

# CONCESSION AGREEMENT

BETWEEN THE CITY OF MIAMI BEACH, FLORIDA  
AND FRIENDS OF THE BASS, INC.  
D/B/A THE BASS MUSEUM OF ART

FOR MANAGEMENT AND OPERATION OF A  
FOOD & BEVERAGE CONCESSION IN THE  
OUTDOOR SPACE ADJACENT TO  
2100 COLLINS AVENUE

**CONCESSION AGREEMENT  
BETWEEN THE CITY OF MIAMI BEACH, FLORIDA AND  
FRIENDS OF THE BASS MUSEUM, INC. D/B/A THE BASS MUSEUM OF ART  
FOR MANAGEMENT AND OPERATION OF A FOOD & BEVERAGE CONCESSION  
IN THE OUTDOOR SPACE ADJACENT TO 2100 COLLINS AVE**

THIS CONCESSION AGREEMENT (the "Agreement") made the \_\_\_\_ day of \_\_\_\_\_, 2018, between the **CITY OF MIAMI BEACH, FLORIDA**, a municipal corporation organized and existing under the laws of the State of Florida (hereinafter called the "City"), having its principal address at 1700 Convention Center Drive, Miami Beach, Florida, 33139, and **FRIENDS OF THE BASS MUSEUM, INC. D/B/A THE BASS MUSEUM OF ART**, a Florida nonprofit corporation, having its principal place of business at 2100 Collins Avenue, Miami Beach, Florida, 33139 (hereinafter called "Concessionaire").

Pursuant to that certain Letter Agreement, dated \_\_\_\_\_, as may be amended from time to time ("Letter Agreement"), Concessionaire operates The Bass Museum of Art, located at 2100 Collins Avenue, Miami Beach, Florida (the "Museum"). In accordance with its management and operation of the Museum under the Letter Agreement, the Concessionaire operates an indoor café for the sale of food and beverages.

The City hereby grants to the Concessionaire, and the Concessionaire hereby accepts from the City, the rights to maintain, manage, and operate a food and beverage concession within the Concession Area (as hereinafter defined), in accordance with the purpose(s) and for the term(s) stated herein, and subject to all the terms and conditions herein contained.

**SECTION 1. TERM.**

1.1 This Agreement shall commence on the 1<sup>st</sup> day of November, 2018 (the "Commencement Date"), and terminate on the 31<sup>st</sup> day of October, 2021 ("Term").

For purposes of this Agreement, a "Contract Year" shall be defined as that certain period commencing on the 1<sup>st</sup> day of November, and ending on the 31<sup>st</sup> day of October.

Provided Concessionaire is in good standing and free from default(s) under Section 9 hereof, and upon written notice from Concessionaire, which notice shall be submitted to the City Manager no earlier than one hundred eighty (180) days, but in any case no later than one hundred twenty (120) days prior to the expiration of the initial Term, this Agreement may be extended for two (2) additional one (1) year renewal terms. Any extension, if approved, shall be memorialized in writing and signed by the parties hereto (with the City hereby designating the City Manager as the individual authorized to execute such extensions on its behalf).

In the event that the City Manager determines, in his sole discretion, not to

extend or renew this Agreement (upon expiration of the initial term or of the first renewal term), the City Manager shall notify Concessionaire of same in writing, which notice shall be provided to Concessionaire within thirty (30) business days of the City Manager's receipt of Concessionaire's written notice.

1.2 It is the intent of the parties hereto that, unless otherwise terminated pursuant to the provisions of this Agreement, the Term of this Agreement is intended to run concurrent with the term, including any extensions thereof, of the Letter Agreement, as defined herein. If, at any time during the Term of this Agreement, the Lease Agreement is terminated or otherwise ceases to be of any legal force and effect, for whatever reason whatsoever, then this Agreement shall automatically terminate, and shall be null and void and of no further force and effect, and the City shall have no further liability with respect to same.

1.3 Termination for Convenience.

The City and Concessionaire shall both have the right to terminate this Agreement, without cause and for convenience, and without any liability, upon providing thirty (30) days written notice to the other party.

**SECTION 2. CONCESSION AREA.**

2.1 Concession Area.

The City hereby allows Concessionaire, during the Term herein, to maintain, manage, and operate an outdoor seating area in the approximately 2000 square feet of outdoor space adjacent to and east of the Museum (the "Concession Area"), which outdoor space is further delineated in the Site Plan attached hereto and incorporated herein as **Exhibit A.**

Concessionaire shall be permitted to place up to nine (9) tables, nine (9) umbrellas, and thirty-six (36) chairs (collectively, "Concession Area Furniture") within the Concession Area. The Concession Area Furniture and Site Plan are subject to approval by the City, including the Planning Department, in its regulatory capacity, and compliance with applicable ADA requirements. No material changes in the proposed Site Plan shall be permitted without the prior written consent of the City Manager or her designee, which consent (if given at all) shall be at the City Manager's (or his designee's) sole and reasonable judgment and discretion.

2.2 As referenced herein, for purposes of contract administration, the City Manager's designee shall be the director of the City's Office of Real Estate ("Contract Manager").

**SECTION 3. USE.**

3.1 The Concession Area shall be used by the Concessionaire solely as an

outdoor seating area for the patrons and guests of the Demised Premises. Concessionaire hereby agrees and acknowledges that the Concession Area shall be open and available to all members of the general public choosing to enjoy Concessionaire's food and beverage services.

3.2 **Concessionaire and the Museum operator pursuant to the Letter Agreement shall at all times throughout the Term of this Agreement be one and the same and cannot exist independently of each other. Concessionaire acknowledges and agrees that its use of the Concession Area shall be, and remain at all times throughout the Term, an ancillary use to the Museum. Concessionaire hereby warrants and represents to City that, as long as Concessionaire remains the operator of the Museum restaurant, Concessionaire shall, throughout the Term of this Agreement, remain as the operator of the Concession Area.**

3.3 The Concession Area shall have minimum days and hours of operation from Wednesday through Sunday, commencing at 10:00 AM and ending at 5:00 PM. Nothing herein contained shall be construed to authorize hours contrary to the laws governing such operations. Any change in the minimum days or hours of operation shall require the prior written consent of the City Manager. In no event shall the hours of operation extend earlier than 7:00 AM, or later than 11:00 PM. Notwithstanding the preceding hours of operation, the Concession Area shall only be open and operating when the Museum is open for business (and, conversely, shall be closed when the Museum is closed).

3.4 The amount of seating in the Concession Area shall be included in the overall seating count of the Demised Premises. There shall be no bar counter of any kind as part of the Concession Area and all food served shall be prepared within the interior kitchen of the Demised Premises. There shall be no alcoholic beverages permitted on the Concession Area. All tables, chairs, and umbrellas will be removed and stored each night at close of business. Any exception to this requirement shall be at the sole and absolute discretion of the City Manager or his designee. Concessionaire shall further maintain the Concession Area and abide by the conditions set forth in **Exhibit B** (the "Additional Requirements"), attached hereto and incorporated herein.

3.5 Removal of Concession Area Furniture during Emergency Situations.

The City Manager or his/her designee may direct or require the Concessionaire to immediately remove, relocate and/or store all or part of the Concession Area Furniture or equipment located thereon for public safety considerations in emergency situations, including, without limitation, a threatened tropical storm or hurricane. Upon written and/or verbal notification by the City Manager or Contract Manager of a tropical storm/hurricane warning or alert, or other major weather event that may adversely impact the City, or upon the designation by the United States

National Weather Service or National Hurricane Center of a tropical storm/hurricane warning or alert, whichever occurs first, the Concessionaire shall, within no more than two hours of same, remove, store, and secure all Concession Area Furniture, and shall take all other measures which may be necessary for the protection of the public with respect thereto. The notification by the City Manager of a hurricane or other major weather event, or the issuance of a hurricane warning, shall constitute a public emergency situation. The failure of the City to direct the Concessionaire to remove or safety store the Concession Area Furniture shall not relieve the Concessionaire of its obligation to remove and store the Concession Area Furniture in response to a threatened storm event as outlined herein.

Should Concessionaire fail to remove the Concession Area Furniture within said two (2) hour period, or in the event the City Manager or Contract Manager determines, at his/her sole discretion, that Concessionaire's removal, storage and other efforts are otherwise not satisfactory, Concessionaire shall thereafter be assessed a fee of \$50.00 per hour, until such time as all of the Concession Area Furniture have been removed to the City Manager's satisfaction. In addition, the City Manager, without any obligation to do so, may immediately proceed to remove, relocate, and/or store the Concession Area Furniture that has otherwise not been removed by the Concessionaire, at the Concessionaire's sole cost and expense, with payment to the City for all such costs due within thirty (30) days of City's invoice to Concessionaire.

Concessionaire shall be solely responsible for any damage to City property or other property resulting from Concessionaire's failure to remove and store Concessionaire's property, or otherwise implement appropriate measures in response to a threatened storm or hurricane. Concessionaire's failure to comply with this section shall constitute a default under this Agreement. The remedies identified herein for Concessionaire's failure to comply with this section are cumulative, and in addition to, all remedies that may be available to the City at law and in equity.

3.6 Concessionaire agrees not to place any speakers, or any other device used to amplify sound, in or around the Concession Area. Concessionaire further agrees not to attach any television, speaker, or any other device used to amplify sound, to the exterior of the Museum. Furthermore, Concessionaire shall in no manner use the Concession Area, or Concessionaire's restaurant in the Museum, as an outdoor entertainment or open-air entertainment establishment, and hereby acknowledges that such uses are prohibited (whether as main or accessory uses).

3.7 NO IMPROPER USE.

It is understood and agreed that the Concession Area shall be used by the Concessionaire during the term of this Agreement only for the uses contemplated herein, and for no other purpose or use whatsoever. Concessionaire may not commit waste on the Concession Area, use the

Concession Area for any illegal purpose, or commit a nuisance on the Concession Area. Concessionaire will not use, nor suffer or permit any person to use in any manner whatsoever, the Concession Area 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.

Concessionaire will protect, indemnify, and forever save and keep harmless the City, its officers, employees, contractors, agents or servants, 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 act, neglect or omission of Concessionaire, or any of its officers, employees, contractors, agents or servants. In the event of any violation by Concessionaire, or if the City shall deem any conduct on the part of Concessionaire to be objectionable or improper, the City Manager or his designee shall have the right to suspend the concession operations should the Concessionaire fail to correct any such violation, conduct, or practice to the satisfaction of the City Manager or his designee within twenty-four (24) hours after receiving written or verbal notice of the nature and extent of such violation, conduct, or practice; such suspension to continue until the violation is cured. Concessionaire further agrees not to commence operations during the suspension until the violation has been corrected to the satisfaction of the City Manager or his designee.

- 3.8 **Notwithstanding anything to the contrary contained herein, in the event of a breach by Concessionaire of any conditions in this Section 3, the City Manager, in his sole determination and judgment, shall have the right to automatically terminate this Agreement, without any liability to the City; said termination effective upon three (3) days written notice to Concessionaire. By executing this Agreement, Concessionaire acknowledges consent to this condition, and further voluntarily and knowingly waives and releases any and all rights now or hereinafter conferred upon Concessionaire pursuant to Florida Statutes.**

#### **SECTION 4. TAXES, ASSESSMENTS AND UTILITIES.**

- 4.1 Concessionaire shall obtain, at its sole expense and responsibility, any business tax receipts required by the City for the proposed use(s) contemplated herein.
- 4.2 Resort Tax.  
Concessionaire shall make commercially reasonable efforts to ensure City of Miami Beach Resort Taxes for any applicable activity or event at the Museum is paid in full to the City's Finance Department. In this regard, the Concessionaire shall advise its direct vendors regarding the obligation to pay resort taxes and Concessionaire shall not return any security deposit

held, if any, until proof of payment has been provided.

4.3 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.

4.4 Concessionaire agrees and shall pay, before delinquency, all taxes and assessments of any kind (including, without limitation, ad valorem taxes, if assessed, and/or Resort Taxes) levied or assessed upon Concessionaire and/or the Concession Area including, without limitation, any such taxes and/or assessments that may be levied and/or assessed against Concessionaire and/or the Concession Area by reason of this Agreement, or by reason of the business or other operations and/or activities of Concessionaire upon or in connection with the Concession Area.

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, which Concessionaire shall conduct diligently and continuously, in good faith. Concessionaire may refrain from paying a tax to the extent it is contesting the 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 (if so ordered).

4.5 Concessionaire shall be solely responsible for and shall promptly pay when due all charges for utility service(s) provided to the Concession Area (including all hook-up fees and impact fees) for gas, electricity, water, sewer, cable, telephone, trash collection, etc., if applicable.

In addition to other rights and remedies hereinafter reserved to the City, upon the failure of Concessionaire to pay for such utility services when due, the City may elect to pay same and Concessionaire shall promptly reimburse the City upon demand. In no event shall the City be liable, whether to Concessionaire or to third parties, for an interruption or failure in the supply of any utilities services to the Concession Area.

4.6 Interest for Late Payment.

Any payment which Concessionaire is required to make to the City which is not paid on or before the respective date provided for in this Agreement shall be subject to a late charge of Fifty and 00/100 (\$50.00), plus interest at the rate of eighteen (18%) percent per annum, or the maximum amount allowable under Florida law, whichever is lesser, from the due date of payment until such time as payment is actually received by the City.

## **SECTION 5. EMPLOYEES AND INDEPENDENT CONTRACTORS.**

- 5.1 Concessionaire shall select, train, employ (or otherwise hire or retain) such number of employees and/or independent contractors as is necessary and appropriate for Concessionaire to satisfy its responsibilities hereunder, and as necessary to maintain the same levels of service as exist in similar first-class concession facilities and operations. Concessionaire's employees and/or independent contractors shall be employees and/or independent contractors of Concessionaire and not of the City, and Concessionaire shall be solely responsible for their supervision and daily direction and control. Concessionaire shall be solely responsible for, and have the sole authority to hire, terminate and discipline any and all personnel and/or contractors employed or retained by Concessionaire.
- 5.2 All employees and/or independent contractors shall observe all the graces of personal grooming. Concessionaire shall hire people to work in its operation who are neat, clean, well groomed, and comport themselves in a professional and courteous manner. Concessionaire and any persons hired and/or retained by Concessionaire shall never have been convicted of a felony.
- 5.3 Concessionaire shall have an experienced manager or managers overseeing the concession operations at all times.

## **SECTION 6. IMPROVEMENTS, MAINTENANCE, REPAIR and OPERATION.**

- 6.1 Concessionaire accepts the use of the Concession Area in its "**AS IS**" "**WHERE IS**" condition. Concessionaire assumes sole responsibility and expense for maintenance of the Concession Area (including all furniture, fixtures, equipment and any other improvements thereon). This shall include, without limitation, daily (i.e. 365 days) removal of litter, garbage, and debris. Concessionaire shall also be responsible for all garbage disposal generated by its operations.
- 6.2 Improvements.
- 6.2.1. Any improvements to the Concession Area shall be at Concessionaire's sole expense and responsibility; provided, however, that any plans for such improvements shall be submitted to the City Manager or Contract Manager for prior written approval. Upon termination and/or expiration of this Agreement, all personal property and non-permanent trade fixtures may be removed by Concessionaire without causing damage to the Concession Area.

All permanent (fixed) improvements to the Concession Area shall remain the property of the City upon termination and/or expiration of this Agreement, except as provided in Subsection 6.2.2.

Concessionaire will permit no liens to attach to the Concession Area



arising from, connected with, or related to, the design, construction, and installation of any improvements.

Construction of any approved improvements shall be diligently pursued to completion and accomplished through the use of licensed, reputable contractors who are acceptable to the City Manager or designee. In addition to obtaining the prior approval of the City Manager or designee (acting on behalf of the City, in a proprietary capacity), Concessionaire shall also be solely responsible for obtaining, at its sole cost and expense, any and all permits, licenses, and/or regulatory approvals; such regulatory approvals which may include, without limitation, land use board and/or the approvals of other required regulatory agencies having jurisdiction) required for the construction of improvements.

6.2.2. Notwithstanding Subsection 6.2.1 hereof, upon termination and/or expiration of this Agreement, Concessionaire shall immediately remove any permanent improvements made to the Concession Area during the Term, at Concessionaire's sole expense and responsibility. In such event, Concessionaire shall also restore the Concession Area to its original condition prior to the improvements being made, reasonable wear and tear excepted.

6.2.3. The above requirements for submission of plans and the use of specific contractors shall not apply to improvements (which term, for purposes of this Subsection 10.1.3 only, shall also include improvements necessary for Concessionaire's ongoing maintenance and repair of the Concession Area) which do not exceed Five Hundred (\$500.00) Dollars; provided that the work is not structural, and provided further that it is permitted by applicable law.

6.3 Garbage Receptacles.

With respect to litter, garbage, and debris removal, Concessionaire shall provide, at its sole expense, a sufficient number of trash receptacles for its own use and for the use of its patrons. Determination of the "number" of receptacles shall at all times be within the City Manager or her designee's sole discretion. Disposal of the contents of said receptacles (and removal of litter, garbage, and debris within the Concession Area), shall be done on a daily (i.e. 365 days) basis. Any costs for removal of the contents of said trash receptacles by the City, because of the Concessionaire's failure to do so, will be assessed to, and become the responsibility of, the Concessionaire.

The dumping or disposal of any refuse, discards, trash, or garbage, generated by, or as a result of Concessionaire's operations, into any of the City's trash dumpster shall be prohibited.

6.4 Maintenance/Repair.

Concessionaire shall maintain, at its sole expense and responsibility, all Concession Area Furniture and any other improvements (whether

permanent or not) required to operate the concession. In the event any Concession Area Furniture and/or other improvement(s) is lost, stolen, or damaged, it shall be replaced or repaired promptly, at the sole expense of Concessionaire.

- 6.4.1. All damage or injury of any kind to the Concession Area, and/or to any improvements and/or Concession Area Furniture thereon, except damage caused by the willful misconduct or gross negligence of the City, shall be the sole obligation of Concessionaire, and shall be repaired, restored and/or replaced promptly by Concessionaire, at its sole expense, to the satisfaction of the City Manager or designee.
- 6.4.2. All of the aforesaid repairs, restoration, and replacement shall be in quality and class equal to or better than the original work (or Concession Area Furniture, as the case may be) and shall be done in good and workmanlike manner.
- 6.4.3. If Concessionaire fails to make any repairs, restoration, and/or replacement, the same may be made by the City, at the expense of Concessionaire, and all sums expended and expenses incurred by the City shall be collectable by the City and shall be paid by Concessionaire within ten (10) days after receipt of a bill or statement thereof. Notwithstanding that the City may elect to make such repairs, restoration, and/or replacement, the City shall have no obligation and/or affirmative duty to do so.
- 6.4.4. It shall be Concessionaire's sole obligation to ensure that any renovations, repairs, and/or improvements made by Concessionaire to the Concession Area comply with all applicable permitting, building codes, and life safety codes of governmental authorities having jurisdiction.

6.5 No Dangerous Materials.

Concessionaire agrees not to use or permit in the Concession Area the storage and/or use of gasoline, fuel oils, diesel, illuminating oils, oil lamps, combustible powered electricity producing generators, turpentine, benzene, naphtha, propane, 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 Area shall be immediately removed.

In consideration of a separate and specific consideration of Ten (\$10.00) Dollars and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Concessionaire shall indemnify and hold the 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 Area as those terms are defined by applicable Federal and State statutes, or any environmental rules and environmental regulations promulgated thereunder. The provisions of this subsection 6.5 shall survive the termination or earlier expiration of this Agreement.

6.6

Security.

Concessionaire shall be responsible for and provide such reasonable security measures as may be required to protect the Concession Area and any improvements and Concession Area Furniture thereon. Under no circumstances shall the City be responsible for any stolen or damaged Concession Area Furniture; damage to or loss of any improvements; or any stolen, lost, or damaged personal property of Concessionaire's employees, contractors, patrons, guests, invitees, and/or any other third parties.

6.7

Inspection.

Concessionaire agrees that the Concession Area (and operations thereon) may be inspected at any time during hours of operation by the City Manager or his designee, or by any other municipal, County or State officer, or other agency having responsibility and/or jurisdiction for inspection of such operations. Concessionaire hereby waives all claims against the City for compensation for loss or damage sustained by reason of any interference with the concession operations, whether by the City or by any public agency or official, in enforcing their respective duties, or enforcing compliance with any applicable laws, or ordinances, or regulations.

**SECTION 7. Concessionaire's Insurance Requirements.**

7.1

Prior to occupying the Concession Area and throughout the Term of the Agreement (including renewal periods), Concessionaire shall, at its sole cost and expense, comply with all insurance requirements of the City. It is agreed by the parties that Concessionaire shall not occupy the Concession Area until proof of the following insurance coverage has been reviewed and approved by the City's Risk Manager. All insurance policies required below shall be issued by companies authorized to do business under the laws of the State of Florida. Provider shall indicate that insurance coverage has been obtained which meets the requirements as outlined below by submitting original certificates of insurance to the City's Risk Manager and Asset Manager respectively:

- 7.1.1. Worker's Compensation for all employees of the provider as required by Florida Statute 440 and Employer's Liability coverage in accordance with the Florida Statutory requirements.
- 7.1.2. Commercial General Liability on a comprehensive basis in an amount not less than \$1,000,000 combined single limit per occurrence, for bodily injury and property damage. City of Miami Beach must be shown as an additional insured with respect to this coverage.

- 7.1.3. Business interruption insurance sufficient to insure Concessionaire for no less than one (1) full year of loss of business, with the City named thereon as loss payee to the extent permitted by applicable law.
- 7.1.4. All-Risk property and casualty insurance, written at a minimum of eighty (80%) percent of replacement cost value and with replacement cost endorsement, covering all leasehold improvements installed in the Concession Area by or on behalf of Concessionaire and including without limitation all of Concessionaire's personal property in the Concession Area (including, without limitation, inventory, trade fixtures, floor coverings, furniture, and other property removable by Concessionaire under the provisions of this Agreement).
- 7.2 The insurance coverage required shall include those classifications, as listed in standard liability insurance manuals, which most nearly reflect the operations of the provider.
- 7.3 Any insurance coverage required above must include a waiver of subrogation in favor of the City.
- 7.4 The company must be rated no less than "A" as to management, and no less than "Class VII" as to financial strength, by the latest edition of Best's Insurance Guide, published by A.M. Best Company, Oldwick, New Jersey, or its equivalent, subject to the approval of the City Risk Management Division.
- 7.5 Compliance with the foregoing requirements shall not relieve the vendor of his liability and obligation under this section or under any other section of this Agreement.
- City reserves the right to impose additional reasonable insurance requirements as the City may deem necessary or in accordance with common practice.
- The policies of insurance referred to above shall not be subject to cancellation or changing coverage except upon at least thirty (30) days written notice to City and then subject to the prior written 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 does not repay City's expenditures within fifteen (15) days of demand, the total sum owed shall accrue interest at the rate of twelve percent (12%) until paid, and such failure shall be deemed an event of default hereunder.
- 7.6 Waiver of Subrogation.  
Concessionaire hereby grants to City of Miami Beach a waiver of any right

to subrogation which any insurer of the Concessionaire may acquire against the City by virtue of the payment of any loss under such insurance. Concessionaire agrees to obtain any endorsement that may be necessary to affect this waiver of subrogation, but this provision applies regardless of whether or not the City has received a waiver of subrogation endorsement from the insurer.

## **SECTION 8. INDEMNITY.**

- 8.1 In consideration of a separate and specific consideration of Ten (\$10.00) Dollars 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, employees, contractors, agents, or servants 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, employees, contractors, agents, or servants in the performance of services under this Agreement.
- 8.2 In addition, and in consideration of a separate and specific consideration of Ten (\$10.00) Dollars 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, employees, contractors, agents, or servants from and against any claim, demand, or cause of action of whatever kind or nature arising out of any misconduct of Concessionaire, its officers, employees, contractors, subconcessionaire(s), agents, or servants not included in Subsection 8.1 herein and for which the City, its officers, employees, contractors, subconcessionaire(s), agents, or servants are alleged to be liable.
- 8.3 Subsections 8.1 and 8.2 shall survive the termination or expiration of this Agreement. Subsections 8.1 and 8.2 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, employees, contractors, agents, or servants.
- 8.4 Force Majeure.  
Whenever a period of time is herein prescribed for the taking of any action by the City or Concessionaire (as applicable), the City or Concessionaire (as applicable), shall not be liable or responsible for, and there shall be excluded from the computation of such period of time, any delays due to strikes, riots, acts of God, shortages of labor or materials, war, or governmental laws, regulations, or restrictions in the nature of a prohibition or moratorium, or any bona fide delay beyond the reasonable control of City or Concessionaire (as applicable). The foregoing shall not apply to any payments of money due under this Agreement.
- 8.5 Waiver of Loss from Hazards.  
Concessionaire hereby expressly waives all claims against the City for loss or damage sustained by the Concessionaire resulting from an event of Force Majeure (as defined herein), and the Concessionaire hereby

expressly waives all rights, claims, and demands against the City and forever releases and discharges the City from all demands, claims, actions, and causes of action arising from any of the aforesaid causes.

## **SECTION 9. DEFAULT AND TERMINATION.**

Subsections 9.1 through 9.4 shall constitute events of default under this Agreement. An event of default by Concessionaire shall entitle the City to exercise any and all remedies described as the City's remedies under this Agreement, including but not limited to those set forth in Subsection 9.5. An event of default by the 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 9.6.

9.1

### **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.

9.2

### **Default in Payment.**

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.

9.3

### **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. 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 the City with written notice of same.

9.4 Termination for Default.

In the event that Concessionaire is in default under the Letter Agreement then the City may, without further demand or notice, terminate this Concession Agreement without being prejudiced as to any remedies which may be available to it for breach of contract.

9.5 City's Remedies for Concessionaire's Default.

On the occurrence of any of the events of default, as set forth in this section, 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 default(s) and to compensate the City for damages resulting from such default(s), 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 the City to Concessionaire. On the date so specified, Concessionaire shall then quit and surrender the Concession Area to the City pursuant to the provisions of Subsection 9.8. Upon the termination of this Agreement by the City, all rights and interests of Concessionaire in and to the Concession Area and to this Agreement, and every part thereof, shall cease and terminate and the City may, in addition to any other rights and remedies it may have, retain all sums paid to it by Concessionaire under this Agreement.

In addition to the rights set forth above, the 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.

9.6 Concessionaire's Remedies for City's Default.

If an event of default, as set forth in this Section, by the City shall occur, Concessionaire may, after the expiration of the cure period, terminate this Agreement upon written notice to the City. Said termination shall become effective upon receipt of the written notice of termination by the City. On the date specified in the notice, Concessionaire shall quit and surrender the Concession Area to the City pursuant to the provisions of Subsection 9.8.

9.7 Termination for Convenience.

Notwithstanding any other provision of this Section 9, this Agreement may be terminated, in whole or in part, by the City, for convenience and without cause, upon the furnishing of thirty (30) days prior written notice to

Concessionaire.

In the event of termination by the City pursuant to this subsection, Concessionaire herein acknowledges and agrees that it shall not have any claim, demand, or cause of action of whatsoever kind or nature, against the City, its agents, servants, and employees (including, but not limited to, claims for any start-up costs, interference in business or damages for interruption of services, or interference in its concession operations). In no event shall the City be liable to Concessionaire for any indirect, incidental, special, lost profits, or consequential damages.

9.8 Surrender of Concession Area.

At the expiration of this Agreement, or earlier termination in accordance with the terms of this Agreement, Concessionaire shall surrender the Concession Area in the same condition as the Concession Area was prior to the Commencement Date of this Agreement, reasonable wear and tear excepted. Concessionaire shall remove all its personal property, 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 after termination of the Agreement shall constitute trespass by the Concessionaire, and may be prosecuted as such. In addition, the Concessionaire shall pay to the City One Thousand (\$1,000.00) Dollars per day as liquidated damages for such trespass and holding over.

**SECTION 10. SPECIAL EVENTS / SPONSORSHIPS.**

10.1 City Special Events.

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 and/or sponsored special events and/or City produced and/or sponsored productions. Additionally, the aforesaid events may also require additional time for load-in and load-out of the event. In such cases, the City may request that Concessionaire cease and desist operations during the term of, and in the area of, the special event and/or production, and Concessionaire shall cease and desist during such time. If the Concessionaire is not required to close, or the City Manager or his designee determines that Concessionaire may remain open in such a manner as prescribed by the City, that will not interfere with the special event and/or production, Concessionaire shall use its best efforts, in either case, to cooperate with the City. If the Concession Area is allowed to operate during special events and/or productions, Concessionaire may be allowed to continue its normal daily operation of equipment and staff. "Normal" shall be defined as equipment and staff that the Concessionaire customarily has available to service its patrons within the Concession Area on a normal business day (during its regular hours of operation).



10.2

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. Any and all benefits derived from an endorsement and/or sponsorship agreement based on the marketing value of a City trademark, property, brand, logo, and/or reputation, shall belong exclusively to the City. Concessionaire shall be specifically prohibited from entering into, or otherwise creating any, sponsorships and/or endorsements with third parties which are based solely or in any part on the marketing value of a City trademark, property, brand, logo, and/or reputation.

**SECTION 11. NOTICES.**

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

Friends of the Bass Museum, Inc.  
Attn: George Lindemann, President  
2100 Collins Avenue  
Miami Beach, Florida 33139

With copy to:

Friends of the Bass Museum, Inc.  
Attn: Silvia Karman Cubina, Executive Director  
2100 Collins Avenue  
Miami Beach, Florida 33139

All notices from 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 copy to:

Office of Real Estate  
City of Miami Beach  
1700 Convention Center Drive  
Miami Beach, FL 33139

Concessionaire and the City may change the above mailing addresses at any time upon providing written notification to the other party. All notices under this Agreement must be in writing.

**SECTION 12. LAWS.**

- 12.1 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, as same may be amended from time to time.
- 12.2 No Discrimination.  
Concessionaire hereby agrees to comply with the City of Miami Beach Human Rights Ordinance, as codified in Chapter 62 of the City Code, and as may be amended from time to time, prohibiting discrimination in employment, housing, public accommodations, or public services, on the basis of actual or perceived race, color, national origin, religion, sex, intersexuality, sexual orientation, gender identity, familial and marital status, age, ancestry, height, weight, domestic partner status, labor organization membership, familial situation, political affiliation, or disability.

**SECTION 13. MISCELLANEOUS.**

- 13.1 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.
- 13.2 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.
- 13.3 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 Concession Area operations, as contemplated herein.
- 13.4 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.
- 13.5 Binding Effect.  
This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.

- 13.6 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.
- 13.7 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 shall be so modified.
- 13.8 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 Area for the purpose of examining the same for any reason relating to the obligations of parties to this Agreement.
- 13.9 Not a Lease.  
**The parties expressly understand and agree that no part, parcel, building, structure, equipment, or space is leased to Concessionaire; that this Agreement is a concession agreement and not a lease, and that Concessionaire's right to operate, manage, and maintain the concession shall continue only so long as Concessionaire complies with the undertakings, provisions, agreements, stipulations, and conditions of this Agreement.**  
**Accordingly, Concessionaire hereby agrees and acknowledges that in the event of termination of this Agreement, whether due to a default by Concessionaire or otherwise, Concessionaire shall surrender and yield unto the City the Concession Area, in accordance with Subsection 9.8 hereof, and the City shall in no way be required to evict and/or otherwise remove Concessionaire from the Concession Area as if this were a tenancy under Chapter 83, Florida Statutes, nor shall Concessionaire be afforded any other rights afforded to nonresidential tenants pursuant to said Chapter (the parties having herein expressly acknowledged that this Agreement is intended to be a concession agreement and is in no way intended to be a lease).**
- 13.10 Signage.  
Concessionaire shall provide, at its sole expense and responsibility, any required signs at its concession. 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 shall be subject to the prior approval of the City as to size, shape, and placement of same.

13.11 Conflict of Interest.  
Concessionaire shall perform its services under this Agreement and conduct the concession operation(s) contemplated herein, in a manner so as to show no preference for other concession operations/facilities owned, operated, managed, or otherwise controlled by Concessionaire.

13.12 No Waiver.  
It is mutually covenanted and agreed by and between the parties hereto that the failure of the City to insist upon the strict performance of any of the conditions, covenants, terms, or provisions of this Agreement, or to exercise any option herein conferred, will not be considered or construed as a waiver or relinquishment for the future of any such conditions, covenants, terms, provisions, or options but the same shall continue and remain in full force and effect.

A waiver of any term expressed herein shall not be implied by any neglect of the City to declare a forfeiture on account of the violation of such term if such violation by continued or repeated subsequently and any express waiver shall not affect any term other than the one specified in such waiver and that one only for the time and in the manner specifically stated.

The receipt of any sum paid by Concessionaire to the City after breach of any condition, covenant, term, or provision herein contained shall not be deemed a waiver of such breach, but shall be taken, considered, and construed as payment for use and occupation (and not as rent), unless such breach be expressly waived in writing by the City.

13.13 No Third-Party Beneficiary.  
Nothing in this Agreement shall confer upon any person or entity, other than the parties hereto and their respective successors and permitted assigns, any rights or remedies by reason of this Agreement.

#### **SECTION 14. LIMITATION OF LIABILITY.**

The City desires to enter into this Agreement placing the management and operation of the Concession Area in the hands of a private management entity only if in so doing the City may limit its liability for any cause of action for breach of this Agreement, such that the City's liability for any such breach shall never exceed the sum of Ten Thousand (\$10,000.00) Dollars. Concessionaire hereby expresses its willingness to enter into this Agreement with a Ten Thousand (\$10,000.00) Dollar limitation on recovery for any action for breach of contract. Accordingly, and in consideration of the separate consideration of Ten Thousand (\$10,000.00) Dollars, the receipt of which is hereby acknowledged, the City shall not be liable to

Concessionaire for damages to Concessionaire in an amount in excess of Ten Thousand (\$10,000.00) Dollars, 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 15. VENUE.**

This Agreement shall be deemed to have been entered into 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 terms or conditions herein, exclusive venue for the enforcement of same shall lie in Miami-Dade County, Florida. **THE CITY AND CONCESSIONAIRE HEREBY KNOWINGLY AND INTENTIONALLY WAIVE THE RIGHT TO TRIAL BY JURY IN ANY ACTION OR PROCEEDING THAT THE CITY AND CONCESSIONAIRE MAY HERINAFTER INSTITUTE AGAINST EACH OTHER WITH RESPECT TO ANY MATTER ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE CONCESSION AREA.**

#### **SECTION 16. PROHIBITION REGARDING EXPANDED POLYSTYRENE FOOD SERVICE ARTICLES OR PLASTIC STRAWS.**

Pursuant to Section 82-7 of the City Code, as may be amended from time to time, effective August 2, 2014, the City has prohibited the use of expanded polystyrene food service articles by City Contractors, in connection with any City contract, lease, concession agreement, or Special event permit. Additionally, pursuant to Section 82-385 of the City Code, as may be amended from time to time, no polystyrene food service articles will be allowed in the right-of-way, and no polystyrene food service articles can be provided to sidewalk café patrons.

*“Expanded polystyrene”* is a petroleum byproduct commonly known as Styrofoam. Expanded polystyrene is more particularly defined as blown polystyrene and expanded and extruded foams that are thermoplastic petrochemical materials utilizing a styrene monomer and processed by any number of techniques including, but not limited to, fusion of polymer spheres (expandable bead foam), injection molding, foam molding, and extrusion-blown molding (extruded foam polystyrene).

*“Expanded polystyrene food service articles”* means plates, bowls, cups, containers, lids, trays, coolers, ice chests, and all similar articles that consist of expanded polystyrene.

Concessionaire agrees not to sell, use, provide food in, or offer the use of

expanded polystyrene food service articles at the Concession Area or in connection with this Concession Agreement. Concessionaire shall ensure that all vendors operating in the Concession Area abide by the restrictions contained in this Section 40. A violation of this section shall be deemed a default under the terms of this Concessionaire Agreement. This section shall not apply to expanded polystyrene food service articles used for prepackaged food that have been filled and sealed prior to receipt by the Concessionaire or its vendors.

Additionally, Concessionaire agrees to comply (and ensure compliance by its vendors) with Section 46-92 (c) of the City Code, which states that it is unlawful for any person to carry **any** expanded polystyrene product onto any beach or into any park within the City or for any business to provide plastic straws with the service or delivery of any beverage to patrons on the beach.

REMAINDER OF PAGE INTENTIONALLY LEFT BLANK

**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.

**FOR CITY:**

**CITY OF MIAMI BEACH, FLORIDA**

**ATTEST:**

**By:** \_\_\_\_\_  
Rafael E. Granado, City Clerk  
\_\_\_\_\_  
Date

\_\_\_\_\_  
Dan Gelber, Mayor

**FOR TENANT:**

**FRIENDS OF THE BASS MUSEUM,  
INC. D/B/A THE BASS MUSEUM OF  
ART**

**ATTEST:**

**By:** \_\_\_\_\_  
Witness  
\_\_\_\_\_  
Print Name  
\_\_\_\_\_  
Date

\_\_\_\_\_  
\_\_\_\_\_  
Authorized Member

**EXHIBIT A**  
Concession Area

DRAFT



# EXHIBIT B

## Additional Requirements

The Concession Area shall be maintained in a clean, neat and orderly appearance at all times by the Concessionaire. The following conditions constitute the minimum operation and maintenance standards required for the property:

- a. Tables, chairs, umbrellas, and any other Concession Area Furniture shall be maintained in a clean, attractive, and orderly appearance, and shall be maintained and kept in good repair at all times;
- b. All Concession Area Furniture shall be of high quality, design, materials, and workmanship to ensure the safety and convenience of the public;
- c. Only the Concession Area Furniture specifically depicted on the approved site plan shall be allowed on the Concession Area;
- d. All tables, chairs, umbrellas, and any other outdoor furniture shall be readily removable, and shall not be physically attached, chained, or in any other manner affixed to any public structure, signage, and/or other public fixture, or to a curb and/or public right-of-way;
- e. Concessionaire is responsible for cleaning the floor surface on which the outdoor seating is located at the close of each business day.
- f. At close of business, all tables, chairs and any other outdoor furniture shall be removed from the Concession Area and stored in a non-visible location from the public right-of-way. Any exception to this requirement shall be at the sole and absolute discretion of the City Manager and/or designee.
- g. The stacking or piling up of chairs shall be prohibited in the Concession Area;
- h. No storage of dishes, silverware, or other similar restaurant utensil or equipment shall be allowed in the Concession Area, or on any other portion of the Museum exterior, or outside the perimeter of the Concession Area, during non-business hours;
- i. There shall be no live entertainment, speakers, or amplified music placed in the Concession Area;
- j. No menu board(s) shall be permitted to be displayed in the Concession Area;
- k. No food preparation, food storage, refrigeration apparatus or equipment, or fire apparatus or equipment, shall be allowed in the Concession Area;
- l. No food displays shall be permitted on the Concession Area. No advertising signs or business identification signs shall be permitted;
- m. Plants shall be properly maintained and distressed plants promptly replaced;
- n. The City Manager or designee may cause the immediate removal, relocation, and/or storage of all or part of any furniture located on the Concession Area in emergency situations or for public safety considerations. Upon written and/or verbal notification by the City Manager of a hurricane or other major weather event, or the issuance of a hurricane warning by Miami-Dade County, whichever occurs first, the Concessionaire shall, within no more than four hours of same, remove and place indoors all tables, chairs, and any other outdoor furniture located on the Concession Area. The notification by the City Manager of a hurricane or other major weather event, or the issuance of a hurricane warning, shall constitute a public emergency situation as referenced in this division. The City Manager may remove, relocate, and/or store any outdoor furniture found on the Concession Area that has otherwise not been removed by the Concessionaire pursuant to this subsection. Any and all costs incurred by the City for removal, relocation and/or storage of Concessionaire's furniture shall be the responsibility of the Concessionaire.