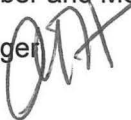


MIAMI BEACH

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

COMMISSION MEMORANDUM

TO: Honorable Mayor Dan Gelber and Members of the City Commission

FROM: Alina T. Hudak, City Manager 

DATE: July 28, 2021

SUBJECT: **A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AMENDING RESOLUTION NO. 2020-31368, WHICH WAIVED THE FORMAL COMPETITIVE BIDDING REQUIREMENT AND AUTHORIZED THE CITY ADMINISTRATION TO NEGOTIATE AMENDMENT NO. 1 TO THE AMENDED AND RESTATED CONCESSION AGREEMENT, DATED MAY 21, 2019 (AGREEMENT), BETWEEN THE CITY AND BOUCHER BROTHERS MIAMI BEACH, LLC (CONCESSIONAIRE), FOR THE MANAGEMENT AND OPERATION OF PUBLIC BEACHFRONT CONCESSIONS, ADDING THE MANAGEMENT AND OPERATION OF THE PUBLIC BEACHFRONT CONCESSIONS LOCATED AT 21ST AND 46TH STREETS TO THE SCOPE OF THE AGREEMENT AND MODIFYING CERTAIN FINANCIAL TERMS OF THE AGREEMENT; SAID AMENDMENT TO THIS RESOLUTION MODIFYING THE ESSENTIAL TERMS OF AMENDMENT NO. 1 FOR BOTH AGREEMENTS IN ORDER TO ADDRESS THE IMPACT OF THE COVID-19 PANDEMIC ON CONCESSIONAIRE'S OPERATIONS, AND UPDATING MISCELLANEOUS PROVISIONS OF THE AGREEMENT; AND AUTHORIZING THE CITY MANAGER TO FINALIZE AMENDMENT NO. 1, CONSISTENT WITH THE TERMS PRESENTED HEREIN, SUBJECT TO FORM APPROVAL BY THE CITY ATTORNEY; AND FURTHER AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE THE AMENDMENT.**

BACKGROUND

Boucher Brothers Management is a known entity with organizational experience and capacity. Boucher Brothers has been in business for over 30 years, providing pool, beach, water sports, large corporate group events and food and beverage concessions. Boucher Brothers provides pool and beach services for approximately 30 Miami Beach condominium and hotel properties encompassing over 11,000 rooms and four water sports locations.

On May 8, 2019, the Mayor and City Commission approved Resolution No. 2019-30829 authorizing the City and Boucher Brothers, LLC (the Concessionaire) to execute a new amended and restated concession agreement (Amended and Restated Agreement) (executed May 21, 2019) to include an initial term of seven (7) years and six (6) months, commencing on July 1, 2019 and ending on December 31, 2026, with two (2) additional renewal options for five (5) years

each. The Agreement provides Concessionaire the exclusive right to operate certain concessions in Lummus Park, Ocean Terrace, North Shore Open Space Park, South Pointe Park Beach and Allison Park, for the rental of beach equipment, food & beverage service, sale of beach related sundries and skin care products, and watersports equipment rentals.

On October 14, 2015, the Mayor and City Commission approved Resolution No. 2015-29166, authorizing the City and Boucher Brothers Miami Beach 21 & 46 ST, LLC (Concessionaire), for the management and operation of the beachfront concessions at 21st and 46th Street (21st and 46th Street Concession Agreement), pursuant to RFP 2015-20-5-WG. This agreement contained an initial term of approximately two (2) years, commencing on December 26, 2015, and ending on December 31, 2017, with three (3) additional renewal options for one (1) year each. The third and final renewal period expired on December 31, 2020. Thereafter, the 21st and 46th Street Concessions Agreement entered into a month-to-month extension, commencing on January 1, 2021, and set to expire on July 31, 2021

ANALYSIS

At the June 24, 2020 Commission meeting, the Administration submitted a request for approval to issue Request for Proposals (RFP) 2020-145-ND for the management and operation of the beachfront concessions at 21st and 46th Street. The Mayor and City Commission discussed this matter and directed the Administration, in order to consolidate vendors and agreements related to the public beachfront concessions, to negotiate with Concessionaire to explore the possibility of incorporating the 21st and 46th Street Agreement into the existing Amended and Restated Agreement, which was recently extended for Lummus Park, Ocean Terrace, North Shore Open Space Park, South Pointe Park Beach and Allison Park.

Consequently, on July 29, 2020, the Mayor and City Commission adopted Resolution No. 2020-31368 accepting the written recommendation of the City Manager to waive the formal bidding requirement by 5/7th vote, pursuant to City Code Section 2-367(e), as being in the best interest of the City; and further, authorized the Administration to finalize negotiations with Concessionaire and bring back to City Commission Amendment No. 1 for final approval.

The Administration has been in negotiations with Concessionaire and recommends Amendment No. 1 to the Amended and Restated Agreement, based upon the following essential terms:

- 1) Incorporation of 21st and 46th Street Agreement which would be incorporated and run concurrent with the terms of the Amended and Restated Agreement.
 - a) Increase the following Concessionaire Service fees (percentage gross payments):
 - City Displacement fees increase from 25% to 30%
 - Advertising/Sponsorship fees increase from 25% to 50%
 - b) The following language originally stipulated in the 21st and 46th Agreement shall be incorporated into the Amended and Restated Agreement:
 - Concessionaire shall be permitted to purchase, at the then current rate, up to one (1) monthly parking pass at each of the 21st and 46th Street surface parking lots; and

- Concessionaire shall have the ability to open/close the 46th Street concession area, based on demand, subject to the prior written approval of the City Manager (or designee); and
 - Concessionaire shall have the right to install a fenced storage enclosure at 21st Street (similar to the existing storage enclosure at 46th Street), subject to all regulatory approvals.
- c) The Concessionaire will resume all business terms proposed and accepted at the July 29, 2020 Commission meeting, effective 2022 including:
- Increased minimum rent guarantee (as of January 2022) from \$122,000 to \$200,000 (in addition to the \$1,200,000 contained in the Agreement);
 - Releasing the \$20,833 security deposit contained in the Agreement for 21st and 46th Street to the City, to be used by the City to host beach event(s) for the benefit of Miami Beach residents; and
 - Providing a \$5,000 annual contribution to the City to be used for beach related initiatives (i.e. seaweed removal, sanitation, marketing, etc.) as an additional public benefit to the \$30,000 Concessionaire already pays annually under the scope of the Amended and Restated Agreement, for a total of \$35,000 annually.

In addition to the above terms, Amendment No. 1 would clarify language pertaining to Section 4.2 of the 21st and 46th Street Agreement.

Pursuant to Section 4.2 of the said Agreement, the *"Concessionaire shall pay to the City the greater of (x) the MG of \$122,000, or (y) after such time as annual Gross Receipts exceed \$600,000.00, twenty-five percent (25%) of all of the Gross Receipts as Percentage of Gross (PG)."* Conversely, the PG paid by the Concessionaire pursuant to Section 4.2 of the Agreement is currently 20.33% of revenues up to \$600,000 annually, and 25% on revenues that exceed \$600,000 annually including food and beverage, the sale of beach related sundries and beach equipment rentals.

In the spirit of the negotiation and in accordance with the RFP response (attached herein as Exhibit C), this provision was intended to have Concessionaire pay 25% of gross sales (PG) above \$600,000 threshold for a given year. The Asset Division Director at the time concurred. However, the Office of Inspector General (OIG) and the City Attorney's Office have opined that the language as written provides that once the Concessionaire clears the \$600,000 threshold for the year, the Concessionaire would owe 25% of all of the gross receipts for the given year. Based on this interpretation, the OIG's audit report revealed a discrepancy from January 2017 through December 2020 (in the amount of \$128,151.72).

Based on the foregoing, clarification is required to address the spirit of the negotiated terms and the OIG's City Attorney's Office interpretation.

- 2) The Administration recommends this section be amended to provide clarity to the intended calculation of the concession fee, with the following modifications included in Amendment No. 1:
- Retrospectively, the amount identified by the OIG for the period of January 2017-

December 2020, in the amount of \$128,151.72 be waived as it was inconsistent with the spirit of the negotiated terms.

- Prospectively, this section will be clarified to align with the interpretation of the OIG and City Attorney's Office. This provision shall be updated to reflect that the Concessionaire would pay 25% of all gross sales for a given year. This would be effective January 2021.

In addition to consolidating the Agreements, the Administration further recommends Amendment No. 1 include rent abatement for Concessionaire.

In January 2020, in accordance with the Amended and Restated Agreement, Concessionaire paid half of the required Minimum Guarantee (MG) due to the City of \$1,200,000. They also paid half of the \$122,000 MG under the 21st and 46th Street Agreement. Shortly thereafter in March 2020, the COVID-19 pandemic forced Concessionaire to close operations on the City's beaches. The Beach did not reopen until June 2020. the Concessionaire was unable to provide the required July 2020 or the complete January 2021 MG payment under the two Agreements. Their 2020 financials indicated a decrease in gross sales of -36% for the 21st and 46th Street Agreement, and -57% for the Amended and Restated Agreement, respectively. In December 2020, Concessionaire requested (attached herein as Exhibit B) to defer the MG payment due in January 2021 under the Amended and Restated Agreement. This request was consented as good faith negotiations were taking place to reach a resolution to Concessionaire's rent relief request.

In consideration of the foregoing, the Administration recommends Amendment No. 1 to include the following modifications to address the significant impact caused by the pandemic.

- 3) Provide temporary financial assistance as it relates Minimum Guarantee (MG) and Percentage of Gross (PG) under both Agreements:

21st and 46th Street:

The annual MG is payable in two installments of \$61,000 in January and July. Concessionaire paid the first installment of the MG in the amount of \$61,000 in January 2020, which covers the first six months of the calendar year.

- Concessionaire paid MG of \$61,000 in January 2020 (covers January-June, 2020);
- MG Credit of \$35,922 due to closures (March 12, 2020 – June 30, 2020).
- MG credit to be applied to January 2021 MG (\$61,000-\$35,000).
- Waive MG July 2020.
- Abatement of PG sales for January 2020 through February 2021.
- PG starting March 1, 2021 = 25% of gross receipts.

Amended and Restated Agreement:

The annual MG is payable in two installments of \$600,000 in January and July. Concessionaire paid the first installment of the MG in the amount of \$600,000 in January 2020, which covers the first six months of the calendar year.

- Concessionaire paid \$600,000 in January 2020 (covers January-June 2020)
- MG credit of \$367,000 due to closures (March 12, 2020 – June 30, 2020).

- MG credit to be applied to January 2021 MG (\$600,000-\$367,000).
- Waive MG July 2020
- Abatement of Percentage Gross Sales Receipts (PG) sales for January 2020 through February 2021.
- PG resuming March 1, 2021.
- January 2022, MG is greater of \$1,200,000 or average PG for the last 5 years of the original concession areas governed by the Amended and Restated Agreement

The Administration and Concessionaire have in good faith, negotiated terms that contemplate the scope of the Agreements, provisions requiring clarification and financial relief. Consequently, Commission direction is being sought for the business terms proposed herein.

CONCLUSION

In consideration of the aforementioned, the Administration recommends, that Mayor and City Commission adopt the Resolution, accepting to waive by 5/7th vote, the formal competitive bidding requirement in Section 2-367(e), finding such waiver to be in the best interest of the City, approving Amendment No. 1 to the Amended and Restated Concession Agreement between the City and Boucher Brothers Miami Beach, LLC (Concessionaire). Said Amendment to the management and operation of public beachfront concessions to include: (1) incorporation of certain scopes of 21st and 46th Street Agreement; (2) clarification of section 4.2 of said Agreement; and (3) a waiver of the minimum guarantee and percentage gross due in January 2020-February 2021; and further delegating the City Manager the authority to finalize Amendment No. 1 consistent with the terms presented herein, subject to form approval by the City Attorney.

Exhibits:

- A Concessionaire Gross Sales, 2019 and 2020
- B Concessionaire Correspondence Regarding Minimum Guarantee Payments
- C RFP Proposal Form and Response