



MIAMI BEACH

City Commission Meeting SUPPLEMENTAL MATERIAL 2

City Hall, Commission Chambers, 3rd Floor, 1700 Convention Center Drive
December 14, 2011

Mayor Matti Herrera Bower
Vice-Mayor Deede Weithorn
Commissioner Jorge R. Exposito
Commissioner Michael Góngora
Commissioner Jerry Libbin
Commissioner Edward L. Tobin
Commissioner Jonah Wolfson

City Manager Jorge M. Gonzalez
City Attorney Jose Smith
City Clerk Robert E. Parcher

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ATTENTION ALL LOBBYISTS

Chapter 2, Article VII, Division 3 of the City Code of Miami Beach entitled "Lobbyists" requires the registration of all lobbyists with the City Clerk prior to engaging in any lobbying activity with the City Commission, any City Board or Committee, or any personnel as defined in the subject Code sections. Copies of the City Code sections on lobbyists laws are available in the City Clerk's office. Questions regarding the provisions of the Ordinance should be directed to the Office of the City Attorney.

SUPPLEMENTAL AGENDA

C7 - Resolutions

C7E A Resolution Approving And Authorizing The Mayor And City Clerk To Execute A Pre-Construction Services Agreement With QGS Development Inc., In An Amount Not To Exceed \$37,500.00, For Pre-Construction Services For The Construction Of The Par 3 Golf Course, Pursuant To Request For Qualifications No. 41-10/11 For A Construction Manager At Risk To Provide Pre-Construction Services And Construction Phase Services Via Guaranteed Maximum Price (GMP) Amendment For The Par 3 Golf Course Project; And, Upon Completion Of Pre-Construction Services, Authorizing The City Manager To Enter Into Negotiations For A Guaranteed Maximum Price (GMP) Amendment (For Construction Services); Further Authorizing The Mayor And City Clerk To Execute A GMP Amendment To The Agreement With QGS Development Inc., Subject To And Contingent Upon The City Commission's Approval Of The GMP; With Previously Appropriated Funding From Fund 388 - SP Post RDA CDT And Municipal Resort Tax.

(Capital Improvement Projects)
(CIPOC Recommendation & Resolution)

C7 - Resolutions (Continued)

- C7F A Resolution Authorizing The Mayor And City Clerk To Execute A Professional Services Agreement With Schwebke-Shiskin & Associates, Inc., Pursuant To The Request For Qualifications (RFQ) No. 36-10/11, For Resident Project Representative Services, For A Period Of Up To Thirteen (13) Months, For Neighborhood No. 8 Bayshore (Package E) - Sunset Islands I & II Project, In The Not To Exceed Amount Of \$249,995 Including Reimbursable Expenses; With Funds Previously Appropriated In The Capital Budget; And Further Authorizing The Reallocation Of Fund 384, 2003 GO Bond Funds, In The Amount Of \$12,614 From The Bayshore Lake Pancoast BP-8C Right Of Way Project Construction Savings To Bayshore Neighborhood Sunset Island I & II.

(Capital Improvement Projects)

(Consultant Compensation & Resolution)

R7 - Resolutions

- R7E A Resolution Waiving, By 5/7ths Vote, The Competitive Bidding Requirement, Finding Such Waiver To Be In The Best Interest Of The City, And Approving A Public Beachfront Concession Agreement Between The City And Boucher Brothers Miami Beach, LLC., For The Exclusive Right To Operate Certain Concessions In Lummus Park, Ocean Terrace, North Shore Open Space Park, And South Pointe Park Beach, In Miami Beach, Florida, For The Rental Of Beach Equipment, Food And Beverage Service, Sale Of Beach-Related Sundries And Skin Care Products, And Watersports Equipment Rentals; Said Agreement Having A Five (5) Year Initial Term Commencing Retroactively On November 5, 2011, And Ending On November 4, 2016, And Providing For A Five (5) Year Renewal Term Which Is Exercisable By The City; Further Retroactively Approving The City Manager's Extension Of The Current Concession Agreement From November 5, 2011, To December 14, 2011.

(Real Estate, Housing & Community Development)

(Memorandum & Resolution)



MIAMI BEACH

City of Miami Beach, 1700 Convention Center Drive, Miami Beach, Florida 33139, www.miamibeachfl.gov

COMMISSION MEMORANDUM

TO: Mayor Matti Herrera Bower and Members of the City Commission

FROM: Jorge M. Gonzalez, City Manager

DATE: December 14, 2011

SUBJECT: **SUPPLEMENTAL MATERIAL FOR ITEM #C7E APPROVING AND AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE A PRE-CONSTRUCTION SERVICES AGREEMENT WITH QGS DEVELOPMENT INC., IN AN AMOUNT NOT TO EXCEED \$37,500.00, FOR PRE-CONSTRUCTION SERVICES FOR THE CONSTRUCTION OF THE PAR 3 GOLF COURSE.**

CIPOC RECOMMENDATIONS

The Committee recommends that prior to negotiating the Guaranteed Maximum Price (GMP) the City hire a cost consultant, to evaluate the GMP arrived at through the pre-construction services. This consultant preferably should have experience in golf course construction, and should evaluate prices with other comparable golf courses in other municipalities.

DB\FVDMHC/shl

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Agenda Item C7E

Date 12-14-11

RESOLUTION NO. _____

A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, APPROVING AND AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE A PRE-CONSTRUCTION SERVICES AGREEMENT WITH QGS DEVELOPMENT INC, IN AN AMOUNT NOT TO EXCEED \$37,500.00, FOR PRE-CONSTRUCTION SERVICES FOR THE CONSTRUCTION OF THE PAR 3 GOLF COURSE, PURSUANT TO REQUEST FOR QUALIFICATIONS NO. 41-10/11 FOR A CONSTRUCTION MANAGER AT RISK TO PROVIDE PRE-CONSTRUCTION SERVICES AND CONSTRUCTION PHASE SERVICES VIA GUARANTEED MAXIMUM PRICE (GMP) AMENDMENT FOR THE PAR 3 GOLF COURSE PROJECT; AND, UPON COMPLETION OF PRE-CONSTRUCTION SERVICES, AUTHORIZING THE CITY MANAGER TO ENTER INTO NEGOTIATIONS FOR A GUARANTEED MAXIMUM PRICE (GMP) AMENDMENT (FOR CONSTRUCTION SERVICES); FURTHER AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE A GMP AMENDMENT TO THE AGREEMENT WITH QGS DEVELOPMENT INC., SUBJECT TO AND CONTINGENT UPON THE CITY COMMISSION'S APPROVAL OF THE GMP; WITH PREVIOUSLY APPROPRIATED FUNDING FROM FUND 388 – SP POST RDA CDT AND MUNICIPAL RESORT TAX.

WHEREAS, on June 1, 2011, the Mayor and City Commission adopted Resolution No. 2011-27677, approving the Par-3 Golf Course Project Master Plan, in concept, as per the scope that had been delineated, with a recommendation by the City Commission that the concept plan be submitted to the Finance and Citywide Projects Committee for approval prior to finalizing construction plans for the Project; and

WHEREAS, on July 13, 2011, the City Commission approved the issuance of Request For Qualifications No. 41-10/11 for a Construction Manager at Risk to Provide Pre-Construction Services and Construction Phase Services Via a Guaranteed Maximum Price (GMP) Amendment for the Par 3 Golf Course Project (the RFQ); and

WHEREAS, on October 19, 2011, the Mayor and the City Commission adopted Resolution No. 2011-27784, accepting the Par 3 Project layout and recommendation of the City Manager, pursuant to the RFQ, and authorized the Administration to enter into negotiations with the top ranked firm, QGS Development, Inc; and

WHEREAS, the scope of work for this Project consists of all materials, labor, equipment, supervision, mobilization, overhead and profit required to re-develop the City's Par-3 Golf Course, and ancillary support facilities such as a pump house, restrooms, storage area, tennis courts, splash pad and tot lot, 9 parking spaces, jogging path, sidewalks, irrigation, flowering tree groves, new retention lakes, grow-in activity, and landscaping; and

WHEREAS, the Project is bounded by Prairie Avenue on the west; West 28th Street on the north; Pine Tree Drive on the east; and Miami Beach Senior High School, the Public Works Yard and the Hebrew Academy on the south; and

WHEREAS, the City's latest estimate of probable cost for the Project, including the Par-3 Golf Course and all related facilities and scope, is \$2,900,000; and

WHEREAS, the Pre-Construction Services include the following: design review, constructability and value engineering of 100% construction documents, for a fee of \$6,750; review of onsite and offsite conditions, for a fee of \$3,500; cost estimating and cost controls for a fee of \$9,750; scheduling, for a fee of \$2,500; bidding (GMP Submittal and Negotiations), for a fee of \$7,500; E-Builder license (two (2) licenses at \$1,200 per license) for a fee of \$2,400; tree root / pruning, for a fee of \$2,600; and a contingency of \$2,500, and

WHEREAS, the Administration recommends approval of the negotiated Pre-Construction Service fee, in the total amount of \$37,500, with QGS Development, Inc, and

WHEREAS, upon completion of the Pre-Construction Services, the Administration further recommends that the City Manager be authorized to enter into negotiation with QGS Development, Inc., for a GMP Amendment (for Construction Phase Services), and further authorize the Mayor and the City Clerk to execute, the Amendment; provided that the City Commission has first approved the negotiated Guaranteed Maximum Price (GMP).

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, that the Mayor and the City Commission of the City of Miami Beach hereby approve and authorize the Mayor and the City Clerk to execute a Pre- Construction Services Agreement with QGS Development Inc., in an amount not to exceed \$37,500.00, for Pre-Construction Services for the Construction of the Par-3 Golf Course, Pursuant to Request for Qualifications No. 41-10/11 for a Construction Manager at Risk to provide Pre-Construction Services and Construction Phase Services via Guaranteed Maximum Price (GMP) Amendment for the Par 3 Golf Course Project; and, upon completion of the Pre-Construction Services, authorizing the City Manager to enter into negotiations for a Guaranteed Maximum Price (GMP) Amendment (for the Construction Services); further authorizing the Mayor and the City Clerk to execute the GMP Amendment with QGS Development, Inc., subject to and contingent upon the City Commission's approval of the GMP; with previously appropriated funding from Fund 388-SP POST RDA CDT and Municipal Resort Tax.

PASSED AND ADOPTED THIS _____ DAY OF _____ 2011.

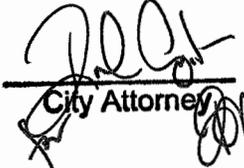
ATTEST:

Robert Parcher, City Clerk

Matti Herrera Bower, Mayor

**APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION**

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City Attorney



Date

12-13-11

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SCHEDULE B

CONSULTANT COMPENSATION

Schedule of Payments

Task 1 - RPR Services for the Sunset Islands I & II *	\$244,386.00
Reimbursable Allowance***	\$.3,000.00
Task 2 - Additional Services	\$0.00

Note*: These services will be paid lump sum based on percentage complete of each phase as identified in the individual tasks.

In the event that, through no fault of the Consultant, RPR services are required to be extended, which extension shall be subject to prior City approval, and what shall be at the City's sole discretion, the Consultant agrees to extend said services for \$17,038.00, per month per project, for the duration required to complete the respective project.

Note***: The Reimbursable Allowance belongs to the City and must be approved in writing, in advance, by the Project Coordinator. Unused portions will not be paid to the Consultant.

**SCHEDULE B1
CITY OF MIAMI BEACH
BAYSHORE NEIGHBORHOOD NO. 8E - SUNSET ISLANDS I II
CONSULTANT'S COMPENSATION FEE SCHEDULE**

TASK NO.	TASK DESCRIPTION	PROJECT DIRECTOR	PROJECT MANAGER	SENIOR ENGINEER	STAFF ENGINEER OFFICE	STAFF ENGINEER	DESIGNER	DRAFTER	CLERICAL	TOTAL HOURS	TOTAL COST
1	Meetings										
1.1	Value Engineering Meetings		2			0				2	\$ 240.00
1.2	Residents's Information Meetings		4			4				8	\$ 808.00
1.3	Pre-Construction Meetings		4			4		4		12	\$ 948.00
1.4	Weekly Construction Progress Meetings	3	118	12		112		120		365	\$ 29,374.00
1.5	Specialty Design Consultant Site Visits	6	15	6		18				45	\$ 4,866.00
	Task: 1 Subtotal:	9	143	18	0	138	0	0	124	432	\$36,236.00
2	RPR Services										
2.1	Refers to Schedule A (Scope of Services) Items: 1,6,8,9,10,11,12,13,14,15,16,18,19,20,21,22,23,24,25,26,27,28	14	50		422	1690			130	2306	\$185,834.00
2.2	Project Closeout		20		33	130		20		203	\$16,466.00
	Task 2 Subtotal:	14	70	0	455	1820	0	0	150	2509	\$202,300.00
3	Plan & Documents Review										
3.1	Project Schedule Review	4	4			5				13	\$ 1,490.00
3.2	Plans Review	4	4			40				48	\$ 4,360.00
	Task 3 Subtotal:	8	8	0	0	45	0	0	0	61	\$5,850.00
4	Reimbursible Expenses										
4.1	Reproduction, courier and postage										\$ 2,000.00
4.2	E-builder										\$ 1,000.00
	Task 4 Subtotal:										\$ 3,000.00
	Subtotal:	31	221	18	455	2003	0	0	274	3002	\$247,386.00
	Hourly Rates (FY 2011)	\$ 150.00	\$ 120.00	\$ 115.00	\$ 82.00	\$ 82.00	\$ 83.00	\$ 55.00	\$ 35.00		

SCHEDULE C

HOURLY BILLING RATE SCHEDULE

<u>Classification</u>	<u>Hourly Billing Rate</u>
Principal/ Project Director	\$150.00 per hour
Project Manager	\$120.00 per hour
Senior Engineer/Architect	\$115.00 per hour
Engineer/ Architect	\$101.00 per hour
Staff Engineer	\$82.00 per hour
Designer	\$83.00 per hour
CAD Operator	\$55.00 per hour
Clerical	\$35.00 per hour

RESOLUTION NO. _____

A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE A PROFESSIONAL SERVICES AGREEMENT WITH SCHWEBKE-SHISKIN & ASSOCIATES, INC., PURSUANT TO REQUEST FOR QUALIFICATIONS (RFQ) NO. 36-10/11, FOR RESIDENT PROJECT REPRESENTATIVE SERVICES, FOR A PERIOD OF UP TO THIRTEEN (13) MONTHS, FOR NEIGHBORHOOD NO. 8 BAYSHORE (PACKAGE E) – SUNSET ISLANDS I & II PROJECT, IN THE NOT TO EXCEED AMOUNT OF \$249,995, INCLUDING REIMBURSABLE EXPENSES; WITH FUNDS PREVIOUSLY APPROPRIATED IN THE CAPITAL BUDGET; AND FURTHER AUTHORIZING THE REALLOCATION OF FUND 384, 2003 GO BOND FUNDS, IN THE AMOUNT OF \$12,614, FROM THE BAYSHORE LAKE PANCOAST BP-8C RIGHT OF WAY PROJECT CONSTRUCTION SAVINGS TO BAYSHORE NEIGHBORHOOD SUNSET I & II.

WHEREAS, on July 1, 2011, the City issued Request for Qualifications No. 36-10/11 for Resident Project Representative Services for Right-of-Way Improvements to Neighborhood No. 8 Bayshore (Package E) – Sunset Islands I & II (the RFQ); and

WHEREAS, the Technical Review Committee convened on October 4, 2011, to evaluate and score the proposals in order to shortlist the responsive proposals based on the evaluation criteria stated in the RFQ; and

WHEREAS, the Committee reconvened on October 10, 2011, to evaluate, score, and rank the shortlisted proposals of A&P Consulting Transportation Engineers, Corp., Bermello Ajamil & Partners, Inc., Calvin, Giordano & Associates, Inc., CES Consultants, Inc., Schwebke-Shiskin & Associates, Inc., and Target Engineering Group, Inc. based on the evaluation criteria stated in the RFQ; and

WHEREAS, on October 19, 2011, the City Commission adopted Resolution No. 2011-27761, accepting the recommendation of the City Manager to allow staff to enter into negotiations with Schwebke-Shiskin & Associates, Inc. (SSA); and should the Administration not be able to successfully negotiate an agreement with SSA, authorizing the Administration to negotiate with Calvin, Giordano & Associates, Inc. (CGA); and should the Administration not be able to negotiate an agreement with CGA, authorizing the Administration to negotiate an agreement with Target Engineering Group, Inc.; and

WHEREAS, the Administration has successfully negotiated the RPR services for Sunset Islands I & II with Schwebke-Shiskin & Associates, Inc. in the lump sum amount of \$247,386, including reimbursable expenses.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, that the Mayor and City Commission of the City of Miami Beach, Florida, hereby authorize the Mayor and City Clerk to execute a Professional Services Agreement with Schwebke-Shiskin & Associates, Inc., pursuant to Request for Qualifications (RFQ) No. 36-10/11, for Resident Project Representative Services, for a period of up to thirteen (13) months, for Neighborhood No. 8 Bayshore (Package E) – Sunset Islands I & II Project, in the not to exceed amount of \$249,995, including Reimbursable Expenses; with funds previously appropriated in the Capital Budget; and further authorize the reallocation of Fund 384, 2003 GO Bond funds, in the amount of \$12,614, from the Bayshore Lake Pancoast BP-8C Right-of-Way project construction savings to Bayshore Neighborhood Sunset Island I & II.

PASSED AND ADOPTED THIS _____ DAY OF _____ 2011

APPROVED AS TO FORM & LANGUAGE & FOR EXECUTION

ATTEST:

[Signature] 12/13/11
City Attorney Date

CITY CLERK

MAYOR

Condensed Title:

A Resolution Waiving, By 5/7ths Vote, The Competitive Bidding Requirement, Finding Such Waiver To Be In The Best Interest Of The City, And Approving A Public Beachfront Concession Agreement Between The City And Boucher Brothers Miami Beach, Llc (Concessionaire), For The Exclusive Right To Operate Certain Concessions In Lummus Park, Ocean Terrace, North Shore Open Space Park, And South Pointe Park Beach, In Miami Beach, Florida, For The Rental Of Beach Equipment, Food And Beverage Service, Sale Of Beach-Related Sundries And Skin Care Products, And Watersports Equipment Rentals; Said Agreement Having A Five (5) Year Initial Term Commencing Retroactively On November 5, 2011, And Ending On November 4, 2016, And Providing For A Five (5) Year Renewal Term Which Is Exercisable By The City; Further Retroactively Approving The City Manager's Extension Of The Current Concession Agreement From November 5, 2011, To December 14, 2011.

Key Intended Outcome Supported:

Increase resident satisfaction with the level of services and facilities.
Supporting Data (Surveys, Environmental Scan, etc.): The overall quality of the beaches (cleanliness, water quality, etc.) appeared as an important area affecting residents' quality of life. 75% of residents and 77% of businesses rated the overall quality of the beaches as excellent or good.

Issue:

Should the City approve the concession agreement?

Item Summary/Recommendation:

In accordance with Management Agreement No. 750-0006 by and between the State of Florida and the City, the City is vested with the management, jurisdiction, and control of all beaches in the City of Miami Beach. On February 21, 2001, the Mayor and City Commission authorized the issuance of an RPP which resulted in the selection of Boucher Brothers Miami Beach, LLC (Boucher Brothers) for the operation and management of beachfront concessions, including beach equipment rentals, food and beverage sales, and watersport rentals, on the beaches seaward of Lummus Park, Ocean Terrace and North Shore Open Space Park. The agreement, as amended, commenced on November 5, 2001, and, after the five (5) year option was exercised, was scheduled to expire on November 4, 2011. During the City Commission retreat on May 20 and 21, 2011, a discussion was held regarding the Public Beachfront Concession Agreement/Program and the expiration of the current agreement. In light of satisfaction with the performance of the current concessionaire, and a desire to ensure that the concession agreement addressed desirable items, such as non-motorized water sports in North Beach, additional cleaning services, and the installation of beach lockers, staff was directed to negotiate a new concession agreement with Boucher Brothers. Consequently, last month, the Concession Agreement was extended on a month-to-month basis pending the review and consideration by the City Commission of a new Concession Agreement; on November 4, 2011, the City accepted payment of fifty percent (50%) of the Year 10 Minimum Guarantee under the Concession Agreement (\$367,257.56).

The current concessionaire is a known entity with organizational experience and capacity, with over 20 years providing pool, beach, water sports, large corporate group events and food and beverage concessions. In addition to the Concession Agreement for Lummus Park, Boucher Brothers serves over 60 hotel and condominium properties throughout Florida's East Coast, with close to 20 Miami Beach condominium and hotel properties, as well as numerous other beach concessions on Florida's West Coast, Virginia and Chicago, IL. Boucher Brothers has over 500 employees during peak season, well over 300 of which are employed in Miami Beach.

The current opportunities afforded under the existing Agreement, as well as other options that can generate potential new revenue for the City, have been researched and negotiated. In addition to allowing the rental of new types of beachfront equipment, servicing new areas, and allowing for "heating" of certain foods, they will develop a non-motorized water sports program in North Beach Open Space Park, operate a beach locker program in Lummus Park, as well as continue to provide (and offer additional) "Value-Added Enhancements." Boucher Brothers will pay the City a "Minimum Guarantee" (MG) concession payment at the beginning of each year (first year value of \$686,563; subject to an annual escalator), and any difference between the MG and the Percentage of Gross (sales) for each service they provide. The proposed Agreement term is for five years, with an option (at the City's sole discretion) of a renewal for an additional five years.

On December 14, 2011, the proposed terms for a new Concession Agreement were discussed by the Finance and Citywide Projects Committee (FCWPC). The FCWPC members present recommended approval of the new Concession Agreement, but instructed staff to conduct further negotiations with Boucher Brothers regarding the renewal language to address concerns raised by Boucher Brothers about the new language. The Committee recommended forwarding to the Commission, for the full Commission's consideration, the proposed annual escalator on the Minimum Guaranteed Concession Payment to be made by Boucher Brothers. As currently provided in the Agreement, the MG would increase by the greater of 3% or CPI.

Advisory Board Recommendation:

Finance and Citywide Projects Committee: December 6, 2011.

Financial Information:

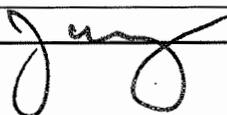
Source of Funds: n/a	Amount	Account
1	N/A	

Financial Impact Summary:

City Clerk's Office Legislative Tracking:

Anna Parekh, Ext 7260

Sign-Offs:

Department Director	Assistant City Manager	City Manager
AP _____	HF _____	JMG _____ 

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MIAMI BEACH

City of Miami Beach, 1700 Convention Center Drive, Miami Beach, Florida 33139, www.miamibeachfl.gov

COMMISSION MEMORANDUM

TO: Mayor Matti H. Bower and Members of the City Commission

FROM: Jorge M. Gonzalez, City Manager

DATE: December 14, 2011

SUBJECT: **A RESOLUTION WAIVING, BY 5/7THS VOTE, THE COMPETITIVE BIDDING REQUIREMENT, FINDING SUCH WAIVER TO BE IN THE BEST INTEREST OF THE CITY, AND APPROVING A PUBLIC BEACHFRONT CONCESSION AGREEMENT BETWEEN THE CITY AND BOUCHER BROTHERS MIAMI BEACH, LLC (CONCESSIONAIRE), FOR THE EXCLUSIVE RIGHT TO OPERATE CERTAIN CONCESSIONS IN LUMMUS PARK, OCEAN TERRACE, NORTH SHORE OPEN SPACE PARK, AND SOUTH POINTE PARK BEACH, IN MIAMI BEACH, FLORIDA, FOR THE RENTAL OF BEACH EQUIPMENT, FOOD AND BEVERAGE SERVICE, SALE OF BEACH-RELATED SUNDRIES AND SKIN CARE PRODUCTS, AND WATERSPORTS EQUIPMENT RENTALS; SAID AGREEMENT HAVING A FIVE (5) YEAR INITIAL TERM COMMENCING RETROACTIVELY ON NOVEMBER 5, 2011, AND ENDING ON NOVEMBER 4, 2016, AND PROVIDING FOR A FIVE (5) YEAR RENEWAL TERM WHICH IS EXERCISABLE BY THE CITY; FURTHER RETROACTIVELY APPROVING THE CITY MANAGER'S EXTENSION OF THE CURRENT CONCESSION AGREEMENT FROM NOVEMBER 5, 2011, TO DECEMBER 14, 2011.**

KEY INTENDED OUTCOMES SUPPORTED

To ensure well-maintained facilities.

BACKGROUND

In accordance with Management Agreement No. 750-0006 by and between the State of Florida and the City, the City is vested with the management, jurisdiction, and control of all beaches in the City of Miami Beach. On October 2, 1985, the Mayor and City Commission approved a Concession Agreement, dated November 7, 1985, between the City and Penrod Brothers for rental of beach equipment, water recreation equipment and food and beverage service at Pier Park, Oceanfront Park and Lummus Park. The agreement expired in November, 2001. On February 21, 2001, the Mayor and City Commission authorized the issuance of an RPP which resulted in the selection of Boucher Brothers Miami Beach, LLC (Boucher Brothers) for the operation and management of beachfront concessions, including beach equipment rentals, food and beverage sales, and watersport rentals, on the beaches seaward of Lummus Park, Ocean Terrace and North Shore Open Space Park. The agreement commenced on November 5, 2001, and expired on November 4, 2006, with an option to renew for an additional five (5) year term. An Amended and Restated Concession Agreement was entered into on May 18, 2005, which clarified and memorialized operational issues. An Amendment to Amended and Restated Concession Agreement was entered into on January 11, 2006, which granted a renewal term through November 5, 2011, and memorialized value-added enhancements from the Concessionaire to the City. A Second Amendment to Amended and Restated Beachfront Concession Agreement was executed on April 16, 2008; said amendment provided for the addition of a concession area adjacent to Bandshell Park. A Third Amendment to Amended and Restated Beachfront Concession Agreement was executed on July 15, 2009, which provided for the reconfiguration of a fenced storage area for storage and for a dumpster facility. The original

Concession Agreement and all subsequent amendments is referred to collectively as the "Concession Agreement" throughout this Commission Memorandum.

COMMISSION RETREAT

During the City Commission retreat on May 20 and 21, 2011, a discussion was held regarding the Public Beachfront Concession Agreement/Program and the expiration of the current agreement. The Commission discussed two options for the continued operation of the public beachfront concessions currently managed by Boucher Brothers: 1) whether to issue a competitive process to seek a concessionaire; or, 2) to renegotiate and enter into a new agreement with the existing entity. If the City elects to waive competitive bidding, it may do so with a 5/7th vote of the City Commission.

In light of satisfaction with the performance of the current concessionaire, and a desire to ensure that the concession agreement addressed desirable items, such as non-motorized water sports in North Beach, additional cleaning services, and the installation of beach lockers, staff was directed to negotiate a new concession agreement with Boucher Brothers.

Last month, the Concession Agreement was extended on a month-to-month basis pending the review and consideration by the City Commission of a new concession agreement. In order to maintain concession services, and in consideration of the parties' agreement to continue the terms of the Concession Agreement in full force and effect, until such time as there was Commission consideration of a proposed new agreement, on November 4, 2011, the City accepted the payment of fifty percent (50%) of the Year 10 Minimum Guarantee amount under the Concession Agreement (\$367,257.56).

BOUCHER BROTHERS, INC.

The current concessionaire is a known entity with organizational experience and capacity. Boucher Brothers Management has been in business for over 20 years providing pool, beach, water sports, large corporate group events and food and beverage concessions. In addition to the Concession Agreement for Lummus Park, Boucher Brothers concession operation serves over 60 hotel and condominium properties throughout Florida's East Coast, with close to 20 Miami Beach Condominium and hotel properties encompassing over 4,000 rooms and six water sports locations in Miami Beach; 15 blocks of city-contracted beach concessions in Ft. Lauderdale; Miami-Dade County contracted Haulover Park; 50 blocks of city-contracted public beach in Virginia Beach, VA; and four beaches and six blocks of city-contracted public beach on Lake Michigan, Chicago, IL. Boucher Brothers has over 500 employees during peak season, well over 300 of which are employed in Miami Beach. Boucher Brothers also serves five hotels in Sunny Isles and Hollywood, three hotels in Bal Harbour, and three hotel properties on the West Coast of Florida, including Naples and St. Pete's Beach.

The City of Ft. Lauderdale recently re-bid the beachfront concession area rights after contracting with Boucher Brothers for three years and, although several prospective bidders requested applications, the sole and successful bidder for the new Ft. Lauderdale contract was Boucher Brothers.

ANALYSIS

While several entities may be interested in undertaking a large-scale beachfront concession operation, the organizational and financial capacity of the concessionaire that will service our highly visited public beachfronts are very important. There are a total of 12 other concessionaires providing beachfront concession services on behalf of 27 private condos/hotels in Miami Beach; one of the concessionaires services six concessions; one concessionaire services four concessions; and the other ten concessionaires service between one and three properties each.

The existing Concession Agreement requires the Concessionaire to remit to the City a minimum

guaranteed concession payment, which was set at \$412,500 the first year of the 2001 Concession Agreement, and was adjusted annually by 5% per annum. In addition, in the event that the percentage of the Concessionaire's food and beverage gross receipts (ranging from 15% to 25% based on volume) and its sundries and beach equipment gross receipts (20%), exceeded the minimum guarantee, then the Concessionaire pays the City the difference between the two (Percentage of Gross). A percentage of gross was also established for beach equipment and watersports equipment rentals. Under the current Concession Agreement, the minimum guarantee is paid in full at the beginning of each Concession Agreement year, with a "true-up" occurring at the end of the Concession Agreement year, if needed. The minimum guaranteed concession payment, which was paid for 2010 (year ten of the current Agreement) was \$686,562.73. The existing Concession Agreement also required the Concessionaire to invest in new equipment during the renewal term, as well as provide some value-added cash and other contributions.

PROPOSED TERMS

The Administration discussed the status of the Concession Agreement with the Boucher Brothers and their interest in continuing to service our public beach areas. Consequently, the current opportunities afforded under the existing contract, as well as other options that can generate potential new revenue for the City, have been researched and negotiated. In addition to allowing the rental of new types of luxury beachfront equipment, servicing new areas, and allowing for "heating" of certain foods, they have expressed a willingness to develop a non-motorized water sports program in North Beach Open Space Park and a beach locker program, as well as continuing to provide (and offer additional) "Value-Added Enhancements" (VAE). The VAE would continue to include annual donations to the City for scholarships and in support of environmental organizations, and a "promotional towel program" in the "Luxury" areas of the Concession Areas that would provide for the promotion of the City of Miami Beach. Additional Value-Added Enhancements are explained further in the memo.

FINANCE AND CITYWIDE PROJECTS COMMITTEE MEETING – 12/6/11

On December 6, 2011, the proposed terms for a new agreement were discussed by the Finance and Citywide Projects Committee (FCWPC). Two particular issues were discussed by the Committee, as they remained areas where there had not been a conclusion on the negotiations. One pertained to the renewal provisions. The Boucher Brothers requested language similar to the language in the current Agreement. The current renewal language provides that the Boucher Brothers must achieve certain benchmarks, and that the renewal is subject to the City Commission's approval, at their sole discretion. It was the recommendation of the Committee members present that we discuss benchmarks with Boucher Brothers and incorporate the original language into the Proposed Agreement.

The other area that remained outstanding pertained to the annual escalator on the Minimum Guarantee. Customary with these types of Agreements, an escalator provision is included, providing for an increase in the MG to reflect, among other things, inflationary costs. The current Agreement included a flat five percent (5%) annual escalator. Boucher Brothers argued that this escalator far exceeded typical inflation indicators, and it was agreed to reduce the escalator, consistent with more typical levels. As such, commencing with the fourth Agreement year, and on the subsequent anniversary of the Commencement Date, the Administration recommends that the MG be automatically increased by the greater of the CPI or three percent (3%). The Committee could not agree on this issue and recommended forwarding this component to the full Commission without a recommendation.

AGREEMENT TERMS:

The following provides a summary of the Agreement Terms, as fully reflected in the attached

proposed Agreement.

Term:

This term of this Concession Agreement is proposed for five (5) years commencing on November 5, 2011, and ending on November 4, 2016 (Initial Term). Provided that Concessionaire is not in default under the Agreement, has met the benchmarks described below, and commencing with timely written notice from Concessionaire, Concessionaire and the City will negotiate exclusively with each other in good faith for a period of sixty (60) days to extend the term of the Agreement for an additional five (5) year renewal term. The renewal term is subject to, and requires, the approval of the Mayor and City Commission. Prior to commencement of negotiations for a renewal term, any such renewal is conditioned on the Concessionaire evidencing having purchased new equipment at a minimum investment of \$400,000 during the Initial Term. Should the Agreement be renewed, the during the renewal term Concessionaire must make an additional \$200,000 minimum investment in new equipment, by no later than the end of the third Agreement year of the Renewal Term.

Concession area(s):

The Concessionaire will service the existing Concession Areas. An additional Concession Area is approved, should the area become serviceable in the future. The Boucher Brothers will assess whether the area is serviceable and report to City staff.

- Lummus Park – beach area bounded by 5th Street to 14th Lane;
- Ocean Terrace – beach area bounded by 73 Street to 75 Street;
- North Shore Open Space Park – This Concession Area, should it become serviceable during the Term, is limited to the beach area bounded by 79 Street to 87 Street;
- South Pointe Park Beach (new) – This Concession Area, should it become serviceable during the Term, is limited to the beach area bounded by South Pointe Park Pier to lifeguard stand (above subject to restrictions on applicable buffer zones, handicap zones, etc.).

Use(s):

The following uses are permitted pursuant to this Concession Agreement. Additional uses were identified to address the City's interest for North Beach economic development, and in response to issues regarding petty thefts on the beach.

- Rental of Beach Equipment – generally includes beach chairs, pads, umbrellas, sun canopies, and such other related equipment. The condition and quality of Beach Equipment shall be maintained in a first-class manner which is equal to, or better than, the condition and quality of beach equipment found in public beach concessions in other world class beach resorts. Beach Equipment must be replaced no later than the fifth year after purchase, unless it is necessary, due to the condition of Beach Equipment, to replace such Equipment prior to the fifth year after purchase;
- Beach Locker Program – To be implemented on a pilot program for one year. If the City and Concessionaire cannot mutually agree on whether to continue to operate the Program, then the City Manager may assume and undertake – whether through the City or by contracting with a third party vendor – operation of a beach locker program within the Concession Areas without any liability to the City;
- Food and Beverage Service – Concessionaire can currently sell cooked, prepared, and/or prepackaged foods and non-alcoholic beverages. Actual cooking from the Concessionaire's on-site facilities is not allowed. However, Boucher Brothers has requested the ability to heat food by means of battery power, solar power, or propane gas. In an effort to improve the quality of the food products provided on the public beachfront, staff recommends that heating be permitted, subject to the City Manager or his/her designee's approval, and following all required regulatory approvals. Boucher Brothers can

- continue to operate up to five (5) non-motorized, stationary carts in the Lummus Park Concession Area are authorized to dispense ice cream and frozen lemonade (currently permitted);
- Sale of Beach-Related Sundries and Skin Care Products
 - Watersports Equipment Rentals – The Concessionaire will continue the operation of the existing active watersports channel within the Lummus Park Concession Area, to include the rental of eight (8) waverunners, one (1) parasail boat, one (1) banana boat, and six (6) kayaks. Any future requests for new and/or additional Watersports Equipment for this concession must be approved. As a new service, Concessionaire will establish and operate a non-motorized Watersports Equipment concession in the Ocean Terrace Concession Area, which shall be provided and implemented no later than ninety (90) days following the City's final approval of a designated non-motorized watersports channel within that Area. This new service, which the City plans to co-promote, is intended to generate traffic to our North Beach area, especially as certain non-motorized watersports have become very popular.
 - Storage – The Concessionaire is entitled to storage facilities, which must be approved by the City. Any new storage facilities requested are to be approved by the City Manager, paid solely and exclusively by Concessionaire, and are subject to all necessary regulatory approvals. It is anticipated that additional storage will be required for, in particular, the new non-motorized watersports concession and the beach locker program.

Value-Added Enhancements (VAE):

The Concessionaire currently provides certain Value-Added Enhancements as a component of their Concession Agreement. In addition to continuing these benefits, following negotiations with staff, they have also agreed to provide additional VAEs:

Existing:

- Annual \$5,000 donation to the City to be utilized for scholarships and contributions to philanthropic organizations
- Annual \$5,000 donation to the City to be utilized in support of environmental organizations and programs
- Promotional towel program in the Luxury areas that provides for a minimum of 600 imprinted lounge chair towels, promoting the City of Miami Beach, and which shall be replaced with 600 new imprinted towels at least once during the Initial Term, and twice during the Renewal Term.

Expansion of existing:

- Enhanced beach cleanliness. Concessionaire will provide assistance in the supervision of cleanliness in Lummus Park, including the area outside of the concession Area(s) beginning west of the sand dunes and extending westerly to the east sidewalk of Ocean Drive, to include: coordination with the City's Sanitation Department for the collection of any litter garbage or debris that is identified by the Concessionaire, including notification of overflowing trash receptacles; notification to the Public Works Department of any issues regarding the operation of any beach showers and the cleanliness of beach restrooms; and coordination with the Code Compliance Division in identifying and reporting littering, illegal vendors, graffiti on city property or any other city code violation.

New VAEs:

- Public Beachfront Outdoor Ashtray Program requiring Concessionaire's purchase, daily placement/removal, and maintenance of no fewer than twenty (20) outdoor ashtrays (maximum cost of \$100/ashtray) for the use of the general public. The outdoor ashtrays (with appropriate signage) shall be placed daily along the existing public trash can line, adjacent to areas outside of the Concession Areas, and adjacent to the following additional areas (for as long as Boucher Brothers manages the adjacent private beachfront concession: the public beachfront area between the private concession areas

behind Penrod's and the Continuum; and the public beachfront area located east of Marjory Stoneman Park. Additionally, the Concessionaire is required to provide ashtrays to patrons using their concession areas.

Concession fees:

Concession fees are provided to the City, as follows:

Minimum Guaranteed Annual Concession Fee (MG):

An MG shall be paid each Agreement each. The MG for the first year of the Initial Terms is \$686,563 apportioned as follows:

Food and Beverage Sales, Beach-related Sundries /Skin Care Products sales	\$174,524.43
Beach Equipment Rentals	\$465,398.46
Watersports Equipment Rentals	<u>\$ 46,639.84</u>
Total:	\$686,562.73

50% of the MG for each Agreement year is due and payable to the City on November 5th of each year during the Term, and the remaining 50% is due on May 5th of each year during the Term.

Escalator:

Customary with these types of Agreements, an escalator provision is included, providing for an increase in the MG to reflect, among other things, inflationary costs. The current Agreement included a flat five percent (5%) annual escalator. Boucher Brothers argued that this escalator far exceeded typical inflation indicators, and it was agreed to reduce the escalator, consistent with more typical levels. As such, commencing with the fourth Agreement year, and on the subsequent anniversary of the Commencement Date, the MG will be automatically increased by the greater of the CPI or three percent (3%).

Percentage of Gross (PG) vs. MG:

For each contract year, Concessionaire shall pay the difference between the MG and the percentage of the gross receipts that exceeds the MG for Food and Beverage sales/Beach-Related Sundries/Skin Care Products; Beach Equipment rentals; and Watersports Equipment rentals, as follows:

Food and Beverage Sales	15%
Beach-related Sundries/Skin Care Products Sales	20%
Beach Equipment Rentals	20%
Watersports Equipment Rentals	20%

The payment of the PG shall be due and payable to the City no later than December 31st of each contract year.

The proposed terms reflect a flat minimum guarantee for Year One (same as year ten of current Agreement) and a deferred escalator that is intended to offset the capital investment necessary to implement the non-motorized sports concession in North Beach and the beach locker program which will be implemented by Boucher Brothers, at their cost.

Security deposit:

A Security Deposit is required in the amount of \$68,652 for the faithful performance of the terms and conditions of this Agreement, and is to be provided to the City in the form of a cash deposit, irrevocable letter of credit, or certificate of deposit. This is in lieu of a performance bond. Boucher Brothers has requested the change from the requirement of a performance bond to an alternative form of security deposit in light of the established history of the

Concessionaire with the City. The alternatives to a performance bond were provided in the current agreement, subject to the City Manager's approval. This Security Deposit is payable in two installments by no later than May 5, 2012.

Insurance:

The Concessionaire meets all City requirements and, further, increased their Commercial General Liability requirement to a minimum amount of \$5 million (from current Agreement's \$2 million coverage).

Special events:

The Special Events language has been modified to address occasions when the Concessionaire may be displaced from a Concession Area due to a special event or film production (except for events produced by the City). When that occurs, the Concessionaire is entitled to a displacement fee based on the prior three-year average sales (per day) in the displaced area.

Maintenance:

Concessionaire must continue to maintain their Concession Area free of litter, garbage and debris. In addition, as part of the negotiations of this Agreement, Boucher Brothers will also be responsible for maintaining any "areas outside of the Concession Areas" identified in the Agreement, including: Buffer Zones, Lifeguard Zones, Handicap Zones; areas 50' from storage facilities and concession facilities that heat food. The Concessionaire is to develop and present the City with a recycling plan.

Vehicles:

There is no increase in the number of permitted vehicles is proposed. Clarification on language regarding what types of vehicles are permitted east of the trash can line has been included, as well as processes for the driving of on-road vehicles on the beachfront.

Penalty in lieu of default:

Notwithstanding the city's right to declare the Concessionaire in Default, as an alternative means of ensuring compliance with non-monetary terms of this Agreement for which a cure period is not possible, this Agreement includes a new provision that provides for a penalty for failure to meet certain terms. Minimum fines, per incident, are provided for these provisions, included as Attachment 13.8 to the Agreement, and attached for your easy reference.

CONCLUSION

The City's public beachfronts are used by both residents and millions of visitors to our beaches. The provision of a quality beachfront concession program, to include food and average services, equipment rental, motorized/non-motorized water sports, and the sale of sundries and lotions, provides an important and valuable amenity, for our residents, as well as the millions of visitors to our beaches. These concession areas are regulated and monitored to ensure appropriate levels of cleanliness, and the provision of safe and reliable services.

While providing a beneficial service to our residents and visitors, the current public beachfront concession program provides the City with revenues through a minimum guaranteed annual payment, and the opportunity for additional payments when revenues exceed a certain percentage of gross. Value-Added Enhancements, provided at no cost to the City, are funding environmental and educational programs, assisting the City in promoting the destination, providing support to our Public Works and code Compliance staff in ensuring that the highly-visited Lummus Park is clean and free of issues, and assisting in our beach cleanliness efforts through the implementation of an outdoor

beachfront ashtray program. The new proposed terms also provide for the implementation of a non-motorized water sports concession in Ocean Terrace that we will promote in conjunction with Boucher Brothers, as a means of economic development for our North Beach Area, as well as a beach locker program to address issues regarding petty thefts on our public beach areas (as reported to us by our Police Department). The proposed terms take into consideration the costs associated with Boucher Brothers' implementation of the new programs; in particular the investment of capital costs for those programs, while ensuring that the City secures a financial commitment that recognizes the value of this agreement.

The Finance and Citywide Projects Committee recommended in favor of the City entering into an Agreement with Boucher Brothers for the services outlined herein. They further recommended that the renewal provisions be the same as the renewal provisions in the current Agreement, and instructed staff to meet with the Boucher Brothers to identify the appropriate benchmark to incorporate into any Renewal Provision. The Committee could not agree on the matter of the annual escalator and referred that issue to the full Commission. The recommended escalator included in the attached, proposed agreement is the greater of 3% or CPI.

Attachments

JMG/HMF/AP

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RESOLUTION NO. _____

A RESOLUTION WAIVING, BY 5/7THS VOTE, THE COMPETITIVE BIDDING REQUIREMENT, FINDING SUCH WAIVER TO BE IN THE BEST INTEREST OF THE CITY, AND APPROVING A PUBLIC BEACHFRONT CONCESSION AGREEMENT BETWEEN THE CITY AND BOUCHER BROTHERS MIAMI BEACH, LLC, FOR THE EXCLUSIVE RIGHT TO OPERATE CERTAIN CONCESSIONS IN LUMMUS PARK, OCEAN TERRACE, NORTH SHORE OPEN SPACE PARK, AND SOUTH POINTE PARK BEACH, IN MIAMI BEACH, FLORIDA, FOR THE RENTAL OF BEACH EQUIPMENT, FOOD AND BEVERAGE SERVICE, SALE OF BEACH-RELATED SUNDRIES AND SKIN CARE PRODUCTS, AND WATERSPORTS EQUIPMENT RENTALS; SAID AGREEMENT HAVING A FIVE (5) YEAR INITIAL TERM, COMMENCING RETROACTIVELY ON NOVEMBER 5, 2011, AND ENDING ON NOVEMBER 4, 2016, AND PROVIDING FOR A FIVE (5) YEAR RENEWAL TERM WHICH IS EXERCISABLE BY THE CITY; FURTHER RETROACTIVELY APPROVING THE CITY MANAGER'S EXTENSION OF THE CURRENT CONCESSION AGREEMENT FROM NOVEMBER 5, 2011, TO DECEMBER 14, 2011.

WHEREAS, on February 21, 2001, the Mayor and City Commission adopted Resolution No. 2001-24256, authorizing the issuance of an RPP which resulted in the selection of Boucher Brothers Miami Beach, LLC (Boucher Brothers) for the operation and management of beachfront concessions including beach equipment rentals, food and beverage sales, and watersport rentals on the beaches seaward of Lummus Park, Ocean Terrace and North Shore Open Space Park; and

WHEREAS, on July 18, 2001, the Mayor and City Commission adopted Resolution No. 2001-24533, authorizing the City Administration to negotiate with Boucher Brothers, as the successful proposer; and

WHEREAS, on October 17, 2001, the Mayor and City Commission adopted Resolution No. 2001-24646, approving and authorizing the Mayor and City Clerk to execute a Concession Agreement with Boucher Brothers for the operation and management of beachfront concessions including beach equipment rentals, food and beverage sales, and watersport rentals on the beaches seaward of Lummus Park, Ocean Terrace and North Shore Open Space Park; said Agreement commenced on November 5, 2001, through November 4, 2006, with an option to renew for an additional five (5) year term; and

WHEREAS, on May 18, 2005, the Mayor and City Commission adopted Resolution No. 2005-25884, authorizing the execution of an Amended and Restated Concession Agreement to memorialize certain operational issues which were not included in the original agreement; and

WHEREAS, on January 11, 2006, the Mayor and City Commission adopted Resolution No. 2006-26102, approving an Amendment to the Amended and Restated Concession Agreement; said Amendment providing for renewal of the Agreement for five (5) years, from November 5, 2006, to November 4, 2011, and memorializing certain value-added enhancements from the Concessionaire to the City; and

WHEREAS, on April 16, 2008, the Mayor and City Commission adopted Resolution No. 2008-26788, approving a Second Amendment to the Concession Agreement, said Amendment providing for the addition of a concession area adjacent to Bandshell Park; and

WHEREAS, on July 15, 2009, the Mayor and City Commission adopted Resolution No. 2009-27127, approving a Third Amendment to Amended and Restated Beachfront Concession

Agreement, which provided for the reconfiguration of a fenced storage area for storage and for a dumpster facility; and

WHEREAS, during the City Commission retreat on May 20 and 21, 2011, a discussion was held regarding the aforesated Concession Agreement, which included discussion on whether to proceed to issue a new competitive solicitation (in light of the imminent expiration of the Agreement); and

WHEREAS, Boucher Brothers is a known entity, with the organizational experience and capacity to continue to operate in Miami Beach; there is a mutual interest in continuing to consistently service our public beach areas, but with additional options that can generate potential new revenue for the City; and

WHEREAS, in light of satisfaction with the performance of the Boucher Brothers' performance under the current Concession Agreement, and a desire to ensure that a new negotiated concession agreement addresses additional desirable items, such as non-motorized watersports in North Beach, additional cleaning services, and the installation of beach lockers, the City Administration began negotiating with Boucher Brothers on a new agreement and, in the interim, also extended the existing Concession Agreement on a month to month basis; and

WHEREAS, in reviewing the current public beachfront concession program, the Administration considered potential changes to the existing agreement with Boucher Brothers that would address other issues, opportunities and concerns that have been identified and for which the public beachfront concession program can provide assistance including beach cleanliness, the extension of public beachfront concession areas, and the addition of non-motorized watersports; and

WHEREAS, Boucher Brothers has over 20 years experience in providing pool, beach, watersports, large corporate group events, and food and beverage concessions, and currently operates over 60 hotel and condominium properties throughout Florida's East Coast, as well as city-contracted public beaches in Virginia Beach, VA, Lake Michigan, Chicago, IL, and hotel properties in Naples and St. Pete's Beach; and

WHEREAS, Boucher Brothers has over 500 employees during peak season, well over 300 of which are employed in Miami Beach; and

WHEREAS, while several entities may be qualified and interested in undertaking a large-scale beachfront concession operation, the organizational and financial capacity of the concessionaire that will continue to service our highly visited public beachfronts is very important; and

WHEREAS, Boucher Brothers made the capital investment necessary to service the Lummus Park and Ocean Terrace concession areas; invested in new equipment during the renewal term; provided value-added cash contributions; and made timely annual minimum guaranteed concession fee payments, including the 2010 payment, in the amount of \$686,562.73; and

WHEREAS, Boucher Brothers is interested in continuing to service our public beach areas, and has agreed to additional terms that can generate potential new revenue for the City, including the rental of new types of luxury beachfront equipment, servicing new areas, developing a non-motorized water sports program in North Beach Open Space Park and a beach locker program, as well as continuing to provide (and offer additional) "Value-Added Enhancements" (VAE); and

WHEREAS, on December 6, 2011, proposed terms for a new concession agreement with Boucher Brothers were discussed and recommended by the Finance and Citywide Projects Committee (FCWPC); and

WHEREAS, after incorporating the comments and recommendations of FCWPC, and conducting further negotiations with Boucher Brothers, the Administration has successfully negotiated the attached new Concession Agreement with Boucher, and would recommend that the Mayor and City Commission waive, by 5/7ths vote, the competitive bidding requirement, finding such waiver to be in the best interest of the City, and approve and authorize the Mayor and City Clerk to execute the attached Agreement.

NOW, THEREFORE, BE IT DULY RESOLVED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, that the Mayor and City Commission hereby waive, by 5/7ths vote, the competitive bidding requirement, finding such waiver to be in the best interest of the City, and approve and authorize the Mayor and City Clerk to execute a new Public Beachfront Concession Agreement between the City and Boucher Brothers Miami Beach, LLC, for the Exclusive Right to Operate Certain Concessions in Lummus Park, Ocean Terrace, North Shore Open Space Park, and South Pointe Park Beach, in Miami Beach, Florida, for the Rental of Beach Equipment, Food and Beverage Service, Sale of Beach-Related Sundries and Skin Care Products, and Watersports Equipment Rentals; said Agreement having a five (5) year initial term, commencing retroactively on November 5, 2011, and ending on November 4, 2016, and providing for a five (5) year Renewal Term which is exercisable by the City; further retroactively approving the City Manager's extension of the current Concession Agreement, from November 5, 2011, to December 14, 2011.

PASSED and ADOPTED this ____ day of _____, 2011.

ATTEST:

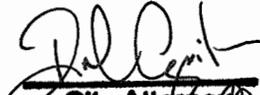
CITY CLERK

MAYOR

JMG/HMF/VAP

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**APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION**



City Attorney



Date 12/13/11

**Boucher Brothers Miami Beach LLC
Public Beachfront Concession Agreement**

**CONCESSION AGREEMENT BETWEEN
CITY OF MIAMI BEACH, FLORIDA
AND
BOUCHER BROTHERS MIAMI BEACH LLC
FOR
MANAGEMENT AND OPERATION OF PUBLIC BEACHFRONT CONCESSIONS**

THIS AGREEMENT made the ____ day of _____, 2011 (the "Effective Date"), between the **CITY OF MIAMI BEACH**, a municipal corporation of the State of Florida ("City"), having its principal address at 1700 Convention Center Drive, Miami Beach, Florida, 33139, and **BOUCHER BROTHERS MIAMI BEACH LLC**, a limited liability company of the State of Florida, with offices at 420 Lincoln Road, Suite 265, Miami Beach, Florida, 33139 ("Concessionaire").

The City hereby grants to Concessionaire, and Concessionaire hereby accepts from the City, the exclusive right to operate the following described concessions within the Concession Areas (as said term is hereinafter defined), in conformance with the purposes and for the period stated herein, and subject to all the terms and conditions herein contained and fairly implied by the terms hereinafter set forth.

SECTION 1. TERM.

- 1.1 This Agreement shall be for an initial term of five (5) years, commencing retroactively on the 5th day of November, 2011 (the "Commencement Date"), and ending on the 4th day of November, 2016 ("Initial Term").
- 1.2 Provided that Concessionaire is not in default under the Agreement, and commencing with written notice from Concessionaire, which notice shall be given in the fourth Agreement year (as such term is defined in **Subsection 1.3** hereof) of the Initial Term, and then no later than 180 days prior to the expiration of such term, Concessionaire and the City shall negotiate exclusively with each other in good faith for a period of sixty (60) days (commencing from the date of Concessionaire's notice) to extend the term of this Agreement for an additional five (5) year term (the Renewal Term). Each of the parties agrees to use its respective best efforts to negotiate such a Renewal Term, on such terms and conditions that are mutually agreed to; provided however that, as to negotiation of the following financial terms, the parties acknowledge that (i) the Minimum Guarantee (MG) amount (as defined in **Subsection 4.1**), for the first Agreement year of the Renewal Term shall be equal to the MG amount for the fifth Agreement year of the Initial Term (including the CPI Adjustments, as defined in **Subsection 4.1**); and, thereafter, the MG during the Renewal Term shall only be subject to annual increases pursuant to the CPI Adjustment; and (ii) that any negotiated amount for the Percentage of Gross (PG) payment for the Renewal Term, shall be adjusted in an amount not to exceed five percent (5%) of the percentage amount agreed to for each item/category of services provided by the Concessionaire, during the Initial Term (and as such percentages are set forth, per item/category of services, in **Subsection 4.2** hereof).

The Renewal Term shall be subject to, and require, the approval of the Mayor and City Commission.

Additionally, any such renewal shall require Concessionaire to purchase new equipment, the types and quantities of which shall be subject to the prior written approval of the City Manager or his/her designee. Concessionaire shall provide the City Manager or his/her designee, at least 180 days prior to the expiration of the Initial Term, (i) a schedule of any equipment which was replaced during the Initial Term, evidencing to the reasonable satisfaction of the City Manager or his/her designee, having expended a minimum investment of \$400,000; and, ii) an itemized list of proposed new equipment which, if the Renewal Term is approved, must be purchased by no later than the end of the third agreement year of the Renewal Term, evidencing a minimum investment in such new equipment in the amount of \$200,000; which proposed \$200,000 investment in new equipment shall be reviewed and

approved by the City Manager or his/her designee prior to commencement of negotiations for a Renewal Term.

- 1.3 For purposes of this Agreement, the "Term" shall be defined as the Initial Term and Renewal Term (if approved), and an "Agreement year" shall be defined as each one (1) year period during the Term, commencing on November 5th , and ending on November 4th .

SECTION 2. CONCESSION AREA(S).

The City hereby grants to Concessionaire the exclusive right, during the Term, to operate certain concessions, as described herein, in the following Concession Areas.

In **Subsections 2.3 and 2.4** hereof, which make reference to a Concession Area becoming "serviceable during the Term," the procedure for such determination shall be as follows:

- a) The City Manager or his/her designees shall notify Concessionaire, in writing, of the City's intent to have one (or both, as the case may be) of the Concession Areas referenced in **Subsections 2.3 and/or 2.4** put into service (the City Notice).
- b) Concessionaire shall have thirty (30) days from receipt of the City Notice to conduct its own due diligence as, in its sole professional judgment, it deems necessary to determine the economic feasibility (for Concessionaire) of putting one (or both) of the aforesated Areas into service (Concessionaire's Due Diligence Period).
- c) On or before the conclusion of Concessionaire's Due Diligence Period, Concessionaire shall provide the City Manager or his/her designee with a written report, assessing the economic feasibility of putting the Concession Area (or Areas) into service (the Due Diligence Report); provided, however, that such Report may not, as a condition of putting an Area (or Areas) into service, include any request for an extension in the Term, or for additional financial remuneration (other than what is already included in the terms of this Agreement).
- d) If Concessionaire fails to provide the City with its Due Diligence Report by the last day of the Due Diligence Period, then Concessionaire shall have waived its right to **not** put the requested Area (or Areas) into service and, in that case, shall thereafter be required to provide the services contemplated under this Agreement for such Area (or Areas) upon written notice from the City, and within such time as shall be determined (and set forth in said notice) by the City Manager his/her designee, but in no event less than sixty (60) days.
- e) If, however, the Concessionaire has timely submitted its Due Diligence Report then, following review of the report by the City Manager or his/her designee, the parties shall meet to discuss same and shall, in good faith, mutually agree upon how to proceed.

2.1 Lummus Park

This Concession Area is limited to the beach area bounded on the south by the northernmost line of the 5th Street right-of-way; bounded on the north by the southernmost line of the 14th Lane right-of-way; bounded on the west by a line 50 feet east from the easternmost edge of the Dune; and bounded on the east by either a line 60 feet west of the Mean High Water Line (MHWL), or by a line 5 feet west of the westernmost lifeguard stand (located within this Concession Area), whichever is further east.

2.1.1 13th to 14th Street Zone:

With regard to the area bounded to the north by a line 50 feet to the north of the midpoint between 13th and 14th Streets; bounded to the south by a line 50 feet to the south of the midpoint between 13th and 14th Streets; and bounded to the east and west by the easternmost and westernmost boundaries of this Concession Area, Concessionaire shall not deploy any Beach Equipment (as hereinafter defined) within this Zone unless specifically requested by an individual patron(s).

2.1.2 9th to 10th Street Zone:

With regard to the area bounded to the north by a line 50 feet to the north of the midpoint between 9th and 10th Streets; bounded to the south by a line 50 feet to the south of the midpoint between 9th and 10th Streets; and bounded to the east and west by the easternmost and westernmost boundaries of this Concession Area, Concessionaire shall not deploy any Beach Equipment, within this Zone, unless specifically requested by an individual patron(s)..

2.1.3 Southern Handicap Zone:

With regard to the area bounded to the north by a line 50 feet north of the southern boundary of this Concession Area; to the south by the southern boundary of this Concession Area; and bounded to the east and west by the easternmost and westernmost boundaries of this Concession Area, Concessionaire shall not deploy any Beach Equipment within this Zone, unless specifically requested by a handicapped patron(s).

2.1.4 Northern Handicap Zone:

With regard to the area bounded to the south by a line 50 feet south of the northern boundary of this Concession Area; to the north by the northern boundary of this Concession Area; and bounded to the east and west by the easternmost and westernmost boundaries of this Concession Area, Concessionaire shall not deploy any Beach Equipment within this Zone, unless specifically requested by a handicapped patron(s).

The City and Concessionaire agree and acknowledge that the public's use of the beach within the Concession Areas is of prime consideration. Accordingly, the Concessionaire shall use best efforts to strive to maintain approximately forty nine (49%) percent of the beach frontage within the entire Lummus Park beach area free and clear of Concessionaire's, Beach Equipment, Watersports Equipment (as hereinafter defined) and any other facilities and equipment, so that such portion of the beach may remain free and clear for the public's use and enjoyment.

2.2 Ocean Terrace

This Concession Area is limited to the beach area bounded on the south by the northernmost line of the 73rd Street right-of-way; bounded on the north by the southernmost line of the 75th Street right-of-way; bounded on the west by a line 50 feet east from the easternmost edge of the Dune; and bounded on the east by either a line 60 feet west of the Mean High Water Line (MHWL), or by a line 5 feet west of the westernmost lifeguard stand (located within this Concession Area), whichever is further east.

2.3 North Shore Open Space Park

This Concession Area, should it become serviceable during the Term, as determined pursuant to the procedures established in **Subsections 2(a) – (e)**, is limited to the beach area bounded on the south by the northernmost line of the 79th Street right-of-way; bounded on the north by the southernmost line of the 87th Street right-of-way; bounded on the west by a line 50 feet east from the easternmost edge of the Dune; and bounded on the east by either a line 60 feet west of the Mean High Water Line (MHWL), or by a line 5 feet west of the westernmost lifeguard stand (located within this Concession Area), whichever is further east.

2.4 South Pointe Park Beach

This Concession Area, should it become serviceable during the Term, as determined pursuant to the procedures established in **Section 2(a) – (e)**, is limited to the beach area bounded on the south by a line 50 feet north of the of the South Pointe Park Pier; bounded on the north by lifeguard stand, bounded on the west by a line 50 feet east from the easternmost edge of the Dune; and bounded on the east by either a line 60 feet west of the Mean High Water Line (MHWL), or by a a line 5 feet west of the westernmost lifeguard stand (located within this Concession Area), whichever is further east.

2.5 Lifeguard Stand/Lifeguard Stand Zone

City and Concessionaire acknowledge that, as of the Commencement Date, there are lifeguard stands within the Concession Areas. As such, City and Concessionaire agree that in the event additional lifeguard stands are added within the Concession Areas during the Term, the size of the buffer areas around the lifeguard stands shall be reduced so as not to further reduce the size of a corresponding Concession Area.

Concessionaire shall not use or deploy any Beach Equipment, Watersports Equipment, or any other facilities and/or equipment on or within those portions of the beach where lifeguard stands are located, including the area extending from the easternmost foot of the Dune to the shoreline, and bounded by a line one hundred (100) feet (each) to the north and south of a lifeguard stand.

2.6 Public Use

Notwithstanding the Concession Areas granted to Concessionaire in this Section 2, Concessionaire hereby acknowledges and agrees that such Areas, along with any and all other public beachfront areas not specifically identified herein, are public and, as such, must remain open, accessible and available for the use and enjoyment of the public, whether or not the public chooses to use any of Concessionaire's facilities and/or equipment, purchase its products, or engage in any of the services it provides. In the event that a member of the public is within a particular Concession Area, Concessionaire agrees to allow for his/her quiet and peaceful enjoyment of same.

2.7 Buffer Zones

City and Concessionaire acknowledge that there are certain areas within Lummus Park Beach, Ocean Terrace Beach, North Shore Open Space Park Beach, and South Pointe Park Beach, that either lie outside of the respective defined Concession Areas, or where Concessionaire's use is limited and/or restricted, including Lifeguard Facility Zones (as defined in **Subsection 2.5**); Handicap Zones (as defined in **Subsections 2.1.3 and 2.1.4**), and other defined zones (as defined in **Subsections 2.1.1 and 2.1.2**); all of which are designed to facilitate public access to the ocean and shoreline, and create buffer zones between the Concession Areas and Lifeguard stands.

City and Concessionaire acknowledge that buffer zones around lifeguard stands shall not apply to areas of the beach that do not fall within a defined Concession Area. One such example would be the beachfront adjacent to a private upland owner's property (unless the City's Rules and Regulations for Beachfront Concessions, as same may be amended from time to time, expressly provide otherwise).

SECTION 3. USE(S).

Concessionaire is hereby authorized to conduct the following kinds of businesses and provide the following kinds of services within the Concession Areas, all of which, shall be provided at Concessionaire's sole cost and expense:

3.1 Rental of Beach Equipment

This shall mean, and generally include, the rental of beach chairs (including lounge chairs), pads, umbrellas, sun canopies, and such other related equipment as may be approved by the City Manager or his/her designee. For purposes of this Agreement, the term "Beach Equipment" shall also include beach lockers, if approved and authorized by the City pursuant to the Beach Locker Program contemplated in **Subsection 3.1.7** hereof.

The City herein approves the rental of Beach Equipment, and the prices for same, as set forth in **Exhibit 3.1**. Any amendments to **Exhibit 3.1**, whether as to type(s) of Beach Equipment to be rented, or as to changes in prices for same, must be approved in writing by the City Manager or his/her

designee prior to such changes being implemented within the Concession Area(s) (and, if approved, an updated **Exhibit 3.1** will be incorporated into this Agreement).

- 3.1.1 The condition and quality of Beach Equipment shall at all times be maintained in good working order and condition, and in a first-class manner which is equal to, or better than, the condition and quality of beach equipment found in public beach concessions in other world class beach resorts on par with the City of Miami Beach. It is the City's intent, and Concessionaire hereby agrees and acknowledges same, to develop and promote world class public beach concession facilities and operations that would be comparable to those found at other world class public beach concession facilities. Accordingly, Concessionaire shall not only, at a minimum, maintain all Beach Equipment placed within the Concession Areas in good working order and condition, but shall adhere, as indicated in this subsection, to the highest ongoing maintenance standards for same.

Attached as **Exhibit 3.1.1** is a full inventory of all Beach Equipment contemplated for use as of the Commencement Date, including types and numbers (per item); dates of lease and/or purchase; and initial condition, established as of the date of inventory. Throughout the Term, all Beach Equipment shall be replaced no later than the fifth year after purchase, unless it is necessary, due to the condition of Beach Equipment, to replace such Equipment prior to the fifth year after purchase. Within thirty (30) days following the Effective Date, Concessionaire shall provide a plan and schedule for the ongoing replacement and/or updating of Beach Equipment throughout the Term.

- 3.1.2 The design, type, material, and color of any and all Beach Equipment shall be submitted to the City's Planning Department, for its review and approval, no more than five (5) business days after the Effective Date. A photo or photos of the City-approved Beach Equipment shall be attached and incorporated as **Exhibit 3.1.2**. The City shall provide written notice to Concessionaire of any Beach Equipment not approved by the Planning Department, and the Concessionaire shall have seventy-two (72) hours to remove such Equipment. Thereafter, Concessionaire shall not change, alter, or modify the design, type, material, and color of any City-approved Beach Equipment without the prior written consent of the City Manager or his/her designee (and, if so approved, an updated **Exhibit 3.1.2** will be incorporated into this Agreement).
- 3.1.3 With regard to an individual Concession Area, all Beach Equipment within that Area shall be placed substantially in accordance with the City-approved site plans for such Area. The approved site plan for each Concession Area shall be attached and incorporated as **Exhibit 3.1.3** and each individual Concession Area shall be labeled on the Exhibit. Concessionaire shall not deviate from or alter an approved site plan without the prior written consent of the City Manager or his/her designee.
- 3.1.4 The set-up of Beach Equipment placed within a Concession Area shall be substantially in accordance with the approved site plan for that Area. The "Set-Up Period" shall commence daily, before 10:00AM (or, in the event of inclement weather, as soon thereafter as such weather permits). During the Set-Up Period, Concessionaire shall be permitted to set up to the maximum number of Beach Equipment allowable for that particular Area (as defined in **Subsection 3.1.6**). In addition to conformance with the approved site plan, daily placement of Beach Equipment during the Set-Up Period shall be in accordance with, and shall not exceed, the maximum number, per Area, set forth in **Subsection 3.1.6**.
- 3.1.5 The parties acknowledge that Concessionaire's patrons may themselves relocate chairs and other Beach Equipment within a Concession Area, and/or to an immediately adjacent Buffer Zone. Such relocation shall generally be permitted; provided that, in the aggregate,

Concessionaire shall not materially alter, nor allow to be materially altered, the configuration of a particular Concession Area (from what is set forth in the approved site plan for that Area) and/or an adjacent Buffer Zone. In such event, Concessionaire shall be responsible for promptly correcting any material alteration to bring the Concession Area back into substantial conformance with the approved site plan.

Moreover, if Concessionaire elects to replace a certain number of standard chairs with luxury chairs (above the number of luxury chairs currently permitted under this Agreement, but not to exceed the aggregate maximum number of chairs permitted under this Agreement), and if at any time thereafter a patron desires a standard chair which is unavailable, due to such replacement, then Concessionaire shall provide the patron with a luxury chair at the standard chair rate.

Notwithstanding anything in this **Subsection 3.1.5**, the City's Ocean Rescue Division shall at all times have the sole and absolute discretion to require Concessionaire, and/or Concessionaire's patrons, to relocate chairs and other Beach Equipment in the event that such chairs and/or Beach Equipment in any way impede and/or obstruct sightlines, or have any other effect whatsoever which would directly or indirectly impede the performance of Ocean Rescue activities. Concessionaire will use best efforts to cooperate with Ocean Rescue to promptly ensure compliance with the preceding requirement.

- 3.1.6 The City and Concessionaire agree and acknowledge that the public's use of the beach is a prime consideration and must be balanced with the services to be provided to the public, and the respective financial remunerations to City and Concessionaire pursuant to this Agreement. Accordingly, notwithstanding the approved site plans and maximum numbers set forth in **Subsection 3.1.3** hereof, Concessionaire further agrees that, notwithstanding its right to set up its maximum numbers during the Set-Up Period, if during the period of time between the Set-Up Period and 1:00PM Eastern Standard Time (or 2:00PM daylight savings time, as applicable) on any day during Concessionaire's hours of operation, more than twenty-five percent (25%) of Concessionaire's maximum number of chairs are vacant ("vacant" being defined for purposes of this subsection as not being rented), then Concessionaire shall remove, at 1:00PM EST (or 2:00PM daylight savings time, as applicable) that day, from the particular area, that number of chairs that equates to the difference between the percentage of vacant chairs and twenty-five percent (25%) of such chairs. For example, assuming that 100 chairs are the maximum, if 100 chairs are set up in an area during the Set-Up Period, and 60 are rented and 40 are vacant then, at 1:00PM EST (or 2:00PM, as applicable), Concessionaire must remove 15 chairs, which equals the difference between the actual number of vacant chairs minus 25% of the maximum number of chairs allowable during the Set-Up Period. If chairs are removed as provided in the preceding sentence, Concessionaire may, later that same day, increase the number of chairs based upon demonstrated increased demand; provided, however, that in no event shall the increased number of chairs in any particular Concession Area exceed the maximum number for that Area by more than twenty percent (20%), without the prior written consent of the City Manager or his/her designee.

Notwithstanding the preceding paragraph, within thirty (30) days after the end of each contract year, City and Concessionaire may meet, as provided in the last paragraph of **Section 6** hereof, to review and, subject to mutual agreement, revise the maximum numbers set forth in **Subsection 3.1.3**, and the formula for removal of vacant chairs set forth in this **Subsection 3.1.6**.

- 3.1.7 Concessionaire shall provide, within thirty (30) days from the Effective Date, a design and plan for the implementation of a Beach Locker Program (the "Program"), including proposed pricing, for review and approval by the City Manager or his/her designee. If, following review of

Concessionaire's plan, the City Manager or his/her designee elects to have Concessionaire implement the Program, then the Manager or his/her designee shall provide written notice to Concessionaire, and Concessionaire shall implement the Program no later than ninety (90) days from receipt of such notice; provided, however, that the parties agree that this initial implementation only contemplates the implementation of a "pilot program" for a period of one (1) year (which term shall commence upon: i) Concessionaire's implementation of the Program; or ii) the date which is ninety (90) days from Concessionaire's receipt of the City's notice, whichever comes first). At least sixty (60) days prior to the end of the one (1) year term of the pilot Program, the City and Concessionaire shall meet and, in good faith, mutually agree upon whether to require Concessionaire to continue to operate the Beach Locker Program throughout the remainder of the Term; provided, however, that if Concessionaire and the City cannot mutually agree on whether Concessionaire should continue to operate the Program (or the terms and conditions for operation of same), then the City Manager or his/her designee, at their sole option and discretion, may assume and undertake – whether through the City or by contracting with a third party vendor – operation of a beach locker program within the Concession Areas, without any liability to the City under this Agreement.

The approved plan, design, and pricing for Concessionaire's Beach Locker Program shall be incorporated as **Exhibit 3.1.7** hereto (Initially, this exhibit shall reference the plan for the pilot program and, thereafter, if City and Concessionaire mutually agree to Concessionaire's continued operation of the Program throughout the remainder of the Term, **Exhibit 3.1.7** shall be updated, as required, to reference any changes in the Program as a result of transition from pilot to permanent status). Following approval by the City Manager or his/her designee, any subsequent changes in the Program plan, design, and/or pricing must be approved, in writing, by the Manager or his/her designee prior to such changes being implemented (and an updated exhibit will be incorporated into this Agreement).

3.1.8 The Concessionaire shall provide outdoor ashtrays in accordance with the Public Beachfront Outdoor Ashtray Program contemplated in **Subsection 3.9.5**.

3.2 Food and Beverage Service.

3.2.1 Concessionaire shall prepare, or cause to be prepared, for sale within the Concession Areas, such cooked, prepared, and/or prepackaged foods and non-alcoholic beverages, as those set forth in the attached **Exhibit 3.1**. However, actual cooking and heating from Concessionaire's on-site facilities shall not be allowed, unless approved by the City Manager or his/her designee pursuant to **Subsection 3.2.8**. The City herein approves the types of food and beverages, and prices for same, as set forth in **Exhibit 3.1**. Any amendments to **Exhibit 3.1**, whether as to type of food and beverages to be sold, or as to changes in prices for same, must be approved, in writing, by the City Manager or his/her designee prior to such changes being implemented within the Concession Area(s) (and, if approved, an updated **Exhibit 3.1** will be incorporated into this Agreement).

3.2.2 Concessionaire shall be permitted to utilize no more than five (5) non-motorized, stationary carts in the Lummus Park Concession Area (as defined in **Subsection 2.1**), to dispense ice cream and frozen lemonade. The design, size, type, material, and color of such carts shall be reviewed and approved in writing by the City's Planning Department. The location of same shall be designated within Concessionaire's approved site plan (as referenced in **Exhibit 3.1.3**). A photo (or photo(s)) of the City-approved carts shall be incorporated herein as **Exhibit 3.2.2**. Thereafter, Concessionaire shall not change, alter, or modify such City-approved carts without the prior written consent of the City Manager or his/her designee (and, if so approved, an updated **Exhibit 3.2.2** will be incorporated into this Agreement).

- 3.2.3 Concessionaire acknowledges that, as of the Commencement Date, Concessionaire itself is providing the food and beverage services contemplated under this Agreement. Notwithstanding the preceding sentence, Concessionaire may, at any time during the Term, subcontract with another entity ("Subconcessionaire") to provide food and beverage services, within the Concession Areas, in the manner and to the extent contemplated under this **Subsection 3.2**, subject to the following: i) Concessionaire shall submit a minimum of three (3) potential Subconcessionaires for the City Manager's or the City Manager's designee's prior review and written approval; and ii) any proposed contract or agreement with a City-approved Sub-Concessionaire shall also be subject to the prior written approval of the City Manager or his/her designee.

Notwithstanding the preceding paragraph, and because the parties agree and acknowledge that the provision of food and beverage services are a vital and principal component of this Agreement, there shall be no interruption in Concessionaire's provision of food and beverage services at any time during the Term (except during events of force majeure, as defined herein). Accordingly, in the event that the City Manager or his/her designee declines to approve a Subconcessionaire and, thereafter, Concessionaire itself fails to resume to provide the non-heated food and beverage services contemplated under this Agreement within three (3) business days, then the City Manager, at his/her sole option and discretion, may declare the Agreement in default; provided further that, for purposes of an event of default by Concessionaire pursuant to this **Subsection 3.2.1**, no extended cure period (as may be provided under **Subsection 13.3**) shall be permitted.

- 3.2.4 All food and beverages sold within the Concession Areas will be properly prepared and served in compliance with all applicable health and sanitary standards, laws and regulations. Concessionaire shall use products to serve food and beverage that are environmentally friendly. The use of Styrofoam containers and plastic (or other non-biodegradable) straws is strictly prohibited.
- 3.2.5 The quality of food and beverages contemplated in **Subsection 3.2.1**, and food and beverage service, will be first-rate and comparable to similar food and beverage operations at at public beach concessions in other world class beach resorts on par with the City of Miami Beach.
- 3.2.6 In addition to Concessionaire's general maintenance obligations for the Concession Areas, as set forth in **Section 10** hereof, all food and beverage dispensing facilities, and the immediately surrounding 50-foot areas, shall at all times be maintained in a clean and sanitary manner. All food and beverage dispensing facilities where heating of food occurs (if allowed pursuant to **Subsection 3.2.8**) shall be properly cleaned, and Concessionaire shall ensure that products used to prepare or heat food are properly disposed of. At least one supervisory employee must possess a Food Service Management Certification issued by a County Public Health Department in Florida. In addition, each food and beverage dispensing facility must be licensed by the Florida Department of Business Regulation, Division of Hotels and Restaurants, the Department of Agriculture, and as may further be required by State law and/or by corresponding agencies.
- 3.2.7 Food and beverage services shall be offered daily to patrons at all times during the Concession Areas' hours of operation (as set forth in **Section 9**); provided, however, that if Concessionaire can show, to the City Manager or his/her designee's reasonable satisfaction, that if either an increase or decrease in demand for such service exists in a Concession Area then, in that event, Concessionaire may request, which request shall be subject to the City Manager or his/her designee's prior written consent, an extension or decrease, in the hours of service for that Area.

3.2.8 Notwithstanding the prohibition on cooking, as set forth in **Subsection 3.2.1**, the City Manager or his/her designee may, in their sole discretion, allow food heating by means of battery power, solar power, or propane gas systems, subject to the following: i) Concessionaire shall submit a request, in writing, to the City Manager or his/her designee, requesting approval to allow heating, and listing where such heating is proposed to occur (i.e. in which Concession Area); ii) such request shall include a list of the food that requires heating and what type of heating process is proposed; iii) Concessionaire shall obtain all necessary regulatory reviews and approvals to permit the type of heating proposed (including without limitation, review and approval from the City's Planning Department and Fire Department), with all such costs to obtain such approvals to be borne solely by Concessionaire; and iv) if approved, use, handling, and storage of batteries, solar power, or propane must comply with all applicable codes and standards. Notwithstanding the preceding, the City may, upon ninety (90) days prior written notice to Concessionaire, rescind any such approval for heating of food, with or without cause, and without any liability to the City under this Agreement.

3.3 Sale of Beach-Related Sundries and Skin Care Products

Beach-related sundries shall generally include the sale of those items identified in **Exhibit 3.1**, in accordance with the price ranges set forth therein. Any amendments to **Exhibit 3.1**, whether as to changes and/or additions of items to be offered for sale, or in the respective price ranges for same, must be approved in writing by the City Manager or his/her designee, prior to such changes and/or additions being implemented (and an updated **Exhibit 3.1** will be incorporated into this Agreement).

Skin Care Products shall include those lotions, oils and other skin care products identified in **Exhibit 3.1**, in accordance with the prices for same set forth therein. Any amendments to **Exhibit 3.1**, whether as to types of Skin Care Products to be sold, or as to changes in prices for same, must be approved in writing by the City Manager or his/her designee, prior to such changes being implemented (and an updated **Exhibit 3.1** will be incorporated into this Agreement).

3.3.1 Notwithstanding the City's approval of the sale of Beach-Related Sundries and Skin Care Products pursuant to this Subsection, the City Manager may subsequently elect, in his sole option and discretion (and with or without cause), to rescind such approval, upon ninety (90) days prior written notice to Concessionaire, and without any liability to the City under this Agreement.

3.4 Watersports Equipment Rentals

Watersports Equipment Rentals shall include the rental of both motorized and non-motorized watersport equipment, as provided for in this Section.

3.4.1 City and Concessionaire agree and acknowledge that, for the active watersports channel existing within the Lummus Park Concession Area (at 9th street), as of the Commencement Date, Watersports Equipment rentals only includes, and is only permitted for, the following Watersports Equipment: eight (8) waverunners, one (1) parasail boat, one (1) banana boat, and six (6) kayaks.

Any future requests for new and/or additional Watersports Equipment (other than the Watersports Equipment referenced in the preceding paragraph) must be approved, in writing, by the City Manager or his/her designee prior to implementation of same. The City herein approves the rental of Watersports Equipment, in the types and numbers defined in this Subsection, and the prices for same, as set forth in **Exhibit 3.1**. Any amendments to **Exhibit 3.1**, whether as to type(s) or number(s) of Watersports Equipment, or as to changes in prices for same, must be approved, in writing, by the City Manager or his/her designee prior to such changes being implemented (and an updated **Exhibit 3.1** will be incorporated into this Agreement).

- 3.4.2 City and Concessionaire herein acknowledge and agree that, as additional consideration for the City entering into this Agreement, City desires that Concessionaire establish and operate a non-motorized Watersports Equipment concession in the Ocean Terrace Concession Area. The non-motorized Watersports Equipment rentals for the Ocean Terrace Concession Area shall be provided and implemented by Concessionaire no later than ninety (90) days following the City's final approval of a designated watersports channel within that Area.

Concessionaire shall provide to the City Manager or his/her designee for their review and approval, within sixty (60) days following the approval of the channel, the final list of the proposed non-motorized watersports equipment to be made available for rental (which may include, for example purposes only, the rental of paddle boards, kayaks, and paddle boats/bikes) and the pricing for such, which shall be incorporated into **Exhibit 3.1**. Any amendments to **Exhibit 3.1**, whether as to type(s) or number of non-motorized watersport equipment to be rented, or as to changes in prices for same, must be approved in writing by the City Manager or his/her designee prior to such changes being implemented within the Concession Area(s), and a new updated **Exhibit 3.1** will be incorporated into this Agreement.

- 3.4.3 City and Concessionaire agree and acknowledge that Watersports Equipment rentals shall only be permitted from a designated watersports channel approved by the City.

3.4.3.1 Concessionaire agrees, at its sole cost and expense, to provide one off-duty police officer during (i) certain City-designated major event periods (as such major event periods may be determined by the City Manager or his/her designee, and as to which the City shall provide a list, no later than ninety (90) days from the commencement of each Agreement year, with the dates of such major events/event periods that the City knows of for such Agreement year, and which list may be amended by the City from time to time); and, ii) federal holidays, to monitor the motorized Watersports Equipment channel during all times that such channel is operating.

3.4.3.2 Concessionaire's future use of any alternate or additional watersports channel(s) is subject to the prior written approval of the City Manager or his/her designee, who shall first obtain a non-binding recommendation from the City's Marine Authority Board.

3.4.3.3. All watersports channels shall be used as an access route through which users of Watersports Equipment may leave the beachfront and enter open water. Said channel(s) shall be a minimum of fifty (50) feet in width and shall extend 300 feet east, perpendicular to the shore line, and be marked by removable high visibility orange colored buoys which shall be a minimum of eighteen (18) inches in diameter. There shall be a minimum of eight (8) buoys on each side of the channel, equally spaced. All buoys shall be clearly marked "IDLE SPEED" in six (6") inch high letters. Specifications or a sample of the line to be used for the channel buoys must be sent to the appropriate regulatory agency for approval prior to use.

3.4.3.4 Motorized Watersports Equipment shall not exceed "idle speed" within the channel.

- 3.4.4 All Watersports Equipment operations must have a "chase" watercraft and properly certified concession staff, readily available to operate same. The chase watercraft must be positioned at the eastern end of the watersport channel, if any rented watercraft are in the water, unless the chase watercraft is being used for other customary life safety related functions related to the watersport operation(s). The chase watercraft must be capable of catching, and performing, a proper rescue of all Watersports Equipment which is available for rent. The chase watercraft must be readily available for use and be safely located on shore, or within the channel, unless

monitoring or recalling a patron. In addition to these requirements, all chase watercraft operators shall wear high visibility yellow colored personal floatation devices when operating the chase watercraft. When the chase watercraft is on shore, said high visibility yellow colored personal floatation device shall be placed on top of the chase watercraft, in order to identify same. All concession staff must be properly certified (complete boater's education course approved by the NASBLA or pass the State of Florida "How to Boat Smart" course), and wear the required identification badge to reflect same, and staff must be readily available at all times that the concession is operating.

- 3.4.5 The operation of all Watersports Equipment shall be conducted east of the 300-foot swimming area ("guarded area") and no closer than 400 feet of any lifeguard stand. Concessionaire is responsible for instructing clients on the safe operation of Watersports Equipment, including advising them to stay away from all "guarded areas." The guarded area extends 300 feet east of the shoreline and 100 feet from the nearest bather or swimmer.
- 3.4.6 The Concessionaire must instruct all users as to all safety precautions, including avoidance of swimmers and bathers, and inform said users of any and all municipal, County, State and Federal requirements associated with the use of the respective watersport equipment.
- 3.4.7 All Concession activities, including the placement and/or use of chairs, umbrellas, sun canopies, or other Beach Equipment, food and beverage service dispensing facilities, Watersports Equipment, and any and all other equipment and facilities, shall not obstruct the view of a lifeguard. Concessionaire shall promptly comply with any request from a lifeguard to relocate any item(s) that obstructs his/her view.
- 3.4.8 Concessionaire shall not knowingly permit anyone under the minimum age, as required by Federal, State, County, or municipal law (unless appropriate written consent of the parent or guardian is provided pursuant to such applicable law), nor anyone under the influence of alcohol or other mood altering drug, to rent, or use any Watersports Equipment. Concessionaire shall not knowingly permit anyone under the age of eighteen (18) to rent Watersports Equipment. Concessionaire shall not knowingly permit anyone under the age of 16 to operate motorized Watersports Equipment. Concessionaire shall not knowingly permit a person 21 years of age or younger to operate a marine vessel of 10 horse power or more, unless such person has in his/her possession aboard the vessel, a photo identification and proof of completion of a boater education course approved by the State of Florida and/or the National Association of State Boating Law Administrators.
- 3.4.9 Concessionaire shall supply all users of Watersports Equipment with the appropriate United States Coast Guard approved "personal flotation device" in appropriate sizes. Proper "personal flotation devices" must be "speed rated".
- 3.4.10 All Watersports Equipment and chase watercraft shall be maintained at Concessionaire's sole cost and expense and shall meet the registration and licensing requirements of the State of Florida, and any other governing agency. Concessionaire agrees that all motorized watersport equipment shall be at minimum of commercial grade and quality. All motorized watersport equipment shall be no more than two (2) model years old. City reserves the right to request proof of title or other proof of purchase related to such Equipment in order for the City to properly monitor this requirement. To assure that all Watersport Equipment is at all times maintained in accordance with the highest industry standards, the City reserves the right to request periodic service and/or maintenance reports to be provided and, if required, certified or otherwise guaranteed by Concessionaire, at its sole cost and expense. All of Concessionaire's motorized Watersport Equipment shall have fuel injected four (4) stroke engines.

- 3.4.11 All motorized Watersports Equipment shall be equipped with "kill-switches" in proper working order.
- 3.4.12 All Watersports Equipment shall be clearly marked to identify the Concessionaire with ten-inch (10") high, one and one-half inch (1 ½") thick, contrasting numbers.
- 3.4.13 Any fueling of Watersports Equipment or chase watercraft on the beach must comply with FDEP, Miami-Dade County DERM and USCG Regulations.
- 3.4.14 Concessionaire must be equipped, on site, with operating fire extinguisher and cellular/wireless type telephone.
- 3.4.15 Concessionaire must provide renters or users a thorough demonstration of the operation of the rented Watersports Equipment and use of all safety equipment including, but not limited to, handling characteristics of Watersports Equipment. Furthermore, all renters and users must be instructed as to the location and proper usage of all on-board safety equipment including, but not limited to fire extinguisher(s).
- 3.4.16 Concessionaire must inform all Watersports Equipment renters or users as to the locations of known diving areas and reefs, how to identify a diving flag, and instruct them to maintain a minimum 100' distance from dive flags, swimmers, other boaters, markers and marked areas.
- 3.4.17 Concessionaire shall have, at a minimum during peak usage ("peak usage" defined as anytime in which eight (8) motorized Watersports Equipment items are present at the subject Concession Area), three (3) employees on site while the Watersports Equipment concession is open; provided, however, that this number may be increased from time to time, if required by the City Manager or his/her designee. Concessionaire shall have at least one (1) Red Cross Lifeguard Course certified employee on duty at all times during which the Watersports Equipment concession is open.
- 3.4.18 Any and all Watersports Equipment concession activities shall only be conducted when the weather conditions and the conditions of the surf permit for the safe operation of same. Concessionaire shall inform each and every prospective patron that if the Ocean Rescue Division of the City of Miami Beach Fire Department (Ocean Rescue) determines that conditions are unsafe or hazardous, he or she may be required to immediately come to shore and discontinue using the Watersports Equipment. In the event that conditions are of such a nature that the Ocean Rescue deems them unsafe or hazardous to the individuals who are operating Watersports Equipment, or to the swimmers and bathers in the vicinity of said Equipment, the Ocean Rescue shall request that Concessionaire cease operating its respective Watersports Equipment concession. Once it is concluded that unsafe or hazardous conditions exist, the Ocean Rescue shall notify Concessionaire.
- 3.4.20 Concessionaire agrees and understands that the maximum horsepower of any motorized Watersports Equipment intended to be used for rental purposes shall not exceed 110 horse power, and chase watercraft shall not exceed 140 horse power. However, in the event the 110 or 140 horse power models are no longer manufactured and/or cost prohibitive, then the City Manager or his/her designee may approve, at their sole discretion, other comparable equipment.
- 3.4.21 Concessionaire agrees and understands that in the event of any accident or collision involving any of its Watersports Equipment which involves an injury to persons (whether minor or major), it must complete and submit a written report to the City's Marine Patrol, with copies to the City's

Ocean Rescue Division and Office of Asset Management, within twenty-four (24) hours of the incident occurring, or upon notification thereof by a third party(ies).

- 3.4.22 In the event the City Manager or his/her designee determine, at their sole option and discretion, that the provision of motorized or non-motorized Watersports Equipment is no longer desired, then the City Manager may revoke Concessionaire's right to provide one or both of these services, with or without cause, and without any liability to the City under this Agreement, upon ninety (90) days prior written notice to Concessionaire. Any minimum guarantee paid by Concessionaire to the City for motorized Watersports Equipment, shall be prorated and/or adjusted accordingly as of the date of revocation of approval for said motorized Watersports Equipment service(s), and no further payment shall be required for same during the Term, unless the City Manager reinstates the motorized Watersports Equipment service(s), at which time the payment provisions of **Section 4** shall once again apply. Because a minimum guarantee on this service(s), is paid in advance, City agrees to refund such pro-rated minimum guarantee (for motorized Watersports Equipment services only) to Concessionaire upon sixty (60) days written demand from Concessionaire.
- 3.4.23 Concessionaire shall maintain any area where Watersports Equipment is placed within the Concession Area clean and free of litter and debris. Any spillage of any chemical or liquid, other than water, shall be cleaned immediately and Concessionaire shall take whatever necessary steps are necessary to remediate, using customary and reasonable efforts, any soiled or impacted area.

3.5 Concession Facilities and Concession Storage Facilities

- 3.5.1 The design, materials, color, signage, etc. of Concessionaire's dispensing facilities and storage facilities must be required and approved by the City's Planning Department, and receive design review approval prior to the Effective Date. The City-approved facilities shall be incorporated herein as **Exhibit 3.5.1**. The size of Concessionaire's food and beverage trailers shall be no larger than 8 feet by 12 feet; provided, however, if heating is allowed, then the size of that food and beverage trailer shall be no greater than 8 feet by 16 feet. The location of facilities must also be approved by the City Manager or his/her designee, and shall be designated within Concessionaire's approved site plan (as referenced in **Exhibit 3.1.3**). Concessionaire shall not deviate from or change the type, design, and/or location of its proposed dispensing or storage facilities without the prior written consent of the City Manager or his/her designee.
- 3.5.2 Prior to the Effective Date, Concessionaire shall provide the City Manager or his/her designee with a written plan for storage and removal of Concessionaire's Beach Equipment, dispensing facilities, and Watersports Equipment; which plan shall be reviewed and approved by the City Manager or his/her designee. This plan shall include the use of any storage facilities contemplated in **Subsection 3.5.1** above.
- 3.5.3 In the event that, at any time during the Term, the State of Florida determines that Concessionaire's dispensing and storage facilities (for purposes of this subsection, the "facilities") do not comply with State law, then Concessionaire shall, at its sole cost and responsibility, immediately take such actions, as necessary, to bring same into compliance, including, without limitation, revising its storage plan and/or either altering or removing the non-complying facilities from the Concession Areas. Concessionaire herein further acknowledges that it shall not hold the City liable for any expenses and/or other damages incurred as a result of its non-compliance with State requirements pursuant to in this subsection (including, without limitation, any cost or other liabilities incurred by Concessionaire as a result of removal of the facilities or, in the alternative, bringing such facilities into compliance with State law.

3.6 Hurricane Evacuation Plan.

Concessionaire agrees that fifty percent (50%) of all its storage and dispensing facilities, Beach Equipment, Watersports Equipment, and any other equipment and facilities used in the concession operations will be removed from the beachfront immediately within eight (8) hours of the issuance of a Hurricane Watch by the Miami-Dade County Office of Emergency Management, and stored at an approved, private, off-site location, and the remaining fifty percent (50%) of the above-referenced facilities and equipment will be removed from the beachfront immediately within eight (8) hours of the issuance of a Hurricane Warning by the Miami-Dade County Office of Emergency Management, and stored at an approved, private, off-site location. Prior to the Effective Date, Concessionaire shall provide the City Manager or his/her designee with a hurricane preparedness/evacuation plan, which shall include the location, and proof of ownership and/or control by Concessionaire (either through a deed, lease or other form satisfactory to the City Manager or his designee), of its proposed hurricane storage facility; both of which shall be attached as **Exhibit 3.6** to this Agreement.

3.7 Sea Turtles.

Concessionaire agrees and understands that the State of Florida has advised that in order to place facilities and/or equipment on the beach, surveys for marine turtle nesting activity must be ongoing, and have been conducted daily for 65 days previous to the initial date of operation, or beginning May 1, of each year. The Concession Area(s) are currently surveyed by the Beach Maintenance Division of the Miami-Dade County Parks and Recreation Department.

- a. It is the responsibility of the Concessionaire to abide by any order issued by the State of Florida and/or cooperate with Miami-Dade County to ensure that nesting surveys may be conducted in accordance with the conditions set forth by the State.
- b. In the event an unmarked marine turtle nest is exposed, or a dead, injured, or sick marine turtle is discovered, the Florida Marine Patrol (1-800-DIAL-FMP) shall be notified immediately such that appropriate conservation measures may be taken.
- c. No temporary lighting associated with the concession will be permitted at any time during the marine turtle nesting season and no permanent lighting is authorized.
- d. The placement and removal of facilities and equipment on the beach seaward of 230 feet from the high water line shall be conducted during daylight hours and shall not occur in any location prior to completion of the necessary marine turtle protection measures.
- e. The beach area seaward of the 230-foot setback from the high water line should be cleared of all furniture and equipment, except lifeguard equipment, at nights during the turtle-nesting season.
- f. Disturbing the existing beach, Dune topography and vegetation is prohibited.

3.8 City Business Tax Receipts.

Concessionaire shall obtain, at its sole cost and expense, any Business Tax Receipts (BTRs) required by City law, as amended from time to time, for the each of its proposed uses, as contemplated in **Section 3** of the Agreement. BTR's shall be obtained for each proposed use within a particular Concession Area. For example, in the Lummus Park Concession Area, the Concessionaire would be required to obtain four (4) BTR's; one each for: (i) rental of Beach Equipment; (ii) food and beverage service; (iii) sale of Beach-Related Sundries/Skin Care Products; and (iv) rental of Watersports Equipment)

3.9 Value-Added Enhancements

The Concessionaire agrees to provide the following Value-Added Enhancements throughout the Term:

- 3.9.1 An annual donation to the City, in the amount of five-thousand dollars (\$5000) per year, to be utilized by the City for scholarships and contributions to philanthropic organizations, with an emphasis on marine-related and children-related recipients. The City shall make the sole and final determination as to the recipient organization(s).

- 3.9.2 An annual donation to the City, in the amount of five-thousand dollars (\$5000) per year, to be utilized by the City in support of environmental organizations and programs. The City shall make the sole and final determination as to the recipient organization(s).

The monetary donations in **Subsections 3.9.1** and **3.9.2** above shall be submitted to the City, in full, at the commencement of each contract year during the Term.

- 3.9.3 Concessionaire shall establish and maintain, at its sole cost and expense, a lounge chair "promotional towel program" in the "Luxury" areas of the Concession Areas, that would provide for the promotion of the City of Miami Beach. Said promotional towel program would provide for a minimum of 600 imprinted lounge chair towels, which shall be replaced with 600 new imprinted towels at least once during the Initial Term, and twice during the Renewal Term. The design and content of the imprinted message shall be determined and approved by the City Manager or his/her designee, at their sole discretion. In order to preserve the City's approval rights in the preceding sentence, Concessionaire shall provide written notice to the City Manager or his/her designee at least thirty (30) days prior to ordering such promotional towels. Concessionaire's notice shall include the proposed design to be used by Concessionaire for the promotional towel program. The City Manager or his/her designee shall have thirty (30) days from receipt of Concessionaire's notice to approve or disapprove of the proposed design and content of the imprinted message, or otherwise submit an alternative design for the imprinted message. If the City Manager or his/her designee fails to approve or disapprove the proposed design and/or content of the imprinted message, or submit an alternative design for the imprinted message, within such thirty (30) day period, the City shall be deemed to have waived its approval rights under this subsection.
- 3.9.4 Concessionaire shall provide, at its sole cost and expense, enhanced beach cleanliness as follows: Concessionaire shall provide assistance in the supervision of cleanliness in Lummus Park, including the area outside of the Concession Area(s), beginning at the west foot of the sand dunes and extending westerly to, and including the east sidewalk of, Ocean Drive; said supervision to include coordination with the City's Sanitation Department for the collection of any litter garbage or debris that is identified by the Concessionaire, including notification of overflowing trash receptacles; notification to the Public Works Department of any issues regarding the operation of any beach showers and the cleanliness of beach restrooms; and coordination with the Code Compliance Division in identifying and reporting littering, illegal vendors, graffiti on City property or any other City Code violation.
- 3.9.5 Concessionaire shall provide, at its sole cost and expense, a public beachfront outdoor ashtray program. Such program shall require the Concessionaire's purchase, daily placement/removal, and maintenance of no fewer than twenty (20) outdoor ashtrays (maximum cost of \$100.00 per outdoor ashtray) for the use of the general public. The proposed make and model of the outdoor ashtrays, and a photo of same, shall be submitted to the City Manager or his/her designee for their approval prior to purchase and placement, but no later than sixty (60) days after the Effective Date. The outdoor ashtrays shall be placed daily along the existing public trash can line, at a distance to be mutually determined by the Concessionaire and the City Manager or his/her designee, in all public beachfront areas (i) adjacent to the Concession Areas; (ii) adjacent to "areas outside of the Concession Areas" (as such term is defined in Section 10.1); and, (iii) adjacent to the following additional areas: the public beachfront area located between the private concession areas behind Penrod's and behind the Continuum, and the public beachfront area located east of Marjory Stoneman Park, for so long as the Concessionaire operates a beachfront concession immediately adjacent to these locations. The outdoor ashtrays shall be placed in such a manner as not to interfere with the servicing of the public trash cans. Such ashtrays are to be placed and removed daily consistent with the current schedule for the placement and removal of Concessionaire's Beach Equipment. A site plan

indicating the placement of the outdoor ashtrays shall be included as **Exhibit 3.9.5**. Concessionaire shall replace any damaged outdoor ashtray, and shall ensure that at no time no fewer than twenty (20) outdoor ashtrays are available for use. Should the City Manager or his/her designee determine, in their sole discretion, that additional outdoor ashtrays are necessary to meet the required placement requirements in this section (e.g. distance, frequency), such additional outdoor ashtrays shall also be purchased, placed/removed and maintained by the Concessionaire, but in no event shall the number of additional ashtrays (including replacement of damaged ashtrays) exceed an additional ten (10) during the Term (in addition to the twenty (20) required pursuant to this subsection).

SECTION 4. CONCESSION FEES.

4.1 Minimum Guarantee (MG):

In consideration of the City's execution of this Agreement and granting the rights provided herein, but subject to reduction as may (only) expressly be provided in this Agreement, Concessionaire shall pay to the City a Minimum Guaranteed Annual Concession Fee (MG), in the total amount of \$686,563, for food and beverage sales, Beach Equipment rentals, the sale of Beach-Related Sundries/Skin Care Products, and Watersports Equipment Rentals. The MG is apportioned as follows:

<i>Food and Beverage Sales, Beach-Related Sundries and Skin Care Products Sales</i>	<i>\$ 174,524.43</i>
<i>Beach Equipment Rentals</i>	<i>\$ 465,398.46</i>
<i>Watersports Equipment Rentals</i>	<i>\$ 46,639.84</i>
<i>Total</i>	<i>\$ 686,562.73</i>

Fifty percent (50%) of the MG for each contract year shall be due and payable to the City on November 5th of each such year during the Term, and the remaining fifty percent (50%) of the MG for that contract year shall be due and payable to the City on May 5th of each such year during the Term.

Commencing with the fourth contract year, and each subsequent annual anniversary of the Commencement Date during the Term, the MG shall be automatically increased by the greater of: i) an amount equal to the percent of change in the Consumer Price Index, All Urban Consumers (CPI - U.S. City Average All Items; base year 1982-84 =100) (the "Index"), as published by the United States Department of Labor, Bureau of Labor Statistics; or ii) three percent (3%) (the "CPI Adjustment").

4.2 Percentage of Gross (vs.) MG (PG):

For each contract year during the Term, Concessionaire shall pay to the City the difference between the MG provided in **Subsection 4.1** above, and a percentage of the gross receipts that exceeds the amount of the MG for food and beverage sales, the sale of Beach-Related Sundries/Skin Care Products, Beach Equipment rentals, and Watersports Equipment rentals (the "Percentage of Gross" (PG)), as follows:

<i>Food and Beverage Sales</i>	<i>15%</i>
<i>Beach-related Sundries/Skin Care Products Sales</i>	<i>20%</i>
<i>Beach Equipment Rentals</i>	<i>20%</i>
<i>Watersports Equipment Rentals</i>	<i>20%</i>

The payment of the PG shall be due and payable to the City no later than December 31st of each contract year.

4.3 The amount in excess of the MG due by Concessionaire for Watersports Equipment rentals for a contract year shall be waived during the time the City is conducting, or having conducted, any sand excavation project within less than one city block of the watersports channel which materially affects

use of the watersports channel in Lummus Park, as follows: prorated for every day that the watersports channel is materially affected, such prorated amount to be equal to the average daily revenues collected over the previous three (3) year period during those affected dates ("Watersports Waiver"). Concessionaire agrees and acknowledges that the Watersports Waiver shall be Concessionaire's sole remedy for damages and/or other compensation from the City due to any alleged adverse impact sustained by the concession operations, and the City shall have no further liability or obligation to Concessionaire with regard to this matter. Notwithstanding the foregoing, the provisions of **Subsection 4.2.1** shall be reinstated, commencing with the next applicable day, at such time as the City Manager, in his/her sole judgment and reasonable discretion, has determined that adequate beach accretion has occurred so as to render the Watersports Waiver invalid. For purposes of this **Subsection 4.3** only, a Watersports channel shall be deemed "materially affected" when Concessionaire's average daily revenue resulting from the use of the affected channel is reduced by at least fifteen percent (15%) from the amount equal to the average daily revenues collected over the previous three (3) year period for such channel.

4.4 The term "gross receipts" is understood to mean all income collected or accrued, derived by the Concessionaire under the privileges granted by this Agreement, excluding amounts of any Federal, State, or City sales tax, or other tax, governmental imposition, assessment, charge or expense of any kind, collected by the Concessionaire from customers and required by law to be remitted to the taxing or other governmental authority. The term "gross receipts" shall also include all income collected, accrued or derived by the Concessionaire from the sale of food, beverages and any other products sold by Concessionaire at a special event at such Concession Area and, in the case of a special event under **Section 16** hereof in which Concessionaire is not providing the food and beverage service at a Concession Area, any Displacement Fee or Alternative Consideration (as such terms are defined in Subsection 16.2.1) received by Concessionaire.

4.5 Interest for Late Payment.
Any payment which Concessionaire is required to make to City which is not paid on or before the respective date provided for in this Agreement shall be subject to interest at the rate of twelve percent 12% per annum, from the due date of payment until such time as payment is actually received by the City.

4.6 Sales and Use Tax.
It is also understood that the required Florida State Sales and Use Tax shall be added to Concessionaire's payments and forwarded to the City as part of said payments. It is the City's intent that it is to receive all payments due from Concessionaire as net of such Florida State Sales and Use Tax.

SECTION 5. MAINTENANCE AND EXAMINATION OF RECORDS.

Concessionaire shall maintain current, accurate, and complete financial records on an accrual basis of accounting related to its operations pursuant to this Agreement. Systems and procedures used to maintain these records shall include a system of internal controls and all accounting records shall be maintained in accordance with generally accepted accounting principles and shall be open to inspection and audit, but not photocopying, by the City Manager or his/her designee upon reasonable prior request and during normal business hours. Such records and accounts shall include a breakdown of gross receipts, expenses, and profit and loss statements. Concessionaire shall maintain accurate receipt-printing cash registers or a like alternative in all Concession Areas which will record and show the payment for every sale made or service provided in such Areas. Concessionaire shall also maintain such other records as would be required by an independent CPA in order to audit a statement of annual gross receipts and profit and loss statement pursuant to generally accepted accounting principles.

A monthly report of gross receipts must be submitted to the City's Finance Department's Revenue Supervisor,

to be received no later than thirty (30) days after the close of each month.

SECTION 6. INSPECTION AND AUDIT.

Concessionaire shall maintain financial records pertaining to its operations pursuant to this Agreement for a period of three (3) years after the conclusion of any contract year, and such records shall be open and available to the City Manager or his/her designee, as deemed necessary by the City Manager or his/her designee, but shall not be subject to photocopying without the Concessionaire's prior consent. Concessionaire shall maintain all such records at its principal office, currently located at 420 Lincoln Road, Suite 265, Miami Beach, Florida, 33139. If moved to another location outside of the City of Miami Beach, all such records shall be relocated, at Concessionaire's expense, to a location in Miami Beach, within ten (10) days' written notice from the City Manager or his/her designee.

The City Manager or his/her designee shall be entitled to audit, but not photocopy (unless first having obtained Concessionaire's consent), Concessionaire's records pertaining to its operations pursuant to this Agreement as often as it deems reasonably necessary throughout the Term of this Agreement, and three (3) times within the three (3) year period following termination of this Agreement, regardless of whether such termination results from the natural expiration of the Term or for any other reason. The City shall be responsible for paying all costs associated with such audits, unless the audit(s) reveals a deficiency of five percent (5%) or more in Concessionaire's statement of gross receipts for any year or years audited, in which case the Concessionaire shall pay to the City, within thirty (30) days of the audit being deemed final (as specified below), the cost of the audit and a sum equal to the amount of the deficiency revealed by the audit, plus interest at the rate of 12% per annum; provided, however, the audit shall not be deemed final until Concessionaire has received the audit and has had a reasonable opportunity to review the audit and discuss the audit with the City. These audits are in addition to periodic audits by the City of Resort Tax collections and payments, which are performed separately. Nothing contained within this Section shall preclude the City's audit rights for Resort Tax collection purposes.

Concessionaire shall submit at the end of each contract year, an annual statement of gross receipts, in a form consistent with generally accepted accounting principles. Additionally, such statement shall be accompanied by a report from an independent CPA firm which shall perform certain agreed upon procedures, as described in the attached **Exhibit 6**.

It is Concessionaire's intent to stay informed of comments and suggestions by the City regarding Concessionaire's performance under the Agreement. Within thirty (30) days after the end of each contract year, Concessionaire and the City Manager or his/her designee may meet to review Concessionaire's performance under the Agreement for the previous contract year. At the meeting, Concessionaire and City may discuss quality, operational, maintenance and any other issues regarding Concessionaire's performance under the Agreement.

SECTION 7. TAXES, ASSESSMENTS, AND UTILITIES.

7.1 Concessionaire agrees to, and shall pay before delinquency, all taxes (including but not limited to Resort Taxes) and assessments of any kind assessed or levied upon Concessionaire by reason of this Agreement, or by reason of any business or activities conducted by Concessionaire in connection with the Concession Areas. Concessionaire will have the right, at its own expense, to contest the amount or validity, in whole or in part, of any tax and/or assessment by appropriate proceedings diligently conducted in good faith. Concessionaire may refrain from paying a tax or assessment to the extent it is contesting the assessment or imposition of same in a manner that is in accordance with law; provided, however, if, as a result of such contest, additional delinquency charges become due, Concessionaire shall be responsible for such delinquency charges, in addition to payment of the contested tax and/or assessment if so ordered.

Concessionaire shall also pay for any fees imposed by law for licenses or permits for any business(es)

or activities of Concessionaire conducted in the Concession Areas.

Concessionaire shall pay before delinquency any and all charges for utilities used by, for, or on behalf of the operations contemplated herein (including, but not limited to, water, electricity, gas, heating, cooling, sewer, telephone, ice machine, trash collection, etc.).

City acknowledges that Concessionaire shall also be permitted to use, but shall pay for, all utilities with respect to its operations at 10th Street and Ocean Drive, including costs associated with operating an ice machine, running water, and electrical.

7.2 Procedure If Ad Valorem Taxes Assessed.

Notwithstanding **Subsection 7.1**, the parties are proceeding under the assumption that, as the operations contemplated herein are for public purposes, historically no ad valorem taxes have been assessed by the Miami-Dade County Tax Appraiser. If, however, such taxes are assessed at any time during the Term, the City and Concessionaire shall use reasonable efforts to achieve and equitable solution to address payment of same.

SECTION 8. EMPLOYEES AND INDEPENDENT CONTRACTORS.

8.1 In connection with the performance of its responsibilities hereunder, Concessionaire shall select, train, and employ (or otherwise retain) such number of employees and/or independent contractors, as is necessary or appropriate for Concessionaire to satisfy its responsibilities hereunder. Concessionaire shall have the authority to hire, terminate and discipline any and all personnel employed (or otherwise retained) by the Concessionaire to satisfy its responsibilities hereunder. Concessionaire shall select the number, function, qualifications, compensation, including benefits (if any), and may, at its discretion and at any time, adjust or revise the terms and conditions relating to such employees and/or independent contractors. None of the employees or contractors of Concessionaire shall be deemed to be employees or contractors of the City for any purpose whatsoever.

8.2 Concessionaire and its employees and/or independent contractors shall wear identification badges and uniforms approved by the City during all hours of operation when such employee or independent contractor are on duty. The Concessionaire shall hire people to work in its concession operation who are neat, clean, well groomed and shall comport themselves in a professional and courteous manner. The Concessionaire and any persons hired by it, shall never have been convicted of a felony. The Concessionaire shall have an experienced manager(s) overseeing the concession operations and Concession Areas at all times. The name (or names) of the Concessionaire's manager(s) shall be provided to the City Manager or his/her designee, on or before the Effective Date, and shall be updated, as necessary.

SECTION 9. HOURS OF OPERATION.

All Concession Areas and concession operations thereon shall be open every day of the year, weather or events of force majeure permitting, and shall be open no earlier than one (1) hour after sunrise daily, and close no later than one (1) hour before sunset daily. Sunrise and sunset shall be established on a daily basis by the National Weather Service. Any change in the hours of operation shall be at the City Manager's or his/her designee's sole option and discretion, and any request by Concessionaire for an increase or decrease in same shall be subject to the prior written approval of the City Manager or his/her designee.

Notwithstanding anything herein to the contrary, if the City Manager or his/her designee, require that the Concessionaire operate a concession at the North Shore Open Space Park Concession Area and/or at the South Pointe Park Beach Concession Areas, such operations may be permitted with reduced hours of operation and reduced services, as may be determined by the City Manager or his/her designee pursuant to the procedures established under **Subsections 2(a) – (e)** hereof.

SECTION 10. MAINTENANCE.

10.1 The Concessionaire accepts the use of the Concession Areas in their "AS IS, WHERE IS" condition. Concessionaire assumes sole responsibility and expense for maintenance, including the collection and daily removal of litter, garbage and debris of the following areas: 1) the Concession Areas, including all facilities and equipment thereon; 2) any Buffer Zone (as defined in **Subsection 2.7** hereof) immediately adjacent to any portion of the Concession Areas; 3) any Lifeguard Facility Zone (as defined in **Subsection 2.5** hereof) immediately adjacent to any portion of the Concession Areas; 4) any Handicap Zone immediately adjacent to any portion of the Concession Areas; 5) the area within fifty (50) feet of any of the Concessionaire's storage areas located outside of a Concession Area; 6) the area within ten (10) feet of any outdoor ashtray required to be placed and maintained by Concessionaire pursuant to this Agreement (and including ashtrays provided by Concessionaire pursuant to the Public Beachfront Outdoor Ashtray Program contemplated in **Subsection 3.9.5**, and ashtrays provided by Concessionaire for use by its patrons); 7) any area within fifty (50) feet of a food and beverage dispensing facility; and 8) the Dune area landward and adjacent to any portion of the Concession Areas (NOTE: for purposes of this **Section 10**, and of any other section of the Agreement which references the term "areas outside of the Concession Areas," that term shall be deemed to reference and include only the specific areas described in Nos. (2) through (8) above).

10.1.1 As an additional requirement of its maintenance responsibilities, Concessionaire shall provide throughout the Term, at its sole cost and expense, sand sifting equipment, whether manual or motorized, and staff appropriately trained and/or certified to operate same, within all Concession Areas and those "areas outside of the Concession Areas" as defined in **Subsection 10.1**, but **not** including the Area defined in Subsection 10.1(8) above. Sand sifting shall occur no less than two (2) times weekly in each Concession Area and in each of the areas outside of the Concession Areas. On or before the Effective Date, Concessionaire shall provide the City Manager or his/her designee with photographs and specifications of the sand sifting equipment it shall employ, which shall be included as **Exhibit 10.1.1** hereof.

10.2 **Garbage Receptacles; Recycling Plan; outdoor ashtrays; and Fenced Storage Area.**
With respect to litter, garbage, and debris removal caused by the Concessionaire's operations, the Concessionaire shall provide, at its sole cost and expense, receptacles within the confines of the Concession Areas, and shall provide a sufficient number of these receptacles for its own use and for the use of its patrons and the public in general. The Concessionaire shall provide the City Manager or his/her designee with a recycling plan for litter, garbage, and debris collected within the Concession Areas; such plan to be submitted to the City Manager or his/her designee within the first Agreement year.

Concessionaire shall provide ashtrays for use by the Concessionaire's patrons; this requirement is in addition to the Concessionaire's obligation to implement and maintain the Public Beachfront Outdoor Ashtray Program contemplated in **Subsection 3.9.5**.

The disposal of the contents of the Concessionaire's garbage receptacles and ashtrays, and removal of litter, garbage, and debris within the Concession Areas, shall be done on a daily basis, and shall be the sole responsibility of the Concessionaire.

The Concessionaire shall be permitted to utilize the dumpster area on the north side of the 10th Street Auditorium, but must provide for its disposal at its sole cost and expense. Concessionaire shall enter into and maintain a current agreement with a trash hauler for disposal at the 10th Street dumpster facility, and provide a copy of such agreement to the City Manager or his/her designee. Any costs for removal of the contents of said trash receptacles by the City, because of the Concessionaire's failure to do the same, will be assessed upon, and become the responsibility of, the Concessionaire. The

dumping or disposal by Concessionaire, including its employees and/or contractors, of any garbage, litter, and/or debris generated by, or as a result of, the concession operations, into any of the Miami-Dade County trash receptacles, is strictly prohibited.

Determination of the "number" of receptacles shall at all times be made by the City Manager or his/her designee at their sole discretion, and Concessionaire shall agree to be bound by same. Notwithstanding the foregoing, with respect to litter, garbage and debris created by the public or other persons in the "areas outside of the Concession Areas," provided for in **Subsection 10.1**, and the contents of the public beachfront outdoor ashtrays, the Concessionaire shall remove such litter, garbage and debris to the City's waste receptacles for disposal by the City.

10.2.1 Concessionaire shall be permitted to operate and maintain, including landscaping, at Concessionaire's sole cost and expense, a twenty five (25) foot by twenty five (25) foot fenced storage area adjacent to the dumpster area on the north side of the 10th Street Auditorium, in accordance with **Exhibit 10.2.1**, to be used for umbrella and chair storage **only**. Said fenced storage area shall be approved by the City's Planning Department or such other applicable authority as may be deemed necessary by the City Manager or his/her designee.

10.2.2 In addition to the area described in **Subsection 10.2.1** above, and subject to all necessary regulatory reviews and approvals, Concessionaire shall also be permitted to operate and maintain, including landscaping, at Concessionaire's sole cost and expense, a 748 square foot fenced storage area located due west of the area described in **Subsection 10.2.1**, in accordance with **Exhibit 10.2.2**. Said fenced storage area shall be approved by the City's Planning Department, or such other applicable authority as may be deemed necessary by the City Manager or his/her designee.

10.3 Facilities/Equipment/Furnishings.

Concessionaire must provide and maintain, at its own cost and expense, all facilities, equipment, and furnishings required to operate the concession. In the event any of the aforesaid items are lost, stolen, or damaged during the Term, they shall be repaired or, if irreparable, replaced, at the sole cost and expense of the Concessionaire, within fifteen (15) days of written notice from the City Manager or his/her designee. This requirement is in addition to Concessionaire's obligation for the periodic replacement of Beach Equipment (under **Subsection 3.1.1**) and Watersports Equipment (under **Subsection 3.4.10**)

10.4 Orderly Operation.

Concessionaire shall keep a neat and orderly operation at all times, and shall be solely responsible for the necessary housekeeping services to properly maintain the Concession Areas and all facilities, equipment and furnishings thereto. There shall be no living quarters, nor shall anyone be permitted to live, within any Concession Areas and/or any facilities thereon. Concessionaire shall make available all of its facilities, equipment and furnishings for inspection during hours of operation by the City Manager or his/her authorized representative.

10.5 No Dangerous Materials.

Concessionaire agrees not to use or permit the storage in the Concession Areas of gasoline, fuel oils, diesel, illuminating oils, oil lamps, combustible powered electricity producing generators, turpentine, benzene, naphtha, propane (unless approved pursuant to **Subsection 3.2.8**), natural gas, or other similar substances, combustible materials, or explosives of any kind, or any substance or thing prohibited in the standard policies of fire insurance companies in the State of Florida. Any such substances or materials found within the Concession Areas shall be immediately removed. This subsection shall not apply to any substances permitted by the City's Rules and Regulations for Beachfront Concession Operations, as same may be amended from time to time; provided the use and storage of such substances comply with such Rules and Regulations.

Notwithstanding any contrary provisions of this Agreement, Concessionaire, shall indemnify and hold City harmless from any loss, damage, cost, or expense of the City, including, without limitation, reasonable attorney's fees, incurred as a result of, arising from, or connected with the placement by Concessionaire of any "hazardous substance" or "petroleum products" on, under, in or upon the Concession Areas, as those terms are defined by applicable Federal and State Statute, or any environmental rules and environmental regulations promulgated thereunder. The provisions of this **Subsection 10.5** shall survive the termination or earlier expiration of this Agreement.

10.6 Security.

Concessionaire shall be solely responsible for providing such reasonable security measures as Concessionaire, in its professional experience and judgment, may deem necessary to protect any of its facilities, equipment, and furnishings within the Concession Areas. Under no circumstances shall the City be responsible (i) for any stolen or damaged facilities, equipment, or furnishings; **nor** shall the City be responsible for (ii) any stolen or damaged personal property of Concessionaire's patrons, guests, invitees, employees, contractors, and/or any other third parties; provided that, as to (ii), the foregoing is not intended to impose any affirmative duty on Concessionaire for any such theft or damage.

10.7 Vehicles on the Beach.

Concessionaire's vehicles shall include (i) any "on-road" vehicles and/or trailers licensed in accordance with applicable County, State and Federal law, to operate on public streets and roadways; and (ii) any "off-road" vehicles such as golf carts and all terrain vehicles ("ATV's") (both (i) and (ii) shall be referred collectively herein as "Vehicles"). Concessionaire's on road vehicles shall only be allowed on the beachfront for purposes of supplying the concession operations and to deploy and remove Watersports Equipment at the beginning and close of operations each day, and must be removed from the beachfront immediately thereafter. No parking of an on-road vehicle on any of the beachfront is permitted, except when engaging in the activities set forth herein. Said supplying and deployment/removal operations shall only be permitted during regular hours of operation, and shall be completed safely and expeditiously as provided for in this Subsection. No Vehicles will be permitted on the beach after sunset or prior to sunrise. Access to the beach for all Vehicles shall only be permitted via specifically designated beach and dune crossovers authorized, in writing, by the City Manager or his/her designee for such use, and nearest to the concession operation, as referenced in **Exhibit 10.7**.

10.7.1 A total of six (6) Vehicles, (which may include such combination of the type of Vehicles specified in (i) and (ii) above as Concessionaire may deem necessary, but which total number of Vehicles shall in no event exceed six (6)) are herein permitted, and shall be properly marked and identified in accordance with the applicable guidelines for Vehicles provided in this Section. In order to contain vehicular traffic on the beach to a minimum, the City Manager or his/her designee must approve any additional Vehicles to be used by Concessionaire prior to such use. Concessionaire shall provide to the City the vehicle model, make, year and license plate information for the six (6) approved Vehicles (or any subsequently approved additional vehicles), and such list shall be incorporated as **Exhibit 10.7.1** and updated accordingly

10.7.2 Vehicles operated on the beachfront shall not exceed 5 M.P.H., and shall only operate in the immediate vicinity of the concession or to-and-from the nearest pre-determined and assigned access ramp. After transporting equipment to, or removing equipment from, a Concession Area, the Vehicles shall be removed from the beachfront area and parked in a legally authorized location. Driving Vehicles on the beachfront area shall be kept to a minimum. No vehicular traffic will be permitted on the beach, at any time or for any purpose, other than as stated herein. Driving an on-road vehicle from one Concession Area, concession facility, and/or concession location to another to service, supervise, or for any other reason other than permitted in this

subsection, is prohibited. Concessionaire, when using an on-road vehicle, must exit to the street using the closest approved beach access point to access other locations. All Vehicles must have a tire-to-ground pressure of ten pounds per square inch (10 p.s.i) or less. Prior to entering the beach area, drivers will turn on their Vehicle headlights and flashers, if available. Both the passenger and driver's side front windows of the Vehicle shall be rolled down while operating said Vehicle on the beach.

- 10.7.3 Eighteen-inch (18") high cones, orange in color, shall be placed in front of, and at the rear of any on-road vehicle when parked temporarily anywhere on the beachfront for the purpose of deploying, servicing or removing Watersports Equipment. The on-road vehicle operator must inspect the on-road vehicle's perimeter and surrounding area, prior to turning the on-road vehicle's ignition switch, to assure a clear path of egress and only proceed with extreme caution. On-road vehicles must always remain on the "hard-packed" sand area, unless otherwise provided for in this Section. Driving or parking Vehicles on any "soft-sand" area is prohibited. The only exception to this rule is for a Concession Area that has been authorized to conduct Watersports Equipment rental activities, and where Concessionaire is in the process of deploying, servicing, or removing Watersports Equipment from such Concession Area. Said deployment, servicing, or removal of Watersports Equipment must be conducted with no less than one (1) additional concession employee that will be positioned on the beachfront, to directly supervise and guide, said deployment, service, or removal operation, to ensure the safety of the beach-going public. Additionally, during any deployment, service, or removal operation, the Concessionaire shall be responsible for placing no less than eight (8), eighteen-inch (18") high cones, orange in color, no less than four (4) on the northernmost boundary and no less than four (4) on the southernmost boundary of the projected path (from hard-packed sand to the shore line) of the Vehicle, to create a clear non-obstructed path perpendicular to the shoreline, of no less than twenty-five feet (25'-0") in width (when measured from north to south). The Vehicle driver and supervising concession employee must independently inspect the Vehicle perimeter, surrounding area, and path (once marked) prior to turning the Vehicle's ignition switch, to assure a clear path of ingress to the shoreline or egress to the hard packed sand and only then, proceed with the respective operation with extreme caution to ensure the safety of all beach-going patrons.
- 10.7.4 All Vehicles must have signage, on each side, with the Concessionaire's name in 4" high letters on a contrasting background.
- 10.7.5 Use of a cellular phone by the driver while the Vehicle is in motion is prohibited. Vehicle gear shift must be placed in the "park" position, and the emergency break engaged prior to any use of a cellular telephone by the driver.
- 10.7.6 Anyone operating a Vehicle for or on behalf of Concessionaire must have a current valid Florida Driver's License. Concessionaire, its employees, and contractors, are prohibited from driving their personal vehicles, whether said vehicle is a motor vehicle, small off-road vehicle, or any other type of vehicle (e.g., motorcycle), on the beach at any time.
- 10.7.7 **Any Vehicle not provided for in this Subsection 10.7, or not approved by the City, will be required to leave the beachfront immediately. Three (3) or more notices from the City of this violation may, at the discretion of the City Manager, lead to the City's termination of this Agreement, upon thirty (30) days written notice to Concessionaire, and without liability to the City.**
- 10.7.8 No Vehicle or any trailer attached thereto may be parked or left unattended on the beach, at any time or for any reason.

10.7.9 Concessionaire agrees and understands that in the event of any accident or collision involving any of its Vehicles which involves an injury to person(s) (whether minor or major), it must complete and submit a written report to the City's Risk Management Officer, with copies to the City's Office of Asset Management, within twenty-four (24) hours following the occurrence of such an accident or collision, or upon notification thereof by a third party(ies).

10.8 Inspection.

The Concessionaire agrees that the Concession Areas, and all facilities, equipment, furnishings, and operations thereon, may be inspected at any time during hours of operation by the City Manager or his/her authorized designee(s), or by any other municipal, County, State agency or official having responsibilities for inspections of such operations. The Concessionaire hereby waives all claims against the City for compensation for loss or damage sustained by reason of any interference (which interference, if by the City, must be reasonable) with the concession operation by the City, or any public agency or official, in enforcing their duties or any laws or ordinances. Any such interference shall not relieve the Concessionaire from any obligation to perform hereunder.

SECTION 11. INSURANCE.

Concessionaire shall maintain, at its sole cost and expense, the following types of insurance coverage at all times throughout the Term:

- a. Comprehensive General Liability:
 - (i) except as specifically provided for in clause (a)(ii) below, comprehensive general liability in the minimum amount of Five Million Dollars (\$5,000,000) per occurrence for bodily injury and property damage. This policy must also contain coverage for premises operations, products and contractual liability.
 - (ii) for all Watersports Equipment rentals, as defined in Section 3.4, comprehensive general liability in the minimum amount of One Million Dollars (\$1,000,000) per occurrence for bodily injury and property damage. This policy must also contain coverage for premises operations, products and contractual liability.
- b. Workers Compensation Insurance shall be required in accordance with the Laws of the State of Florida.
- c. Automobile Insurance shall be provided covering all owned, leased, and hired vehicles and non-ownership liability for not less than the following limits:

Bodily Injury	\$1,000,000 per person
Bodily Injury	\$1,000,000 per accident
Property Damage	\$1,000,000 per accident

The policies of insurance referred to above shall not be subject to cancellation or changing coverage except upon at least thirty (30) days prior written notice to the City, and then only subject to the prior written approval of the City Manager or his/her designee. Prior to the Effective Date, Concessionaire shall provide City with a Certificate of Insurance for each such policy. Except for Workers' Compensation, ALL POLICIES SHALL NAME THE CITY OF MIAMI BEACH FLORIDA AS AN ADDITIONAL NAMED INSURED. All such policies shall be obtained from companies authorized to do business in the State of Florida with an A.M. Best's Insurance Guide (latest edition) rating acceptable to the City's Risk Manager, and any replacement or substitute company shall also be subject to the approval of the City's Risk Manager. Should Concessionaire fail to obtain, maintain or renew the policies of insurance referred to above, in the required amounts, the City may, at its sole discretion, obtain such insurance, and any sums expended by City in obtaining said insurance, shall be repaid by Concessionaire to City, plus ten percent (10%) of the amount of premiums paid to compensate City for its administrative costs. If Concessionaire fails to repay City's expenditures within fifteen (15) days of demand, the total sum owed shall accrue interest at the rate of twelve percent (12%) per annum until paid, and such failure shall be deemed an event of default hereunder.

The terms of insurance policies referred to in this Section 11 shall preclude subrogation claims against Concessionaire, the City, and their respective officers, employees, contractors and agents.

SECTION 12. INDEMNITY.

- 12.1 In consideration of a separate and specific consideration of \$10.00 and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Concessionaire shall indemnify, hold harmless and defend the City, its officers, officials, employees, contractors, and agents, from and against any claim, demand or cause of action of whatsoever kind or nature arising out of error, omission, or negligent act of Concessionaire, its officers, directors, employees, contractors (including, without limitations, any subconcessionaires), or agents, in the performance of services under this Agreement.
- 12.2 In addition, in consideration of a separate and specific consideration of \$10.00 and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Concessionaire shall indemnify, hold harmless and defend the City, its officers, officials, employees, contractors, or agents, from and against any claim, demand or cause of action of whatever kind or nature arising out of any misconduct of Concessionaire, its officers, directors, employees, contractors (including, without limitations, any subconcessionaires), or agents, not included in **Subsection 12.1** above and for which the City, its officers, officials, employees, contractors or agents, are alleged to be liable.
- 12.3 **Subsections 12.1 and 12.2** shall survive the termination or expiration of this Agreement. **Subsections 12.1 and 12.2** shall not apply, however, to any such liability that arises as a result of the willful misconduct or gross negligence of the City, its officers, officials, employees, contractors, or agents.
- 12.4 Force Majeure.
Neither party shall be obligated to perform hereunder and neither party shall be deemed to be in default if performance is prevented by:
- a. fire which renders at least thirty percent (30%) of the Concessionaire's cumulative facilities and equipment unusable and which is not caused by negligence of Concessionaire;
 - b. earthquake; hurricane; flood; act of God; direct act of terrorism; or civil commotion occurring on the Concession Area(s); or during or in connection with any event or other matter or condition of like nature; or
 - c. any law, ordinance, rule, regulation or order of any public or military authority stemming from the existence of economic or energy controls, hostilities, or war.

The parties hereto acknowledge that Concessionaire's obligations and benefits hereunder may be negatively affected by an event of Force Majeure. If an event of Force Majeure occurs during a contract year, and provided further that Concessionaire's minimum guarantee (MG) payment(s) to the City for that contract year is greater than the applicable percentage guarantee (PG) payment, then the City Manager or his/her designee, in their sole discretion, may extend the Term of this Agreement for a reasonable period of time; provided, however, such extension shall take effect only if Concessionaire agrees to such extension.

- 12.5 Labor Dispute.
In the event of a labor dispute which results in a strike, picket, or boycott affecting the Concession Areas described in this Agreement, Concessionaire shall not thereby be deemed to be in default or to have breached any part of this Agreement, unless such dispute shall have been caused by illegal labor practices or violations by Concessionaire of applicable collective bargaining agreements and there has

been a final determination of such fact which is not cured by Concessionaire within thirty (30) days following such determination.

12.6 Waiver of Loss from Hazards.

The Concessionaire hereby expressly waives all claims against the City or its officers, officials, employees, contractors or agents, for loss or damage sustained by the Concessionaire resulting from any Force Majeure contemplated in **Subsection 12.4** and Labor Dispute in **Subsection 12.5** above, and the Concessionaire hereby expressly waives all rights, claims, and demands against the City or its officers, officials, employees, contractors, or agents, and forever releases and discharges the City and its officers, officials, employees, contractors, or agents, from all demands, claims, actions and causes of action arising from any of the aforesaid causes.

SECTION 13. DEFAULT, TERMINATION AND PENALTIES

Subsections 13.1 through 13.3 shall constitute events of default under this Agreement. An event of default by Concessionaire shall entitle City to exercise any and all remedies described as City's remedies under this Agreement, including but not limited to those set forth in **Subsection 13.4 and Section 14**. An event of default by City shall entitle Concessionaire to exercise any and all remedies described as Concessionaire's remedies under this Agreement, including but not limited to those set forth in **Subsection 13.5**.

13.1 Bankruptcy.

If either the City or Concessionaire shall be adjudged bankrupt or insolvent, or if any receiver or trustee of all or any part of the business property of either party shall be appointed, or if any receiver of all or any part of the business property shall be appointed and shall not be discharged within sixty (60) days after appointment, or if either party shall make an assignment of its property for the benefit of creditors, or shall file a voluntary petition in bankruptcy, or insolvency, or shall apply for reorganization or arrangement with its creditors under the bankruptcy or insolvency laws now in force or hereinafter enacted, Federal, State, or otherwise, or if such petitions shall be filed against either party and shall not be dismissed within sixty (60) days after such filing, then the other party may immediately, or at any time thereafter, and without further demand or notice, terminate this Agreement without being prejudiced as to any remedies which may be available to it for breach of contract.

13.2 Default in Payment.

In the event Concessionaire fails to submit any payment within five (5) days of its due date, there shall be a late charge of \$50.00 per day for such late payment, in addition to interest at the highest rate allowable by law (currently 12% per annum). If any payment and accumulated penalties are not received within fifteen (15) days after the payment due date, and such failure continues three (3) days after written notice thereof, then the City may, without further demand or notice, terminate this Agreement without being prejudiced as to any remedies which may be available to it for breach of contract; and may begin procedures to collect the Security Deposit provided for in **Section 14** herein.

13.3 Non-Monetary Default.

In the event that Concessionaire or the City fails to perform or observe any of the covenants, terms or provisions under this Agreement, and such failure continues thirty (30) days after written notice thereof from the other party hereto, such non-defaulting party may immediately or at any time thereafter, and without further demand or notice, terminate this Agreement without being prejudiced as to any remedies which may be available to it for breach of contract. In the event that a default is not reasonably susceptible to being cured within such period, the defaulting party shall not be considered in default if it shall, within such period, commence with due diligence and dispatch to cure such default and thereafter completes with dispatch and due diligence the curing of such default, but in no event shall such extended cure period exceed ninety (90) days from the date of written notice thereof. In the event Concessionaire cures any default pursuant to this subsection, it shall promptly provide City with written notice of same.

13.4 City's Remedies for Concessionaire's Default.

If any of the events of default by Concessionaire as set forth in this Section shall occur, the City may, after notice (if required) and the expiration of cure periods, as provided above, at its sole option and discretion, institute such proceedings as in its opinion are necessary to cure such defaults and to compensate City for damages resulting from such defaults, including but not limited to the right to give to Concessionaire a notice of termination of this Agreement. If such notice is given, the Term of this Agreement shall terminate upon the date specified in such notice from City to Concessionaire. On the date so specified, Concessionaire shall then quit and surrender the Concession Area(s) to City pursuant to the provisions of **Subsection 13.7**. Upon the termination of this Agreement, all rights and interest of Concessionaire in and to the Concession Area(s) and to this Agreement, and every part thereof, shall cease and terminate and City may, in addition to any other rights and remedies it may have, retain all sums paid to it by Concessionaire under this Agreement, including but not limited to, beginning procedures to collect the Security Deposit, as provided in **Section 14** herein. In addition to the rights set forth above, City shall have the rights to pursue any and all of the following:

- a. the right to injunction or other similar relief available to it under Florida law against Concessionaire; and or
- b. the right to maintain any and all actions at law or suits in equity or other proper proceedings to obtain damages resulting from Concessionaire's default.

13.5 If an event of default, as set forth in this Section, by the City shall occur, the Concessionaire may, after notice (if required) and the expiration of the cure periods, as provided above, at its sole option and discretion, terminate this Agreement upon written notice to the City and/or sue for damages. Said termination shall become effective upon receipt of a written notice of termination by the City, but in no event shall Concessionaire specify a termination date that is less than sixty (60) days from the date of the written termination notice. On the date specified in the notice, Concessionaire shall quit and surrender the Concession Areas to City pursuant to the provisions of **Subsection 13.7**.

13.7 Surrender of Concession Areas.

At the expiration of this Agreement, or earlier termination in accordance with the terms of this Agreement, Concessionaire shall surrender the Concession Areas in the same condition as the Concession Areas were prior to the commencement of this Agreement, reasonable wear and tear excepted (including any beach erosion not directly caused by Concessionaire and/or its operation). Concessionaire shall remove all its facilities, equipment, fixtures, personal property, etc. upon forty-eight (48) hours written notice from the City Manager or his designee unless a longer time period is agreed to by the City. Concessionaire's obligation to observe or perform this covenant shall survive the expiration or other termination of this Agreement. Continued occupancy of the Concession Area(s) after termination of this Agreement and expiration of such 48-hour period shall constitute trespass by the Concessionaire, and may be prosecuted as such. In addition, the Concessionaire shall pay to the City one thousand dollars (\$1,000) per day as liquidated damages for such trespass and holding over.

13.8 Penalties in Lieu of Default.

Notwithstanding the City's right to declare the Concessionaire in default, as an alternative means of ensuring compliance with certain non-monetary terms of this Agreement for which the parties agree and acknowledge that the cure period provided for defaults herein is an inadequate remedy, the City Manager or his/her designee may issue a fine to the Concessionaire for violations of provisions in the Sections and Subsections described in **Exhibit 13.8**, in the amounts contained therein.

SECTION 14. SECURITY DEPOSIT OR ALTERNATE SECURITY

Concessionaire shall furnish to the City Manager or his/her designee a Security Deposit, in the amount of \$68,652.00, as security for the faithful performance of the terms and conditions of this Agreement, to be paid as follows: half (50%) of the amount shall be due on the Effective Date, with the remaining half (50%) due no later than May 5, 2012. A cash deposit, irrevocable letter of credit, or certificate of deposit may also suffice, as

determined by the City Manager or his/her designee in his/her reasonable discretion, and subject further to the reasonable review and approval of the City's Chief Financial Officer. In the event that a Certificate of Deposit is approved, it shall be a \$68,652.00 one-year Certificate of Deposit in favor of the City, which shall be automatically renewed, the original of which shall be held by the City's Chief Financial Officer. Concessionaire shall be so required to maintain said Security Deposit, or alternate security as accepted by the City Manager or his/her designee, in full force and effect throughout the Term.

SECTION 15. ASSIGNMENT.

Except as otherwise provided in this Subsection, Concessionaire shall not assign; sublease; grant any concession or license (other than the subconcession for food and beverages which shall be governed pursuant to the procedures in **Subsection 3.2** hereof); permit the use of by any other person other than Concessionaire; or otherwise transfer all or any portion of this Agreement and/or of the Concession Area(s) (all of the foregoing are herein after referred to collectively as "transfers"), without the prior written consent of the City Manager or his/her designee, which consent shall not be unreasonably withheld.

If there is a change in control of Concessionaire, then any such change in control shall constitute a "transfer" for purposes of this Agreement and shall be approved by the City Commission prior to consummation of such change in control. "Change in control", for purposes hereof, shall mean a change of the ownership, directly or indirectly, of greater than thirty-three and four tenths percent (33.4%) of the voting or ownership interest or right to profits in such Concessionaire, by means of one or more transfers, sales, mergers, consolidations, dissolutions or otherwise; provided that the foregoing shall not be deemed to include (i) a pledge or collateral assignment of the profits of Concessionaire in connection with any financing, provided such pledge or collateral assignment is subordinate to the rights of the City to the fees payable to the City pursuant to **Section 4** hereof; (ii) any transfer to other owners of Concessionaire or to trusts the beneficiaries of which are any owner(s) of Concessionaire or member(s) of their immediate family; or (iii) a change in the ownership of Concessionaire through a registered public offering of shares in Concessionaire ((i), (ii) and (iii) above collectively are referred to herein as the "Transfer Exclusions"). Except for the Transfer Exclusions, any change of the ownership, directly or indirectly, of thirty-three and four tenths percent (33.4%) or less of the voting or ownership interest or right to profits in such Concessionaire (a "Minor Change"), by means of one or more transfers, sales, mergers, consolidations, dissolutions or otherwise, shall be subject to the approval of the City Manager or his/her designee.

Concessionaire shall notify the City of any proposed transfer that is not a Transfer Exclusion, and shall notify the City Manager or his/her designee of any proposed Minor Change, prior to consummation of same and the City or the City Manager or his/her designee, as applicable, shall respond within thirty (30) days. In the event that any such transfer or Minor Change is approved, the transferee shall agree to be bound by all the covenants of this Agreement required of the transferor hereunder. Any transfer or Minor Change made without complying with this Section shall be null, void, and of no effect and shall constitute an act of default under this Agreement. Notwithstanding any such consent, or any permitted transfer or Minor Change under any provision of this Section, unless expressly released by the City, Concessionaire shall remain jointly and severally liable (along with each approved transferee, who shall automatically become liable for all obligations of the transferor hereunder with respect to that portion of the Agreement so transferred), and the City shall be permitted to enforce the provisions of this Agreement directly against Concessionaire or any transferee of the Concessionaire without proceeding in any way against any other person.

SECTION 16. SPECIAL EVENTS / SPONSORSHIPS.

16.1 Concessionaire's proposed uses, as defined in **Section 3** herein, do not contemplate the production, promotion or sponsorship by the Concessionaire of special events in any of the Concession Areas. In the event Concessionaire does produce, promote, or sponsor a special event in the City, it shall comply with by the City's Special Events Permit Requirements and Guidelines, as same may be amended from time to time, including the payment of all required fees.

16.2 The City Manager or his/her designee shall evaluate requests for special events permits on a case by case basis in accordance with the City's Special Events Permit and Film and Print Permit Requirements and Guidelines, as may be amended from time to time (the "Guidelines"). In the event that a special event and/or film permit is requested by an entity, other than the Concessionaire, and the proposed special event and/or film production is scheduled to occur within a Concession Area, as such Concession Area is delineated in **Exhibit 3.1.3**, and would cause the operations within that particular Concession Area to cease wholly or partly, and provided that the Concessionaire is not in default under the Agreement at the time of the request, the Concessionaire agrees to cooperate with the City and the special event or film permittee to allow use of such Concession Area during the period of the special event or film production, including set-up and break-down time.

16.2.1 Should the Concessionaire be displaced from all or any portion of a Concession Area due to a special event or film production, then the Concessionaire shall be entitled to a "Displacement Fee" (as hereinafter defined). For purposes of this subsection only, "displacement" shall mean that the Concessionaire cannot provide the food and beverage services, sales of Beach-Related Sundries/Skin Care Products, rental of Beach Equipment, or rental of Watersports Equipment from a section of a Concession Area, as such sections shall be defined in **Exhibit 16.2.1**, and the services provided by the Concessionaire cannot be otherwise reasonably accommodated by the relocation of the services to another section of the Concession Area, as approved by the City Manager or his/her designee.

The Displacement Fee for each section will be calculated by the City Manager or his/her designee and Concessionaire at the start of each Agreement year. The Displacement Fee shall be based upon the average of daily revenues generated by the Concessionaire in the section of the Concession Area from which Concession Services will be displaced, and shall be based upon the average of the last three (3) full years of revenues for that section of the Concession Area, multiplied by the number of days that Concessionaire is displaced. The Displacement Fee is to be paid to the City by the special event permittee or film production (as the case may be), for remittance to Concessionaire. The Concessionaire may waive all or a portion of the Displacement Fee remittance from the City, at its sole option, in exchange for other consideration(s) of equal value from the special event permittee or film production, as may be negotiated directly between the Concessionaire and the special event permittee or film production ("Alternative Consideration"). Written notice of such waiver, and the value of the Alternative Consideration, shall be provided by the Concessionaire to the City Manager or his/her designee prior to payment of the Displacement Fee to the City by the special event permittee or film production. The Concessionaire acknowledges that, in the event of notification to and acceptance by the City of a waiver request for the Displacement Fee, there shall be no other remedy for the Concessionaire for the collection of any additional fees and/or consideration as a result of displacement of a section of a Concession Area due to a special event or film production, and the City shall have no further liability to Concessionaire under this subsection.

16.2.2 Notwithstanding anything to the contrary, if a special event or film production occurs in a Concession Area, Concessionaire shall not be liable for any charge, fee or other expense, governmental or otherwise, in connection with such special event or film production, nor for waste clean-up, removal, or other obligations under this Agreement with respect to the area used by the special event or film production during the permitted time.

16.3 City Special Events.

Notwithstanding **Subsections 16.1 and 16.2** above, and in the event that the City, at its sole discretion, deems that it would be in the best interest of the City, the City reserves the right to displace the Concessionaire for City-produced special events and/or City-produced productions. In such cases, the

City may require that Concessionaire cease and desist operations during the term of, and in the area of the City-produced special event and/or production. No displacement fee shall be paid by the City to the Concessionaire for a City-produced special event/production occurring in a Concession Area. If the Concessionaire is not required to close, or chooses to remain open without interference to the City-produced special event and/or production, Concessionaire agrees to cooperate with the City. If the Concessionaire is allowed to remain open during City-produced special events and/or productions, the Concessionaire may be allowed to have in operation its normal daily complement of equipment and staff. "Normal" shall be defined as equipment and staff, approved by the City, that the Concessionaire has available for the public on a normal day, 365 days per year. Such equipment or staff shall not be increased or altered during City-produced special events and/or productions without the prior written consent of the City Manager or his/her designee. To the extent that the normal daily complement of equipment and staff is displaced by the City-produced special event and/or production, the Concessionaire may reallocate such displaced equipment and staff on a pro-rata basis within the portion of the Concession Areas not being utilized by the special event or production.

16.5 Sponsorships.

The City reserves unto itself all present and future rights to negotiate all forms of endorsement and/or sponsorship agreements based on the marketing value of any City trademark, property, brand, logo and/or reputation (hereinafter referred to in this subsection as a "City Mark" or the "City Marks"). Any and all benefits derived from an endorsement and/or sponsorship agreement based on the marketing value of a City Mark, including any monetary contributions, shall belong solely and exclusively to the City.

Concessionaire shall be specifically prohibited from entering into, or otherwise creating, endorsements or sponsorship agreements with third parties which are based solely or in any part on the marketing value of a City Mark. This shall include, for example purposes only, any agreement between the Concessionaire and a food and beverage and/or skin care product company for the designation of a product(s) as the official product(s) of Miami Beach, South Beach, etc.

The prohibition on Concessionaire entering into endorsements or sponsorship agreements, pursuant to this **Subsection 16.5**, shall not be deemed to include nor prohibit the Concessionaire's right to offer the exclusive sale, rental or use of any particular brand or product that would be permitted for use or sale pursuant to this Agreement, subject to the Concessionaire's disclosure of same, as required pursuant to this paragraph, and subject to the City's rights in the following paragraph (which City rights shall be superior to any rights or permissions granted to Concessionaire pursuant to this **Subsection 16.5**). Moreover, the City will not limit Concessionaire's ability to negotiate a reduced rate for purchase from any vendor whose product(s) Concessionaire uses or offers for sale or rent pursuant to this Agreement. Notwithstanding the preceding, Concessionaire shall, on or before the Effective Date, provide the City with an itemized list describing any agreements or arrangements which have been entered into or made, or which may be imminently entered to or made, pursuant to a written contractual agreement or verbal agreement, that Concessionaire has made, or intends to imminently make, regarding the exclusive sale, rental, or use of any brand or product. Concessionaire's submitted list shall be attached and incorporated as **Exhibit 16.5** to this Agreement. It shall also be Concessionaire's sole responsibility and obligation to update such list/exhibit within thirty (30) days of a particular brand or product being added, or deleted, as the case may be .

Notwithstanding the above (including the rights given to Concessionaire in the preceding paragraph), should the City enter into any exclusive endorsement and/or sponsorship agreement for products sold, rented, distributed, or otherwise used by the Concessionaire, then Concessionaire shall be required to sell, rent, distribute, or use ONLY the products under the City's exclusive endorsement and/or sponsorship agreement, and may not sell, rent, distribute, or otherwise use products produced by the City's exclusive sponsor's competitors. Notice of any exclusive endorsement/sponsorship agreement entered into by the City for any products

sold, rented, distributed, or otherwise used by the Concessionaire shall be provided by the City to the Concessionaire at least ninety (90) days prior to the commencement of any such exclusive endorsement/sponsorship agreement by the City. It is understood that the Concessionaire may have existing agreements for the sale, rental, distribution or use of the product(s) that may be competitive products of the City's exclusive sponsor. In those instances, unless there is a penalty for cancellation/termination of such agreement or contract between Concessionaire and the third party (for the sale, rental, distribution or use of such competitor products), the Concessionaire shall cancel/terminate those agreements or contracts within thirty (30) days of the City's notice to the Concessionaire by the City of the City's exclusive endorsement/sponsorship agreement.

The City also acknowledges that, prior to the City providing notice to Concessionaire of any exclusive endorsement and/or sponsorship agreement, as provided in this **Subsection 16.5**, Concessionaire may have purchased, for example, certain Beach Equipment (including, as defined herein, beach chairs, lounge chairs, pads, umbrellas, and sun canopies), and/or Watersports Equipment (including, as defined herein, motorized and non-motorized equipment such as wave runners, parasail boats, banana boats, kayaks, and paddle boats) for use in the Concession Areas, and to provide the services contemplated under this Agreement, that may be deemed to be a competitive (or otherwise prohibited) product under one of the aforesated proposed exclusive endorsement and/or sponsorship agreements that the City may seek to enter into during the Term (For purposes of this **Subsection 16.5** only, such Beach Equipment and Watersports Equipment and other equipment and products required to be provided by Concessionaire hereunder that has been purchased by Concessionaire for the Concession Areas, and to provide the services contemplated under this Agreement, shall be referred to collectively as Concessionaire's Equipment). Concessionaire's Equipment shall only be exempt from the requirements of **Subsection 16.5** provided that PRIOR TO the City giving Concessionaire notice of its intent to enter into the particular exclusive endorsement and/or sponsorship agreement: (i) the particular Concessionaire's Equipment was already approved by the City Manager or his/her designee, and is referenced in a corresponding exhibit to this Agreement; **and** (ii) the Concessionaire shall have entered into a binding contract for the purchase of such Concessionaire's Equipment (PRIOR TO the date of the aforesated City notice to Concessionaire). As to subsection (ii), the City Manager or his/her designee may request such documentation as they deem reasonably necessary including, without limitation, sales slips, invoices, receipts, sales contracts, purchase orders, etc., evidencing proof of Concessionaire's purchase of the particular Concessionaire's Equipment.

Notwithstanding the preceding paragraph, should the City enter into an exclusive endorsement/sponsorship agreement in which the proposed City sponsor will provide the particular Concessionaire's Equipment to the City and/or the Concessionaire at no cost to the City and/or Concessionaire, the City reserves the right to require Concessionaire to use this sponsor-provided Concessionaire Equipment.

It is further understood that, should the City enter into any exclusive endorsement/sponsorship agreement that includes the public beachfront concessions that are the subject of this Agreement, the City shall have the right to place, or allow the placement of, any signage, equipment, logos or graphics, as same may be approved by the City's Planning Department, or the City Manager or his/her designee, on any or all of the following Concessionaire's equipment and facilities: food and beverage dispensing facilities, carts, kiosks, storage containers, Watersports Equipment, Beach Rental Equipment, and Vehicles; provided, however, that the (i) cost and expense to place any such approved signage, equipment, logos or graphics, and to remove such approved signage, equipment, logos or graphics, shall not be the responsibility of the Concessionaire; and (ii) the City shall use, or cause to be used, reasonable care in the placement and removal of such signage, equipment, logos or graphics and, in the event that any of the aforesated Concessionaire's equipment is/are damaged as a result of the placement or removal of such approved signage, equipment, logos, or graphics, then the City shall be

responsible for repairing any such damage, to the extent of restoring the equipment or facility(ies) to the condition it/they existed prior to the placement or removal (as the cause may be) of the approved signage, equipment, logos, or graphics, reasonable wear and tear excepted. Concessionaire shall endeavor to ensure that any such signage, equipment, logos or graphics are not unduly obscured or damaged.

SECTION 17. NO IMPROPER USE.

The Concessionaire will not use, nor suffer or permit any person to use in any manner whatsoever, the Concession Areas, or any facilities, furnishings or equipment thereon, for any improper, immoral or offensive purpose, or for any purpose in violation of any Federal, State, County, or municipal ordinance, rule, order or regulation, or of any governmental rule or regulation now in effect or hereafter enacted or adopted. The Concessionaire will protect, indemnify, and forever save and keep harmless the City, its officers, officials, employees, contractors, and agents, from and against damage, penalty, fine, judgment, expense or charge suffered, imposed, assessed or incurred for any violation, or breach of any law, ordinance, rule, order or regulation occasioned by any neglect, act or omission of the Concessionaire, or any officers, directors, employee, contractors (including any subconcessionaire) or agents regarding the Concession Areas. In the event of any violation by the Concessionaire or if the City or his/her authorized representatives shall deem any conduct on the part of the Concessionaire to be objectionable or improper, the City Manager shall have the right to suspend concession operations should the Concessionaire fail to correct any such violation, conduct, or practice, to the satisfaction of the City Manager, within twenty-four (24) hours after receiving written notice of the nature and extent of such violation, conduct, or practice; such suspension to continue until the violation is cured. The Concessionaire further agrees not to commence operations during the suspension until the violation has been corrected to the satisfaction of the City Manager. Notwithstanding the foregoing, Concessionaire is not liable for any acts or omissions of the public.

SECTION 18. PRICE SCHEDULES.

Concessionaire agrees that prices charged for beach equipment rentals, sale of food and beverage service, sale of beach sundries/skin care products, and watersport equipment rentals will be consistent with the price schedule(s) herein submitted by the Concessionaire and approved by the City, and incorporated herein as **Exhibit 3.1** to this Agreement. All subsequent price approvals and changes must be approved in writing by the City Manager or his/her designee. Prices shall be reasonably consistent with those charged for similar items and services in the general vicinity. The City Manager shall have the final right of approval for all such prices and changes, but said right shall not be arbitrarily or unreasonably exercised. The Concessionaire agrees to refrain from the sale or rental of any item identified as prohibited by the City and to sell or rent only those items approved by the City. The Concessionaire agrees to maintain an adequate supply necessary to accommodate beach patrons.

SECTION 19. NOTICES.

All notices from the City to the Concessionaire shall be deemed duly served upon receipt, if mailed by registered or certified mail with a return receipt to the Concessionaire at the following address:

Boucher Brothers Miami Beach LLC
420 Lincoln Road, Suite 265
Miami Beach, Florida 33139

With copy to:

Abigail C. Watts-FitzGerald
Hunton & Williams
1111 Brickell Avenue, Suite 2500
Miami, Florida 33131

All notices from the Concessionaire to the City shall be deemed duly served upon receipt, if mailed by registered or certified mail return receipt requested to the City of Miami Beach at the following addresses:

City Manager
City of Miami Beach
1700 Convention Center Drive
Miami Beach, FL 33139

With Copies to:

Asset Manager
City of Miami Beach
555 17 Street
Miami Beach, Florida, 33139

City Attorney
City of Miami Beach
1700 Convention Center Drive
Miami Beach, FL 33139

The Concessionaire and the City may change the above mailing address at any time upon giving the other party written notification. All notices under this Concession Agreement must be in writing.

SECTION 20. LAWS.

20.1 Compliance.

Concessionaire shall comply with all applicable City, County, State, and Federal ordinances, statutes, rules and regulations, including but not limited to all applicable environmental City, County, State, and Federal ordinances, statutes, rules and regulations.

20.2 Governing Law.

INTENTIONALLY OMITTED.

20.3 Equal Employment Opportunity.

Neither Concessionaire nor any affiliate of Concessionaire performing services hereunder, or pursuant hereto, will discriminate against any employee or applicant for employment because of race, creed, sex, color, national origin, religion, sex, gender identity, sexual orientation, disability, marital or familial status or age. Concessionaire will make good faith efforts to utilize minorities and females in the work force and in correlative business enterprises.

20.4 No Discrimination.

The Concessionaire agrees that there shall be no discrimination as to race, color, national origin, religion, sex, gender identity, sexual orientation, disability, marital and familial status, or age, in its employment practice or in the operations referred to by this Concession Agreement; and further, there shall be no discrimination regarding any use, service, maintenance, or operation within the Concession Areas. All services offered on the beach shall be made available to the public, subject to the right of the Concessionaire and the City to establish and enforce rules and regulations to provide for the safety, orderly operation and security of the facilities.

SECTION 21. MISCELLANEOUS.

21.1 No Partnership.

Nothing contained in this Agreement shall constitute or be construed to be or create a partnership or joint venture between the City and Concessionaire.

21.2 Modifications.

This Agreement cannot be changed or modified except by agreement in writing executed by all parties hereto. Concessionaire acknowledges that no modification to this Agreement may be agreed to by the City unless approved by the Mayor and City Commission, except where such authority has been expressly provided herein to the City Manager or his designee.

21.3 Complete Agreement.

This Agreement, together with all exhibits incorporated hereto, constitutes all the understandings and agreements of whatsoever nature or kind existing between the parties with respect to Concessionaire's operations, as contemplated herein.

21.4 Headings.

The section, subsection and paragraph headings contained herein are for convenience of reference only and are not intended to define, limit, or describe the scope or intent of any provision of this Agreement.

21.5 Binding Effect.

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.

21.6 Clauses.

The illegality or invalidity of any term or any clause of this Agreement shall not affect the validity of the remainder of the Agreement, and the Agreement shall remain in full force and effect as if such illegal or invalid term or clause were not contained herein unless the elimination of such provision detrimentally reduces the consideration that either party is to receive under this Agreement or materially affects the continuing operation of this Agreement.

21.7 Severability.

If any provision of this Agreement or any portion of such provision or the application thereof to any person or circumstance shall be held to be invalid or unenforceable, or shall become a violation of any local, State, or Federal laws, then the same as so applied shall no longer be a part of this Agreement but the remainder of the Agreement, such provisions and the application thereof to other persons or circumstances, shall not be affected thereby and this Agreement as so modified shall.

21.8 Right of Entry.

The City, at the direction of the City Manager, shall at all times during hours of operation, have the right to enter into and upon any and all parts of the Concession Areas for the purposes of examining the same for any reason relating to the obligations of parties to this Agreement.

21.9 Not a Lease.

It is expressly understood and agreed that no part, parcel, building, facility, equipment or space is leased to the Concessionaire, that it is a concessionaire and not a lessee; that the Concessionaire's right to operate the concession shall continue only so long as this Agreement remains in effect.

21.10 Signage.

Concessionaire shall provide, at its sole cost and expense, any required signs at its concessions. All advertising, signage and postings shall be approved by the City, and shall be in accordance with all applicable municipal, County, State and Federal laws and regulations. Any signage posted by Concessionaire on its facilities and equipment shall be subject to the prior approval of the City as to size, shape and placement of same.

21.11 Use of Beach.

The beach is for the use and enjoyment of the public, for recreation and other public purposes and the public's right to such use shall not be infringed upon by any activity of the Concessionaire. Upon execution of this Agreement, Concessionaire acknowledges that all of the beaches are public and as such concession operations must not restrict, or appear to restrict, access to the general public, or in any way limit the public nature or ambiance of the beachfront. The Concessionaire will conduct its operations so as to maintain a reasonably quiet and tranquil environment for the adjacent area, and make no public disturbances.

21.12 Conflict of Interest.

Concessionaire shall perform its services under this Agreement and conduct the concession operations contemplated herein, in a manner so as to show no preference for other concession operations/facilities (e.g. particularly concession operations behind private property along the City's beachfront) owned, operated, managed, or otherwise controlled by Concessionaire with regard to its responsibilities pursuant to this Concession Agreement.

21.13 Reasonableness.

Notwithstanding anything to the contrary in this Agreement, including but not limited to references to "sole option" or "sole discretion" or words of similar meaning, in each instance in which the approval or consent or other action of the City Commission or the City Manager or his/her designee is allowed or required in this Agreement, such approval, consent, or other action shall not be unreasonably withheld, conditioned or delayed.

21.14 Procedure for Approvals and/or Consents.

In each instance in which the approval or consent of the City Manager or his/her designee is allowed or required in this Agreement, it is acknowledged that such authority has been expressly provided herein to the City Manager or his/her designee by the Mayor and City Commission of the City. In each instance in which the approval or consent of the City Manager or his/her designee is allowed or required in this Agreement, Concessionaire shall send to the City Manager a written request for approval or consent (the "Approval Request"). The City Manager or his/her designee shall use good faith efforts to respond to the Approval Request within sixty (60) days from the date of such Request (i.e. to provide written notice to Concessionaire approving of, consenting to or disapproving of the Request). However, the City Manager or his/her designee's failure to consider such Request within this time provided shall not be deemed a waiver, nor shall Concessionaire assume that the Request is automatically approved and consented to. The Subsection shall not apply to approvals required herein by the Mayor and City Commission.

21.15 No Waiver.

No waiver of any covenant or condition of this Agreement by either party shall be deemed to imply or constitute a waiver in the future of the same covenant or condition or of any other covenant or condition of this Agreement.

21.16 No Third Party Beneficiary.

Nothing in this Agreement shall confer upon any person or entity, including, but not limited to subconcessionaires, other than the parties hereto and their respective successors and permitted assigns, any rights or remedies by reason of this Agreement.

SECTION 22. LIMITATION OF LIABILITY.

The City desires to enter into this Agreement placing the operation and management of the Concession Area(s) in the hands of a private management entity only if so doing the City can place a limit on its liability for any cause of action for breach of this Agreement, so that its liability for any such breach never exceeds the sum of \$100,000.00. Concessionaire hereby expresses its willingness to enter into this Agreement with a \$100,000.00 limitation on recovery for any action for breach of contract. Accordingly, and in consideration of

the City's entering into this Agreement, the City shall not be liable to Concessionaire for damages to Concessionaire in an amount in excess of \$100,000.00, for any action for breach of contract arising out of the performance or non-performance of any obligations imposed upon the City by this Agreement. Nothing contained in this paragraph or elsewhere in this Agreement is in any way intended to be a waiver of limitation placed upon the City's liability as set forth in Florida Statutes, Section 768.28.

SECTION 23. VENUE.

This Agreement shall be deemed to have been made and shall be construed and interpreted in accordance with the laws of the State of Florida. This Agreement shall be enforceable in Miami-Dade County, Florida, and if legal action is necessary by either party with respect to the enforcement of any and all the terms or conditions herein, exclusive venue for the enforcement of same shall lie in Miami-Dade County, Florida. **CITY AND CONCESSIONAIRE HEREBY KNOWINGLY AND INTENTIONALLY WAIVE THE RIGHT TO TRIAL BY JURY IN ANY ACTION OR PROCEEDING THAT CITY AND CONCESSIONAIRE MAY HEREIN AFTER INSTITUTE AGAINST EACH OTHER WITH RESPECT TO ANY MATTER ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE CONCESSION AREA(S).**

IN WITNESS WHEREOF, the parties hereto have caused their names to be signed and their seals to be affixed, all as of the day and year first above written, indicating their agreement.

PASSED AND ADOPTED THIS _____ day of _____, 2011.

Attest:

CITY CLERK

MAYOR

Witness:

**BOUCHER BROTHERS
MIAMI BEACH LLC**

Signature

Name and Title of Signatory

**APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION**

[Handwritten Signature] 12/13/11
for City Attorney **Date**
[Handwritten Signature]

