and how it impacts the MCC usage outlook. The CORPORATION will create, maintain and frequently update a public dashboard of its KPIs to ensure transparency. The dashboard will be located on the CORPORATION’s home webpage. Exhibit A herein contains the definitions for each KPI.

(c) To formulate a comprehensive and complete Plan with KPI goals, CORPORATION shall: (i) engage all relevant stakeholders, including the CITY and related hospitality and tourism businesses in the City, customers, and key employees (including sales personnel) and (ii) analyze relevant market and customer data.

(d) CORPORATION shall present the Plan with Goals (and any material amendments thereto) to the CITY, as part of its budgetary review process, and CORPORATION shall take into account and give due consideration to any and all comments and recommendations of the CITY to the Plan. CORPORATION shall adopt the final Plan and determine its contents in its sole and absolute discretion.

2.4 Preparation of budget. During the term of this Agreement, CORPORATION shall prepare and present to the CITY an annual budget, which shall include an appropriate line item for reserves, (the “Budget”) in support of the Plan. On an annual basis no later than September 30<sup>th</sup> of each year covered by the then current Budget (the “Current Annual Period”), CORPORATION shall prepare and submit to CITY for its approval the Budget for the following twelve-month period (the “New Annual Period”) detailing with specificity the revenues and expenses necessary and desirable to successfully implement the Plan. The annual budget will be developed to work within the financial requirements set forth in this Agreement and the budget and forecast the revenues for the operations shall demonstrate that the revenues are equal or greater to the expenses of the CORPORATION’S operations of the Facility taking into account the funding limitations set forth in this Agreement. CORPORATION is permitted to reallocate funding among any Budget line items. CORPORATION is also required to develop operating and capital Budget reserves and make annual contributions at the end of each budget year of at least five percent (5%) of the CORPORATION’S annual revenues, including its CITY provided hotel tax revenues. Use of reserves for any purpose other than monthly cash flow purposes is strictly prohibited without the written consent of the CITY.

2.5 Responsibilities and services reserved to CITY.

(a) CORPORATION acknowledges and agrees that the CITY is retaining MCC grounds maintenance currently executed by the CITY’S Parks and Recreation Department.

(b) CORPORATION acknowledges and agrees that the CITY reserves rights to use the MCC no more than 15 calendar days annually. The CORPORATION acknowledges and agrees that those usage days will be free of charge to the CITY. The CITY will be responsible for outside costs, however, building costs i.e. rental, for the MCC will be waived.

(c) CORPORATION acknowledges and agrees that no amendments shall be made to the Bylaws without the consent of the CITY. The CORPORATION shall maintain the composition of its Board of Directors as provided in its Bylaws.

2.6 Community Benefit. The CORPORATION is engaged by the CITY to perform the services detailed above and in addition, the CITY expects the CORPORATION to deliver on its mission to be inclusive of the Rochester community needs for civic engagement. Community Benefit may include community programming, access to events booked within the MCC including concerts, entertainment and other community programs. In addition, the CORPORATION can propose new elements of a Community Benefit plan on an annual basis.

## SECTION 3. CITY OBLIGATIONS

### 3.1 Review of plan and budget.

(a) The CITY shall allocate \$3,800,00.00 annually for each year of the initial term of this Agreement from the hotel tax revenue annually to partially fund the CORPORATION, which will be incorporated into the CORPORATION's annual Budget inclusive of MCC operations and all sales and destination marketing activities.

(b) CITY shall review the annual Plan prepared by CORPORATION and approved by the Board of Directors, and within thirty (30) days of such presentation, provide any comments and recommendations thereto.

(c) CITY shall review the Budget prepared by CORPORATION, and within thirty (30) days of such presentation, provide comments and final acceptance of the Budget. If CITY fails to provide comment and accept the Budget by the commencement of the New Annual Period, the budget will become effective in the New Annual Period. The Budget cannot exceed the predetermined amount in revenue from the CITY'S hotel tax fund unless otherwise stated in writing by the CITY.

### 3.2 Funding of approved budget.

(a) CITY shall fund the CORPORATION for the Services provided to CITY under this Agreement, based on the approved Budget, in furtherance of the Plan.

(b) Based on the approved Budget, CITY shall fund CORPORATION in twelve (12) monthly installments as funds are collected beginning February of each Budget year. CITY shall make all payments by electronic funds transfer to the bank account designated by CORPORATION.

(c) The CITY will provide a copy of the budget and forecast the revenues for the operations of the CORPORATION, showing that the revenues are equal or greater to the expenses, and the resolution approving such budget, to the Minnesota Department of Employment and Economic Development ("DEED") and the Commissioner of Minnesota Management and Budget ("MMB").

### 3.3 Limitations on CITY funding.

(a) All funds provided to CORPORATION under this Agreement shall be derived only from a portion of the hotel tax revenues actually, and only to the extent, received by the CITY.

(b) CITY shall not be obligated to make payment hereunder from any other source of funds.

(c) Notwithstanding any provision of this Agreement or any exhibit or other agreement or document related hereto to the contrary, CITY's payment of funds under this Agreement is in all respects subject to annual appropriation by the CITY. The CITY's entire obligation under this Agreement shall be limited to the amount appropriated; subject to the provisions set forth in this section 2.3.

(d) The CORPORATION must pay all costs of operation and maintenance of the Facility in accordance with the approved budget.

(e) The CITY does not anticipate the receipt of any funds under this Agreement, provided, however, if the CITY receives money in excess of the amount necessary to pay the operating expenses of the portion of Facility and to pay the principal, interest, or redemption premiums on debt, then a portion of that excess money must be paid to MMB in the amount determined by the Commissioner of MMB.

3.4 License to use intellectual property. Subject to Section 6 below, CITY shall license to CORPORATION the non-exclusive right to use CITY trademarks, trade-name, copyrighted materials, and related intellectual property of the CITY during the term hereof.

3.5 Designation as Official Destination Marketing Organization The City shall designate the CORPORATION as the official Destination Marketing Organization for industry recognition purposes and exclusively provide this designation to the Corporation.

3.6 Access to CITY camera system at MCC The CITY shall provide access to the camera network at the MCC to the CORPORATION and the MCC Operator for security purposes. The CITY shall continue to own and maintain said network and only grant access to the CORPORATION and MCC Operator.

#### **SECTION 4. PERFORMANCE REVIEW AND REPORTING**

4.1 Plan Review. On an annual or more frequent basis (as mutually agreed to by the Parties), CITY and CORPORATION shall measure the Performance Metrics enumerated in the Plan through its implementation thereof, and such other metrics, as the Parties may mutually determine.

4.2 Plan Presentation. On an annual basis, but no later than September 30<sup>th</sup> of each year during the term of this Agreement, CORPORATION shall present the Plan to the CITY for its review and CORPORATION shall take into account and give due consideration to any and all recommendations of the CITY to the Plan. CORPORATION in its sole and absolute discretion shall determine the content and substance of the Plan.



4.3 Revisions to the Plan. CORPORATION shall regularly, but no less than quarterly, consult with and provide the CITY the opportunity to propose improvements and revisions to any efforts undertaken pursuant to the Sales and Marketing Plan. To the extent that the Parties agree to implement such improvements and revisions, CORPORATION will incorporate into its performance reporting any additional Performance Metrics as may be required to adequately measure performance under the Plan.

4.4 Performance Reporting. As part of the Plan review, the Parties agree to meet to evaluate the Plan, and performance in comparison to goals, at least on a quarterly basis, and CORPORATION shall deliver to the CITY a performance report in a form mutually acceptable to the Parties, such report to include an update on all of the agreed upon metrics and the performance in comparison to the agreed upon goals.

4.5 Annual Performance Report. Within sixty (60) days after the close of each year, CORPORATION shall submit to the CITY a report of CORPORATION's performance under this Agreement, in a form reasonably satisfactory to the CITY. The report shall include an analysis of the effectiveness of the Plan and whether, and to what extent, the Performance Metrics have been met. CORPORATION shall make available at its offices for CITY's inspection copies of reports, promotional literature and communications, advertisements and related materials prepared with the CITY-provided funds for the term covered by the report. Among other things, the CITY will annually determine that the CORPORATION is using the Facility to operate the Governmental Program and shall annually provide a notarized written statement to MMB confirming that fact, if true.

4.6 Performance Metrics Audit. On an annual basis, CORPORATION shall prepare and deliver to the CITY a Performance Metrics audit to evaluate CORPORATION's performance under this Agreement and otherwise measure CORPORATION's satisfaction/achievement of the Performance Metrics. CITY reserves the right to validate the Performance Metrics audit prepared by CORPORATION through a third-party independent auditor. CORPORATION shall make available any information related to this Agreement requested by CITY for the audit within ten (10) working days of the request.

## **SECTION 5. FINANCIAL AUDITS**

5.1 Audit Report. Within one hundred twenty (120) days after the end of each year, CORPORATION shall prepare and submit to the CITY and, upon its request, the Commissioner of MMB, the CORPORATION's expense an annual audit report of revenues and expenses related to this Agreement and an opinion thereon prepared by an independent certified public accounting firm. The audit report shall include an annual financial statement prepared in accordance with generally accepted accounting principles (GAAP) and the provisions of the Statement of Financial Accounting Standards No. 117

(Financial Statements of Not-for-Profit Organizations). CORPORATION shall make available to the CITY all work papers and records produced by the auditor pertaining to the audit, or copies thereof, within ten (10) working days after notice by CITY to do so.

5.2 Inspection of Books and Records. The CITY or its agent may inspect CORPORATION's books and records that relate to this Agreement at such times during normal business hours that the CITY deems appropriate, upon one business day notice. Upon reasonable request, CORPORATION shall furnish copies of all books and records to the CITY, at no cost to the CITY. In addition, the CITY and the CORPORATION, upon direction from the MMB Commissioner, shall take such actions and furnish such documents to the MMB Commissioner as the Commissioner of MMB determines are necessary to ensure interest paid on the G.O. Bonds is exempt from federal taxation.

## **SECTION 6. PERSONNEL**

6.1 CORPORATION shall interview all existing CORPORATION marketing, visitor experience, sales and support personnel, make offers of employment to such personnel that CORPORATION, in its sole discretion, considers qualified, and during the term hereof employ such staff as CORPORATION considers necessary to fulfill its obligations hereunder. CORPORATION shall have the right to change its personnel designated to provide services to the CITY, subject to the CITY's right to consult with CORPORATION as to any change to the President position. CORPORATION shall make the final determination as to all personnel and the President in its sole and absolute discretion.

6.2 Confidentiality. To the fullest extent allowed by law, CORPORATION shall cause its President and sales personnel to execute confidentiality and non-compete agreements within a 150 mile radius, which agreements shall be in place for a one-year period unless there is a mutually agreed upon release.

6.3 Independent contractor. CORPORATION may establish and maintain welfare and other benefit plans for its employees, in its sole and absolute discretion. All employees of CORPORATION, including those individuals who formerly worked for the CORPORATION and the CITY, shall not be employees of the CITY for any purpose, and shall not be entitled to any benefits or rights enjoyed by CITY employees, including, but not limited to, unemployment compensation, workers' compensation, health insurance and retirement benefits. Without limiting the foregoing, while engaged in performance of this Agreement, CORPORATION is an independent service provider and is not an officer, agent, or employee of the CITY. CORPORATION assumes full responsibility for the acts and/or omissions of CORPORATION's employees or agents as they relate to performance of this Agreement. CORPORATION assumes full responsibility for workers' compensation insurance and payment of all federal, state and local taxes or contributions, including, but not limited to, unemployment insurance, social

security, Medicare and income taxes with respect to CORPORATION and CORPORATION's employees.

## **SECTION 7. INTELLECTUAL PROPERTY**

7.1 CORPORATION shall own all right, title, and interest in and to any Work Product (as hereinafter defined) produced by CORPORATION or its contractors, consultants, subcontractors and sub consultants under this Agreement, and CORPORATION agrees that such Work Product shall be deemed a "work made for hire".

7.2 In the event CORPORATION uses any individual who is not a full-time employee of CORPORATION or entity to perform any work required of it pursuant to this Agreement, CORPORATION shall require said individual or entity to sign an agreement containing identical wording as the foregoing Section 6.1 with the exception that word "CORPORATION" is to be replaced with the individual's or entity's name.

7.3 The term "Work Product" shall mean all written and other tangible expressions, including, but not limited to, customer information and lists, drawings, documents, reports, surveys, renderings, exhibits, models, prints, and photographs. All Work Product furnished by CORPORATION hereunder shall be and shall remain the property of the CORPORATION during the term of this Agreement.

7.4 CORPORATION warrants that it has the lawful right to release Work Product of other third parties to the CITY. In the event that there is any claim by any third-party for wrongful release of Work Product, CORPORATION shall defend and save the CITY, its members, officers, agents and employees harmless from liability of any nature or kind for or on account of the use of the Work Product in the performance of this Agreement. The foregoing provisions of this Section 6 shall survive the term and termination of this Agreement.

7.5 Upon the effective date of this Agreement, CITY agrees to allow CORPORATION the use of the CITY name and logo unless otherwise noted in writing by the CITY. CORPORATION shall promptly cease and desist from such use after receiving notification from CITY.

## **SECTION 8. INDEMNITY AND INSURANCE**

8.1 Indemnification. To the fullest extent allowed by law, CORPORATION, its successors and assigns, shall defend, indemnify and hold the CITY, its agents, representatives, officers, members, officials, and employees harmless from and against all allegations, demands, proceedings, suits, actions, claims, damages, losses, expenses, including but not limited to, attorney fees, court costs, and the cost of appellate

proceedings, and all claim adjusting and handling expense related to, arising from or out of, or resulting from any negligent or intentional actions, acts, errors, mistakes or omissions caused by CORPORATION, its agents or contractors while performing the Services under this Agreement, including but not limited to, any subcontractor or anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable and any injury or damages claimed by any of CORPORATION's and subcontractor's employees. The Indemnity shall not extend to any gross negligence or wrongful acts of CITY its agents, representatives, officers, members, officials, and employees.

8.2 Insurance. Without limiting any of its obligations or liabilities, CORPORATION, at CORPORATION's own expense, shall purchase and maintain the hereinafter stipulated minimum insurance:

(a) All insurance shall be from a company or companies lawfully authorized to do business in the State of Minnesota with an A.M. Best, Inc. rating of "A" or above with policies and forms satisfactory to the CITY.

(b) All insurance required herein shall be maintained in full force and effect during the Term of this Agreement; failure to do so may, at the sole discretion of the CITY, constitute a material breach of this Agreement.

(c) CORPORATION's insurance shall be primary insurance, and any insurance or self-insurance maintained by the CITY shall not contribute to it. Any failure to comply with the claim reporting provisions of the policies or any breach of a policy warranty shall not affect coverage afforded under the policy to protect the CITY.

(d) The policies shall contain a waiver of transfer rights of recovery (subrogation) against the CITY, its agents, representatives, directors, officers, and employees for any claims arising out of the work or services of CORPORATION under this Agreement.

(e) CORPORATION shall use commercially reasonable efforts to obtain insurance policies hereunder without any deductibles; however, to the extent that it becomes commercially impracticable for CORPORATION to obtain any policy with no deductible, CORPORATION shall consult with and obtain the prior written consent, which shall not be reasonably withheld or delayed, of the CITY to purchase such policy with a deductible.

(f) The policies shall be in place by no later than the date of execution and delivery of this Agreement and such coverages shall remain in place for the duration of this Agreement. CORPORATION shall be obligated to notify the CITY of any claim that may be covered under the policies required by this Agreement within three (3) business days of its knowledge thereof.

(g) On or prior to execution of this Agreement, CORPORATION shall provide to the CITY certificates of insurance for all policies required herein. The CORPORATION shall provide notice in the event of any coverage cancelations, changes or drop of policies within 30 days. Certificates shall be sent to CITY Certificate Owner at:

City of Rochester  
201 4th Street SE #321  
Rochester, MN 53904-3742

(h) The insurance policies required by this Agreement, except workers' compensation and fidelity/crime insurance policies, shall name the CITY, its agents, representatives, officers, members, officials, and employees as additional insureds thereunder by endorsement and shall be and are considered primary to any valid and collectible insurance.

(i) Required coverage. CORPORATION shall cause to be in effect the following insurance:

(1) General Liability. CORPORATION shall maintain "occurrence" form Commercial General Liability Insurance with a limit of liability not less than \$2,000,000 for each occurrence for bodily injury and property damage and \$10,000,000 general aggregate. This policy shall include personal and advertising injury, independent contractors, contractual liability and product and completed operations.

(2) Automobile Liability. CORPORATION shall maintain Commercial/Business Automobile Liability insurance with a combined single limit for bodily injury and property damages of not less than \$1,000,000, each accident with respect to CORPORATION's work or services under this Agreement.

(3) Worker's Compensation. CORPORATION shall maintain Worker's Compensation insurance to cover obligations imposed by federal and state statutes having jurisdiction of CORPORATION's employees engaged in the performance of the work or services under this Agreement, and Employer's Liability insurance of not less than \$1,000,000 covering CORPORATION employees. In case any work or services under this Agreement are subcontracted, CORPORATION shall require all subcontractors to provide insurance as required by applicable federal and state statutes.

(4) Fidelity insurance. CORPORATION shall purchase and maintain fidelity and crime insurance coverage with a limit of \$1,000,000 per loss.

(5) Other insurance. CORPORATION shall maintain any other insurance coverage or amounts of insurance the CITY may reasonably require from time to time for the protection of the public, the CITY and its employees, officials, representatives, officers, members, and agents. The CITY may elect by written notice to CORPORATION to require additional coverage or increased amount of any insurance to

account for changes in risks, inflation, or any other factor that the CITY reasonably determines to affect the prudent amount of insurance to be provided by CORPORATION.

(6) Vendor/Subcontractor – CORPORATION shall require all vendors and subcontractors to carry the appropriate level of insurance including liquor liability. City reserves the right to review this prior to the signing of any subcontractor agreements. In the specific cases of the MCC Operator and Food and Beverage Operator, the subcontractors must mirror the policies and coverage limits of the CORPORATION stipulated above. CITY must also be named on any subcontractor insurance policies as additional insured as well as being notified of any cancelations, changes or drops of policies within 30 days.

(7) In addition to the required coverages stipulated above, CORPORATION shall reimburse CITY on annual basis for existing policy's held for contents, fire, wind and hail and boiler machinery. CORPORATION shall remit payment to CITY on monthly basis as CITY invoices for policies held.

(j) These insurance provisions are separate and apart from any indemnification obligations and should not be interpreted as a limitation of liability.

## **SECTION 9. ASSETS**

9.1 All assets of the corporation and all assets associated with MCC and related activities will be the property of the City.

9.2 In the event of termination all assets will revert to City.

## **SECTION 10. TERMINATION**

### 10.1 Termination.

(a) Termination upon default. In the event CORPORATION defaults in its obligations under this Agreement and the default remains uncured for a period of sixty (60) days after the CITY gives written notice to CORPORATION specifying the default, then the CITY may terminate this Agreement effective immediately and may exercise any remedy at law or in equity that it deems necessary or desirable. In the event that CORPORATION commences to cure the default but the default is not capable of being cured within such sixty (60) days, the cure period shall be extended for such additional time as required for CORPORATION to complete the cure of the default, provided, however, that the cure period shall not in any event extend beyond one-hundred twenty (120) days from the date of the original notice of default. CORPORATION shall be deemed to be in default if it fails to:

(i) Render the Services as required by this Agreement;

- (ii) Implement, or satisfactorily perform and meet the minimum Performance Metrics under, the Sales and Marketing Plan;
- (iii) Supply information or reports as required by this Agreement; or
- (iv) Comply with any other provision of this Agreement.

(b) Termination other than upon default. The CITY shall have the right to terminate this Agreement other than pursuant to Section 8.2(a) hereof at any time upon three hundred sixty (360) days prior written notice to CORPORATION, provided, however, that CITY shall not be entitled to give such termination notice during the first eighteen (18) months of the Initial Term.

10.2 State Law Modifications. Notwithstanding any other provisions of this Agreement to the contrary, if the State law providing the Statutory Authority to the CITY for the Governmental Program is repealed or modified in a manner that would prevent CITY from operating the Governmental Program (“Repealing or Modifying Law”), this Agreement shall terminate upon the effective date of such Repealing or Modifying Law.

10.3 MMB Approval. This Agreement must be approved in writing, by the Commissioner of MMB and is null and void if not so approved.

10.4 Effect of termination. In the event of either an expiration or termination of this Agreement pursuant to the terms hereof, within five (5) days thereafter CORPORATION shall return to the CITY all unexpended funds provided by the CITY hereunder, and CORPORATION shall take all necessary action and execute any and all agreement(s) or document(s) requested by the CITY to transfer all right, title and interest in the assets and property of CORPORATION to the CITY. In the event of termination, all of the assets including unexpended funds will become property of the CITY.

## **SECTION 11. MISCELLANEOUS**

11.1 Relationship of the Parties. This Agreement shall not constitute, create, give effect to or otherwise imply a joint venture, partnership or formal business organization of any kind between the Parties. Each Party to this Agreement shall act as an independent contractor and not as an agent for the other, and neither Party shall have any authority to bind the other except to the extent specifically provided herein.

11.2 Damages. IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER FOR CONSEQUENTIAL, INCIDENTAL, INDIRECT, OR SPECIAL DAMAGES OF ANY KIND WHATSOEVER, WHETHER IN AN ACTION IN CONTRACT OR IN TORT, ARISING FROM THE PURPOSES OF WHICH THIS AGREEMENT WAS ENTERED INTO.

11.3 Assignment. Neither Party may assign nor transfer, its interest or delegate its obligations hereunder without the prior written consent of the other Party.

11.4 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Minnesota without regard to its conflicts of laws principles. Each Party irrevocably submits to the jurisdiction of the federal or state courts in the State of Minnesota for the purposes of any suit, action or other proceeding arising out of this Agreement and each Party irrevocably and unconditionally waives any objection to the laying of venue of any action, suit or proceeding arising out of this Agreement in the federal or state courts in the State of Minnesota.

11.5 Waiver; Amendment. None of the provisions of this Agreement shall be considered waived by any Party unless such waiver is given in writing to the other Party. The failure of any Party to insist upon strict performance of any of the terms and conditions hereof, or failure or delay to exercise any rights provided herein or by law, shall not be deemed a waiver of any rights of either Party. This Agreement shall not be amended or modified unless set forth in a written amendment hereto and executed by the duly authorized representatives of each Party. [This Agreement may not be changed, amended, or modified without the written consent of the Commissioner of MMB.](#)

11.6 Entire Agreement; Severability. The foregoing paragraphs and references, including all exhibits hereto, contain the entire Agreement between the Parties and supersede any previous understanding, commitment, or agreement, oral or written. Any provision of this Agreement which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceability such provision in any other jurisdiction.

11.7 Notice. All notices and other communications given or made pursuant to this Agreement shall be in writing and shall be deemed effectively given upon the earlier of actual receipt or: (i) personal delivery to the Party to be notified, (ii) when sent, if sent by electronic mail or facsimile during normal business hours of the recipient and if not sent during normal business hours, then on the recipient's next business day, (iii) five (5) days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (v) one (1) business day after being (x) sent by U.S. Express Mail, return receipt requested, or (y) deposited with a nationally recognized overnight courier, freight prepaid, specifying next business day deliver, with written verification of receipt. All such notices or other communications shall be sent to any Party at the address set forth below:

If to CORPORATION:

CORPORATION, Inc.



Attention: Executive Director  
Phone No: \_\_\_\_\_

Email: \_\_\_\_\_

With a copy to: **ATTORNEY**

If to CITY: City of Rochester  
Attention: City Administrator  
Phone No: (507) 328-2004  
  
Email: SRymer@rochestermn.gov

With a copy to: City of Rochester  
Attention: City Attorney  
Phone No: (507) 328-2103  
  
Email: Jloos@rochestermn.gov

11.8 Liens. The CORPORATION shall not create or allow, without the prior written consent of DEED and the Commissioner of MMB, any voluntary lien, encumbrance or involuntary lien or encumbrance that can be satisfied by the payment of monies and which is not being actively contested against the Facility, the CITY's ownership interest in the Facility, or the CORPORATION's interest in the Agreement, whether such lien or encumbrance is superior or subordinate to the Declaration.

11.9 Cumulative Remedies. No remedy conferred upon any Party pursuant to this Agreement is intended to be exclusive of any other remedy available under this Agreement or applicable law and each remedy shall be cumulative and shall be in addition to every other remedy available under this Agreement or applicable law now or in the future.

11.10 Counterparts. This Agreement may be executed in several counterparts. If so executed, each of such counterparts shall be deemed an original for all purposes and all counterparts shall, collectively constitute an agreement. In making proof of this Agreement, it shall not be necessary to produce or account for more than one such counterpart.

11.11 Facsimile or Electronic Signature. Either Party may deliver its signature to this Agreement or any notice or other document described in this Agreement by facsimile or other electronic transmission to the other Party. Any document signed and delivered by a party by facsimile or other electronic transmission and reasonably believed by the recipient to have been sent by or on behalf of that Party shall (a) be binding upon

and fully enforceable against that Party as though it had delivered a manually-signed counterpart to the recipient and (b) be accepted by any court as equivalent to a manually-signed counterpart for purposes of any evidentiary rule.

#### 11.12 Force Majeure.

Force Majeure Events. Performance by either Party shall not be deemed to be in default where delays or failure to perform are the result of any of the following acts, events or conditions or any combination thereof (“Force Majeure Events”) that (i) have had a direct, material, adverse effect on the rights or obligations of the Parties and (ii) are beyond the reasonable control of the Party relying thereon as justification for not performing an obligation or complying with any condition required of such party under the terms of this Agreement:

a. An act of God, lightning, hurricanes, blizzards, earthquake, acts of a public enemy, war, terrorism, blockade, freight embargoes, epidemics, insurrection, economic emergency, riot or civil disturbance, sabotage or similar occurrence; a landslide, fire, explosion, flood, nuclear radiation or similar occurrence not created by an act or omission of either Party;

b. The order, judgment, action and/or determination of any federal, State or local court, administrative agency or governmental authority with jurisdiction within the City, excepting decisions interpreting federal, State and local tax laws generally applicable to all business taxpayers, adversely affecting the operation or management of CORPORATION; provided, however, that such order, judgment, action and/or determination shall not be the result of the willful, intentional or negligent action or inaction of the Party relying thereon and that neither the contesting of any such order, judgments, action and/or determination, in good faith, nor the reasonable failure to so contest, shall constitute or be construed as a willful, intentional or negligent action or inaction by such party;

c. The suspension, termination, interruption, denial or failure of or delay in renewal or issuance of any Governmental Approval which is essential to the operation or management of CORPORATION (as evidenced by written notices from the governmental authority having jurisdiction over such matter), or a third party challenge to the approval of any Governmental Approval, with the term “Governmental Approval” excluding any Authority approval as contemplated under this Agreement;

d. Strikes or similar labor actions.

11.13 Procurement of Goods and Services. CORPORATION shall follow best procurement practices in the purchase of goods and services that are paid for through this Agreement. The term “best procurement practices” shall entail CORPORATION: (i) implementing and maintaining responsible management and oversight so as to manage its procurement contracts fairly and effectively, (ii) considering factors such as the

requirements of the business, alternatives, timing, supply strategy and total life cycle costs of the good or service when evaluating vendors' submissions, (iii) providing all qualified vendors with fair access so as to avoid conflict of interest, and to choose the successful vendor through a fair and non-discriminatory process, (iv) assuring that it is receiving quality service and goods at the right place and time, and (v) otherwise promoting integrity, professionalism, accountability, transparency, compliance to internally articulated requirements, and continuous improvement.

*[Signatures on the following page.]*

**IN WITNESS WHEREOF**, the Parties have caused their respective authorized representatives to execute this Agreement on the date first written above.

**On behalf of CORPORATION, Inc.**

\_\_\_\_\_

**Name:** \_\_\_\_\_

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

**Date:**

**On behalf of CITY:**

\_\_\_\_\_

**Name:** \_\_\_\_\_

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

**Date:**

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