

## COMMISSION MEMORANDUM

TO: Mayor Philip Levine and Members of the City Commission

FROM: Jimmy L. Morales, City Manager

DATE: July 26, 2017

SUBJECT: **A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, ACCEPTING THE WRITTEN RECOMMENDATION OF THE CITY MANAGER (AS SET FORTH IN THE CITY COMMISSION MEMORANDUM ACCOMPANYING THIS RESOLUTION) AND WAIVING, BY 5/7<sup>TH</sup> VOTE, THE COMPETITIVE BIDDING REQUIREMENT, FINDING SUCH WAIVER TO BE IN THE BEST INTEREST OF THE CITY, AND APPROVING, IN SUBSTANTIAL FORM, THE ATTACHED ONE (1) YEAR PILOT AGREEMENT BETWEEN THE CITY AND VAN DAALEN TENNIS, LLC FOR PROGRAMMING AT THE CITY'S NORTH SHORE TENNIS CENTER, SUBJECT TO FINAL NEGOTIATION OF THE AGREEMENT BY THE CITY ADMINISTRATION, AND SUBJECT TO LEGAL REVIEW AND FORM APPROVAL OF THE FINAL NEGOTIATED AGREEMENT BY THE CITY ATTORNEY'S OFFICE; AND FURTHER AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE THE FINAL AGREEMENT.**

### ANALYSIS

On April 26, 2017, City Commission referred the item regarding insourcing of North Shore Tennis to the Neighborhoods and Community Affairs Committee ("NCAC"), in light of several emails that the Administration and individual City Commissioners received regarding the teaching professionals at North Shore Tennis Center ("the Center").

At the May 19, 2017 NCAC meeting, the Committee moved to refer the item to the Finance and Citywide Projects Committee ("FCWPC"), and directed staff to identify potential operating models, outlining their financial implications for consideration as part of the budgeting process.

In the essence of time, a special FCWPC meeting was noticed for June 5, 2017. Following direction from NCAC, staff identified the outsourcing of programming and instruction and the insourcing of the Center's operations as a potential operating model (See Exhibit B).

In this model, the Center's hours of operation would be 7:30 a.m. to 9:30 p.m., 7 days a week. The City would be responsible for the front desk, reservation and software system, money collection, maintenance of courts and overall facility, and other tasks or duties as needed. Additionally, all membership and court fees would stay with City.

As such, and so as to not interrupt current programming and instruction at the North Shore Tennis Center, the Administration recommends entering into a Pilot Agreement with Van Daalen Tennis, LLC, for a period of one year, beginning on August 1, 2017.

After the one year pilot, the City will evaluate the performance of Van Daalen Tennis, LLC as it relates to customer satisfaction, revenue generated, program offerings, and expenses incurred. At that time, the City can either terminate the Agreement (at the end of the one (1) year term), or explore such other options (including continuing to retain Van Daalen, LLC), as the City may deem appropriate.

As consideration of the services to be provided pursuant to the Agreement, the City agrees to pay Van Daalen Tennis, LLC the following:

- (1) a programming fee equal to 70% of all monthly gross programming fees collected by the City, with the City retaining 30% (the "City's Share") of the monthly gross programming fees;
- (2) a management fee equal to 70% of the City's Share, with the City retaining the remainder of the City's Share; and
- (3) Van Daalen Tennis, LLC's programming fee and management fee shall be subject to a cap of \$500,000 for the one (1) year pilot term, or a pro-rata thereof, as to any month to month extension of the term.

Martin Van Daalen (principal) has been working at the North Shore Tennis Center since 2015 serving as the Director of the Miami Beach Tennis Academy. Mr. Van Daalen has many years of experience coaching players such as Pete Sampras, Mary Pierce and Jennifer Capriati. He is also the former coach of Men's Tennis for the USTA Player Development program and is the author of Teaching Tennis Volume 1. As part of the attached Agreement, Van Daalen Tennis, LLC, not the City, would contract with the existing tennis teaching professionals (currently working at the North Shore Tennis Center). As of July 20, 2017, Van Daalen verbally represented to the City that it will secure employment or independent contractor agreements with the existing tennis professionals, so that teaching services at North Shore will continue on an uninterrupted basis.

#### **CITY MANAGER'S RECOMMENDATION**

Based upon the foregoing, the City Manager recommends that the Mayor and City Commission waive the formal competitive bidding requirement, by a 5/7<sup>th</sup> vote, as permitted under Section 2-367(e) of the City Code, as being in the best interest of the City.

*Attachment*

*Exhibit A - Van Daalen Tennis, LLC Management Agreement*

*Exhibit B - Potential Operating Model Presented at June 5, 2017 Special FCWPC Meeting*

*Exhibit C - Resolution*

JLM/EC/JR

RESOLUTION NO. \_\_\_\_\_

A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, ACCEPTING THE WRITTEN RECOMMENDATION OF THE CITY MANAGER (AS SET FORTH IN THE CITY COMMISSION MEMORANDUM ACCOMPANYING THIS RESOLUTION) AND WAIVING, BY 5/7<sup>TH</sup> VOTE, THE COMPETITIVE BIDDING REQUIREMENT, FINDING SUCH WAIVER TO BE IN THE BEST INTEREST OF THE CITY; AND APPROVING, IN SUBSTANTIAL FORM, THE ATTACHED ONE (1) YEAR PILOT AGREEMENT BETWEEN THE CITY AND VAN DAALEN TENNIS, LLC FOR PROGRAMMING AT THE CITY'S NORTH SHORE TENNIS CENTER, SUBJECT TO FINAL NEGOTIATION OF THE AGREEMENT BY THE CITY ADMINISTRATION, AND SUBJECT TO LEGAL REVIEW AND FORM APPROVAL BY THE CITY ATTORNEY; AND FURTHER AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE THE FINAL AGREEMENT.

**WHEREAS**, on April 26, 2017, City Commission referred the item regarding insourcing of North Shore Tennis to the Neighborhoods Community Affairs Committee ("NCAC"), in light of several emails that Administration and individual City Commissioners received regarding the teaching professionals at the North Shore Tennis Center ("the Center"); and

**WHEREAS**, at the May 19, 2017 NCAC meeting, the Committee moved to refer the item to the Finance and Citywide Projects Committee ("FCWPC"), and directed staff to identify potential operating models, outlining their financial implications for consideration as part of the budgeting process; and

**WHEREAS**, in the essence of time, a special FCWPC meeting was noticed for June 5, 2017 and, following direction from NCAC, staff identified the outsourcing of programming and instruction and the insourcing of the Center's operations as a potential operating model; and

**WHEREAS**, in this model, the Center's hours of operation would be 7:30 a.m. to 9:30 p.m., 7 days a week, and the City would be responsible for the front desk, reservation and software system, money collection, maintenance of the overall facility, and Van Daalen Tennis, LLC would maintain responsibility of the programming, including contracting with each of the individual tennis teaching professionals who are currently working at the North Shore Tennis Center; and

**WHEREAS**, the FCWPC recommended that staff implement this model; and

**WHEREAS**, in order to prevent the interruption of the current programming and instruction at the North Shore Tennis Center, the Administration recommends entering into the attached Pilot Agreement with Van Daalen Tennis, LLC, for a period of one year, beginning on August 1, 2017; and

**WHEREAS**, at the conclusion of the one (1) year term, the attached Agreement would continue on a month to month term (terminable for convenience by the City), enabling the City, during the term, to evaluate the performance of Van Daalen Tennis, LLC as it relates to customer satisfaction, revenues generated, program offerings, and expenses incurred; and

**WHEREAS**, it is understood that if the City is dissatisfied with the performance, revenues or programming deliverables of Van Daalen Tennis, LLC after the one (1) year pilot program, the City may terminate the Agreement and explore other options; and

**WHEREAS**, Martin Van Daalen (principal) has been working at the North Shore Tennis Center since 2015 serving as the Director of the Miami Beach Tennis Academy; and

**WHEREAS**, Mr. Van Daalen has many years of experience coaching players such as Pete Sampras, Mary Pierce and Jennifer Capriati and he is also the former coach of Men's Tennis for the USTA Player Development program and is the author of Teaching Tennis Volume 1; and

**WHEREAS**, the City Manager recommends that the Mayor and City Commission waive the formal competitive bidding requirement, by a 5/7<sup>ths</sup> vote, as permitted under Section 2-367(e) of the City Code, as being in the best interest of the City, and approve, in substantial form, the Agreement with Van Daalen Tennis, LLC, incorporated herein by reference and attached to this Resolution as Exhibit "1".

**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 accept the written recommendation of the City Manager (as set forth in the City Commission Memorandum accompanying this Resolution) and waive, by 5/7<sup>th</sup> vote, the competitive bidding requirement, finding such waiver to be in the best interest of the City; and approve, in substantial form, the attached One (1) Year Pilot Agreement between the City and Van Daalen Tennis, LLC for programming at the City's North Shore Tennis Center, subject to final negotiation of the Agreement by the City Administration, and subject to legal review and form approval by the City Attorney; and further authorize the Mayor and City Clerk to execute the final negotiated Agreement.

**PASSED and ADOPTED** this 26<sup>th</sup> day of July, 2017.

**ATTEST:**

\_\_\_\_\_  
Philip Levine, Mayor

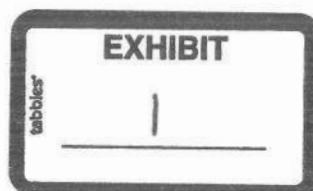
\_\_\_\_\_  
Rafael E. Granado, City Clerk

APPROVED AS TO  
FORM & LANGUAGE  
& FOR EXECUTION

David C. [Signature] 7/24/17  
City Attorney Date

**DRAFT**

**VAN DAALEN TENNIS, LLC.  
ONE (1) YEAR PILOT AGREEMENT  
TO PROVIDE PROGRAMMING AT THE  
CITY'S NORTH SHORE TENNIS  
CENTER**



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**ONE (1) YEAR PILOT AGREEMENT BETWEEN  
CITY OF MIAMI BEACH, FLORIDA AND VAN DAALEN TENNIS, LLC TO PROVIDE  
TENNIS PROGRAMMING AT THE CITY'S NORTH SHORE TENNIS CENTER**

THIS AGREEMENT made the \_\_\_\_ day of \_\_\_\_\_, 2017 ("Effective Date"), between the **CITY OF MIAMI BEACH**, a municipal corporation of the State of Florida (hereinafter called "City"), having its principal address at 1700 Convention Center Drive, Miami Beach, Florida, 33139, and **VAN DAALEN TENNIS, LLC.**, a Florida limited liability company, having its principal offices at 15051 Royal Oaks Lane, Apt. 1604, North Miami , Florida 33181 (hereinafter called "CONTRACTOR").

**SECTION 1. TERM.**

- 1.1 This Agreement shall be for one year-. The Agreement shall be deemed by the parties hereto to have commenced retroactively, as of, **TBD**, (the "Commencement Date"), and shall terminate on **TBD**.
- 1.2 At the conclusion of the one (1) year term in subsection 1.1 above, the Agreement shall continue on a month to month basis (the "Holdover Term"), so as to enable the City to evaluate such factors including but not limited to, CONTRACTOR'S performance hereunder, customer satisfaction, program offerings, revenues generated and expenses incurred; all so that the City may determine, during this month to month Holdover Term, whether it wishes to continue CONTRACTOR'S services under this Agreement, or terminate the Agreement and explore such other options as the City, in its reasonable discretion, may elect. During the Holdover Term, the City through its City Manager, shall have the option to terminate the Agreement, without cause and for convenience, upon thirty (30) days prior written notice to CONTRACTOR.
- 1.3 **The fees to participate in CONTRACTOR'S tennis programs are set forth in Exhibit "A" hereto, which is incorporated herein by reference. Any changes to the approval fees shall require prior written approval of the City Manager, or his designee.**

**SECTION 2. CENTER WHERE PROGRAM OCCURS**

- 2.1 The City has employed the CONTRACTOR, and CONTRACTOR agrees, to manage tennis programming, at the following City-owned recreational facilities (hereinafter such recreational facilities may be referred to individually as a "Center" or collectively as the "Centers"):
  - 2.1.1 That certain City-owned recreational facility commonly known as the North Shore Tennis Center, located at 501 72 Street, Miami Beach, Florida 33141.

**SECTION 3. USE(S).**

The CONTRACTOR is hereby authorized to conduct the following kind(s) of businesses and provide the following kind(s) of services within the Centers, all at its sole cost and expense:

- 3.1 Public Tennis Facility.  
CONTRACTOR agrees it will use the Center solely for the operation of a first-class tennis programming facility. This use shall include the operation of the tennis courts and potential pro shop. CONTRACTOR'S services in connection with the uses set forth herein shall include those services proposed by CONTRACTOR, as attached and incorporated in Exhibit



"A" hereto, and permitted Special Events (as defined in Section 17) related to such public tennis center activities; provided, however, that in the event of a conflict between Exhibit "A" and the terms of this Agreement, the terms of this Agreement shall take precedence.

No other use, business, or services shall be conducted by CONTRACTOR at the Center without the prior written consent of the City Manager, or his designee.

CONTRACTOR agrees, acknowledges, covenants and represents to the City that the Center is for the use by the public; that such public use is a prime consideration; and must be balanced accordingly with the services to be provided by the CONTRACTOR, without restricting, or in any way limiting, the public access, nature, or ambiance of the Center. Accordingly, CONTRACTOR agrees, acknowledges, covenants and represents to City that the public's right to use the Center shall not be infringed upon by any activity of CONTRACTOR. This includes, without limitation, the monopolization of courts for lessons during identified "peak times".

CONTRACTOR hereby agrees, acknowledges, covenants, and represents to City that, during the term of this Agreement, it shall continually provide high-quality, first-class affordable tennis services to the City's residents and visitors; to meet the demands of the City's hotel community for access to high quality, first-class tennis programming within Miami Beach; and to progressively upgrade tennis programming at the Center throughout such Term.

3.2 Prohibited Activities.

CONTRACTOR will conduct its operations so as to maintain a reasonably quiet and tranquil environment for the adjacent areas, and make no public disturbances.

CONTRACTOR shall not use the Center for any unlawful purpose and shall comply with all laws and permitting requirements now in force or hereafter adopted, applicable to the Center, and/ or uses and businesses conducted on the Center. CONTRACTOR agrees not to use the Center for, or to permit the operation of, any offensive, noisy or dangerous activity, nuisance or anything against public policy. There shall be no living quarters at the Center, nor shall anyone be permitted to live at the Center. Except as may result from acts of force majeure, CONTRACTOR agrees that it will not allow the Center to become unoccupied or vacant. CONTRACTOR will not permit the outside use of any musical instrument or noise-making device at the Center, which would be in violation of the City's Noise Ordinance, as same may be amended from time to time.

3.3 Hurricane Evacuation Plan.

CONTRACTOR agrees to comply with the City's Hurricane Evacuation Plan and will cooperate fully with the instructions given by the City's representative to initiate the plan immediately upon notice of the issuance of a Hurricane Warning by the Miami-Dade County Office of Emergency Management. CONTRACTOR shall, at a minimum, secure the Center and all related materials and assist with the removal and reinstalling of windscreens in accordance with the procedures included in the City's Recreation Division Hurricane Evacuation Plan, as included in Exhibit "B," attached hereto.

3.4 Personnel Background Checks, ID Badge Requirements.

CONTRACTOR shall comply with the requirements of Sections 1012.32 and 1012.465, Florida Statutes, requiring that only those employees who have successfully passed the

background screening required by the referenced statutes, and who meet the standards established by the statutes, be allowed access to the Center and/or allowed to perform services under this Agreement. This requirement shall also extend to all CONTRACTOR representatives, agents, independent contractors, sub-contractors, or volunteers (such employees, representatives, agents, independent contractors, sub-contractors, or volunteers of CONTRACTOR shall be collectively referred to herein as "Personnel") performing duties under this Agreement.

The Personnel shall undergo the aforesaid background screening and a drug screening, (collectively referred to herein as "Background Check Process") prior to entering the Center to begin employment and/or deliver services. The Background Check Process will be conducted by the City of Miami Beach Human Resources Department. **The Personnel shall not be permitted to work at the Center until such time as the Background Check Process has been completed and the Personnel is cleared to perform duties under this Agreement.** If any Personnel is away from the job for a period of 45 or more days, the City will require a new Background Check Process.

The CITY and CONTRACTOR agree and acknowledge that the failure of CONTRACTOR to perform any of the duties described in Subsection 3.4 shall constitute a material breach of this Agreement, for which the City reserves the right to terminate immediately and without further liability to the City. CONTRACTOR agrees to indemnify and hold harmless the City, its officers and employees of any liability in the form of physical or mental injury, death or property damage resulting in CONTRACTOR's failure to comply with the requirements of this Subsection 3.4, or Sections 1012.32 and 1012.465, Florida Statutes.

CONTRACTOR agrees to require all of its Personnel to notify the CONTRACTOR and the City of any arrest(s) or conviction(s) of any offense within 24 hours of its occurrence. CONTRACTOR further agrees to immediately notify the City upon becoming aware that one of its Personnel, who was previously certified as completing the Background Check Process, is subsequently arrested or convicted of any disqualifying offense. **Failure by CONTRACTOR to notify the City of such arrest or conviction within 24 hours of being put on notice shall constitute a material breach of this Agreement entitling the City to terminate this Agreement immediately, without further liability to the City.**

3.5 Business Tax Receipts.

CONTRACTOR shall obtain, at its sole cost and expense, any and all business tax receipts required by law for the proposed uses contemplated in this Agreement.

Without limiting the generality of the foregoing, securing the requisite business tax receipts, in addition to completing the Background Check Process in accordance with Subsection 3.4 hereof, shall be required and obtained for **each** individual professional tennis instructor providing lessons and/or clinics at the Center.

## **SECTION 4. FEES AND REPORTS**

4.1 CONTRACTOR Payment

The fees to participate in CONTRACTOR'S North Shore Tennis Programs are set forth in Attachment "A" hereto, which is incorporated herein by reference. In consideration of the Services to be provided, City shall pay CONTRACTOR, a programming fee equal 70% of all monthly gross programming fees collected by the City, leaving the City with 30% (the "City's Share") of the monthly gross programming fees. The City shall also pay CONTRACTOR a

management fee equal to 70% of the City's Share, to use to pay CONTRACTOR's coaches, with the City retaining the remainder of the City's Share of the monthly gross programming fees. The CONTRACTOR's annual programming fee and management fee shall not exceed \$500,000 during the term, or a pro-rata thereof, during any month to month extension of the term. The City shall provide payment to CONTRACTOR by the 15<sup>th</sup> of the Month.

By way of an example, assuming that the gross programming revenues for one month equal \$100,000, the CONTRACTOR'S programming fee and management fee would be calculated as follows:

CONTRACTOR receives a programming fee of 70% of the monthly gross programming revenues, in the amount of \$70,000, with the City retaining 30%, in the amount of 30,000.

CONTRACTOR will receive a management fee of 70% of the City's Share (70% of \$30,000), in the amount of \$21,000, leaving the City with \$9,000 of the total monthly gross programming revenues.

#### 4.2 CONTRACTOR Reports

4.2.1 The CONTRACTOR shall provide a monthly activity report/revenue report which shall be submitted to the City bi-weekly. The monthly reports shall include, but not be limited to, the following information:

- (A) a comprehensive break-down of all day play, clinics, tournaments and revenues generated in the prior month by category, and other performance measures as determined by the City.
- (B) a work plan to adequately address Continuous Quality Improvement goals in the CONTRACTOR's management plan.
- (C) the City reserves the right to add or modify the items required in the monthly report, as the City deems necessary, in its sole and reasonable discretion, in order to adequately monitor performance of the CONTRACTOR.

#### 4.3 Sales and Use Tax.

Payment of any required Florida State Sales and Use Tax shall be the responsibility of CONTRACTOR. It is the City's intent that it is to receive all payments due from CONTRACTOR (as contemplated in 4.1) as net of such Florida State Sales and Use Tax.

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

- 5.1 CONTRACTOR agrees that during the Term of this Agreement, Martin Van Daalen shall have active, ongoing direct participation in the day to day tennis programming operation, of the Center. In the event that the CONTRACTOR, or otherwise ceases to participate in the day to day tennis programming operation of the Center pursuant to this Agreement, then the City, at its sole option, may terminate this Agreement for cause pursuant to Section 15. In the alternative, should the City not opt to terminate this Agreement as provided therein, it shall have prior written approval as to any replacement of the Principal subsequently offered by the CONTRACTOR.

In connection with the performance of its responsibilities hereunder, CONTRACTOR may hire Personnel (as defined in Subsection 3.4 herein), who will be the Personnel of the CONTRACTOR and not of the City, and who will be subject to a background Check Process, as set forth in Subsection 3.4 herein, at the expense of the CONTRACTOR. CONTRACTOR shall provide an adequate number of Personnel and man-hours in order to perform the services required under this Agreement. CONTRACTOR shall select the number, function, , compensation, including benefits (if any), and may, at its discretion and at any time, adjust or revise the terms and conditions relating to such Personnel, in order to ensure an adequate number of Personnel and man-hours.

- 5.1.2 The CONTRACTOR agrees that all personnel for the North Shore Tennis Center shall be certified Tennis Professionals by USPTA, USTA, USPTR or equivalent. The CONTRACTOR and personnel must demonstrate knowledge and experience in tennis instruction and related activities, as well as, knowledge of the legal requirements that are involved in this type of operation. There must be onsite tennis program management by the CONTRACTOR, at the Tennis Center during operating hours.
- 5.1.3 Independent/Sub-contractors/Third Party Professional shall not be permitted at the Center. Independent/Sub-contractors/Third Party Professionals include but are not limited to a resident/nonresident:
  - (A) Who teaches or gives tennis lessons for a fee independent of CONTRACTOR
  - (B) Who teaches on a court with a ball basket and with more than three balls with one or more players independent of CONTRACTOR
  - (C) Who collects money for instruction and/or lesson independent of CONTRACTOR

5.2 CONTRACTOR's Personnel shall wear clean appropriate apparel to include uniforms/name tags, such that Center patrons can easily identify CONTRACTOR and its Personnel. All Personnel furnished to the City of Miami Beach must be uniformed. Each uniform shall display CONTRACTOR's name and logo, which logo shall be subject to approval by the City. Uniforms must be provided at the CONTRACTOR's expense, and may not be charged to an employee or deducted from an employees' paycheck, therefore reducing the hourly pay rate to less than the living wage rate required under the City's Living Wage Ordinance, as same may be amended from time to time.

All Personnel shall observe all the graces of personal grooming. The CONTRACTOR shall hire Personnel to work in its operation who are neat, clean, qualified and efficient and shall comport themselves in a professional and courteous manner and be in conformity with the City's Customer Service standards, as set forth in the attached Exhibit "C". If the City deems it appropriate, the CONTRACTOR and its Personnel may be required to attend Customer Service training as conducted by the City. The CONTRACTOR and any Personnel hired by same shall comply with the pre-employment requirements and standards as established by the City of Miami Beach's Human Resources Department. If CONTRACTOR materially fails to comply with these provisions, the City may send notice of default. The CONTRACTOR shall have an experienced Tennis Programming manager overseeing the Center and related operations at all times the Center is open to the general public in the absence of the CONTRACTOR.

## **SECTION 6. HOURS OF OPERATION & COURTS USAGE .**

### **6.1 Center Hours**

The CONTRACTOR shall offer programming at the Centers from 7:30 A.M. to 9:30 P.M. every day of the year, with the exception of closures due to weather conditions or events of force majeure permitting, and certain holiday agreed upon by the CONTRACTOR and the City of which proper signage and notification to patrons must be adhered to.

6.2 Change of Hours

Any change in the hours of operation shall be at the City's sole option and discretion, and any request by CONTRACTOR for an increase or decrease in same shall be subject to the prior written approval of the City Manager or his designee.

6.3 Court's Usage.

6.3.1 The CONTRACTOR acknowledges and agrees to prioritize utilization of courts for public usage by restricting lesson/clinic/programming courts not to exceed four (4) clay courts and one (1) hard court at the North Shore Tennis Center during peak hours of play (7:30 AM to 11:00 AM and 4:00 PM to 7:00 PM ). Courts are not to be booked or reserved by the professional tennis instructors for lessons more than one (1) day in advance. The term lesson shall mean a unit of instruction on an individual or group basis for which payment is received as outlined in Exhibit "A".

6.3.2 Additional court usage for lessons, programs and clinics during non-peak hours shall be subject to the prior written approval of the City. At no time shall more than 50% of all courts be utilized for lessons, programs and clinics until 10 minutes after any non-peak hour and there are no tennis patrons waiting for a court, without the prior written approval of the City. CONTRACTOR must use due diligence when assigning courts for open play and lessons to include: (a) alternating courts where lessons are taught to avoid overplaying a court or battery of courts and (b) separating open play courts from lesson courts to avoid injury. CONTRACTOR can allow for court reservations to be made on hour or half hour intervals as appropriate. Reservations for doubles play shall be for up to two (2) hours.

6.4 Public Benefits.

6.4.1 The CONTRACTOR agrees that the City's Parks and Recreation Department programs or co-sponsored programs will have use of two (2) courts at the Center, at no charge to the City, twice per week, for two (2) hours for each court, between the hours of 11:00 a.m. and 5:00 p.m, to be mutually agreed upon by the parties.

6.4.2 CONTRACTOR agrees to provide free instructional lessons to after-school and summer camp participants, to be mutually agreed upon by the parties. Use of courts pursuant to the immediately preceding sentence shall be deemed to be the utilization of courts for public usage.

6.4.3 The CONTRACTOR also agrees to provide fee waivers and/or fee reductions in pricing for programs (i.e. clinics, academies, lessons, camps, etc.) for those City of Miami Beach residents from low socio-economic backgrounds who qualify. The CONTRACTOR agrees to utilize the same criteria for determining eligibility for fee waivers or reductions as being used by the City of Miami Beach Parks and Recreation Department at the time of the request. Fee waivers do not apply to private lessons unless agreed upon by CONTRACTOR.

6.4.4 The CONTRACTOR shall also offer free and/or affordable programming for Miami Beach residents with disabilities (i.e. Wheelchair Tennis) and for Miami Beach

Senior residents. The CONTRACTOR will make provisions for summer and specialty camps, which camp programs will include, without limitation, camp programs for people with disabilities and for Seniors based on the established Parks and Recreation Department format.

**SECTION 7. TENNIS FEES, PROGRAMS & RELATED SERVICES TO BE PROVIDED.**

- 7.1 The CONTRACTOR must comply with the fee schedule for the professional tennis instruction that offers the tennis patron a choice in instructor level and hourly fee commensurate with the instructor's level, as agreed upon and listed in Exhibit "A", (to be provided by the CONTRACTOR) attached hereto. Any change of this said fee and instructor levels shall be approved by the City prior to implementation of fees.
- 7.2 Fees for lessons and clinics to be offered must be prominently posted at the Center at those location(s) where such fees are normally paid. All fees and charges shall be competitive with those charged by comparable public tennis centers in Miami-Dade and Broward Counties. Initial fees for programs, clinics and lessons are set forth in Exhibit "A" (to be provided by CONTRACTOR) attached hereto.
- 7.3 The City shall approve in writing, in advance, any increase in fees from those currently set forth in Exhibit "A;" provided the CONTRACTOR shall have the right to increase fees in an amount equal to the amount of any sales and use tax increase enacted after the effective date of such exhibit or schedule without City's consent.
- 7.4 The CONTRACTOR agrees to provide the programs set forth in Exhibit "A". An implementation schedule of said services shall be provided by the CONTRACTOR within thirty (30) days of the Commencement Date. Said schedule and any modifications, additions or deletions to the list are subject to the prior approval of the City.
- 7.5 The CONTRACTOR shall be authorized to provide courts, free of charge for the following: practice for professional tennis players and their coaches, during professional tennis demonstrations, promotional events, clinics and lessons being offered to the public at no charge, subject to the prior written approval of the City.
- 7.6 The CITY shall utilize a computer software system (i.e. Tennis Director, RecWare, Active Network, etc.) for the purposes of tracking reservations, financials, memberships, etc. The City shall have administrator rights to the CONTRACTOR's computer software system for the purposes of conducting audits. Additionally, on-line reservations will be provided for by the CITY as well as phone and in-person reservations, all of which must be managed and cross-referenced to avoid overbookings, no-shows, and adherence to prioritization and utilization of courts for public usage by restricting lesson/clinic/programming courts during peak hours.
- 7.7 Any print materials prepared by the CONTRACTOR for use of the Center shall have the approval of the City prior to printing. Materials must include the City designation/ logo and appropriate ADA (Americans with Disabilities Act) disclaimer. CONTRACTOR shall submit to the City (for review and approval prior to the initiation of contract activities), a communication plan addressing programming to be scheduled at the Center. All communications shall be directed to the appropriate City staff. City shall assist with marketing materials to include: banners, fliers, postcards and website information.
- 7.8 CONTRACTOR shall be responsible for stocking the Pro-Shop with appropriate tennis

products, including but not limited to snacks, strings, racquets, apparel, and beverages. Notwithstanding anything contained in this Section 7, or in the Agreement, CONTRACTOR's food and beverage service shall be subject to and shall not, under any event, conflict with, or otherwise violate, the City's exclusive vending contract with Coca-Cola Refreshments USA, Inc. d/b/a Florida Coca-Cola Bottling Company and Coca-Cola North America, a division of the Coca-Cola Company ("Coca-Cola Contract") and the City's exclusive vending contract with Bettoli Trading Corp. ("Bettoli Contract") (collectively referred to herein as "City Vending Contracts"); copies of which are attached hereto and made a part hereof as composite Exhibit D. All such revenue shall be treated as programming related fees. City will not be responsible for purchasing, inventory, ordering, delivery or security of such products.

## **SECTION 8 ALTERATIONS, MAINTENANCE, REPAIRS & SECURITY**

### **8.1 Building and Facility Alterations.**

CONTRACTOR may not make alterations or additions to the Center. In the event of an emergency to prevent injury to persons or property, CONTRACTOR shall use reasonable efforts to secure the affected area and will immediately notify the City's Parks and Recreation Department to advise of said emergency. At that time the City will assess the situation, further secure the area in question, and determine means and method of repairs.

CONTRACTOR shall not have the right to create or permit the creation of any lien attaching to City's interest in the Center as a result of any such alterations or additions.

### **8.2 Building and Facility Maintenance.**

The City further acknowledges that the CONTRACTOR shall not be required to improve, repair, restore, refurbish, or otherwise incur any expense in improving or changing the condition of the Center, except for all costs in connection with the fulfillment of this Agreement including, without limitation, costs in connection with the maintenance of the programming equipment.

The City shall maintain all electrical, HVAC, plumbing and foundation and structural systems, roofs, exterior walls, and sports lighting at the Center at its sole cost, and in its sole discretion as to the means, manner and methods used for such maintenance.

The City will maintain the grass and landscaped areas in those portions surrounding the Center and within the Center, as well as maintenance of the equipment in connection with the upkeep of the tennis courts to include:

- (A) Windscreens
- (B) Clay
- (C) Nets (includes hardware)
- (D) Lines (includes hardware)
- (E) Balls
- (F) Algae and Weeds on courts
- (G) Restrooms (clean and stocked)
- (H) Pro Shop and facility cleanliness
- (I) Litter Control
- (J) Water coolers, ice, water and cups on the courts for patron use.

CONTRACTOR agrees to assist in helping to ensure the facility remains clean and tidy.

City shall have sole discretion as to the means, manner and methods utilized for the aforestated maintenance.

8.3 Courts and Related Facilities Maintenance Standards.

The City shall comply with minimum standards set forth for the underground watering systems, as set forth by the builder of the Center (Welch Tennis). The City shall conduct monthly maintenance inspections by a City approved outside independent certified tennis court builder/manufacturer to ensure courts are up to industry standards.

8.4 Equipment.

The CONTRACTOR must provide and maintain, at its own cost and expense, all materials, labor, and any and all equipment required to operate tennis programming at the Center. Such equipment to be included as part of the CONTRACTOR's expense are:

- (A) Ball Caddies
- (B) Racquets
- (C) String
- (D) Water Cooler
- (E) Stringing Machine
- (F) Ball Machine
- (G) Clothing Racks for Display

In the event any of the CONTRACTOR'S equipment or materials are lost, stolen, or damaged, they shall be replaced or repaired at the sole cost and expense of the CONTRACTOR in no more than five (5) days from date of loss, or if not possible, within such time frame, as promptly as reasonably possible, but in no event to exceed fifteen (15) days. The CONTRACTOR shall maintain, in accordance with the manufacturer's specifications and maintenance requirements, all equipment, whether City owned or owned by the CONTRACTOR, herein specified and purchased. All equipment shall be kept clean, fully functional and free of damage.

8.5 Orderly Operation.

The CONTRACTOR shall have a neat and orderly operation at all times and shall be solely responsible for tennis programming. There shall be no living quarters nor shall anyone be permitted to live within the Center.

8.6 No Dangerous Materials.

The CONTRACTOR agrees not to use or permit at the Center 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 Center shall be immediately removed.

Notwithstanding any contrary provisions of this Agreement, CONTRACTOR, after the Commencement Date, 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 CONTRACTOR, after the Commencement Date, but during the term of this Agreement, of any hazardous substance, or petroleum products on, under, in or upon the Center as those terms are defined by



applicable Federal and State Statute, or any environmental rules and environmental regulations promulgated thereunder; provided, however, CONTRACTOR shall have no liability for any violation arising or damage incurred as a result of the willful misconduct or gross negligence of the City, its agents, servants or employees. The provisions of this Subsection shall survive the termination or earlier expiration of this Agreement.

8.7 Security.

The CITY shall be provide reasonable security measures that may be required in the City's discretion to protect the Center and any of the equipment, materials and facilities thereon.

8.8 Inspection.

The CONTRACTOR agrees that the Center and all , equipment, 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, State officer, or agency having responsibilities for inspections of such operations. The CONTRACTOR 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 operations by any public agency or official in enforcing its or his duties or any laws or ordinances. Any such interference (which interference, if by the City, must be reasonable) shall not relieve the CONTRACTOR from any obligation hereunder.

**SECTION 9. INSURANCE .**

CONTRACTOR shall maintain, at its sole cost and expense, the following types of insurance coverage at all times throughout the term of this Agreement.

- a. 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 Center operations, products and contractual liability.
- b. Workers Compensation Insurance as required under the Laws of the State of Florida.

The policies of insurance referred to above shall not be subject to cancellation or change 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 designee. Prior to the Commencement Date, CONTRACTOR shall provide City with a Certificate of Insurance for each such policy. 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 Insurance Guide (latest edition) rating acceptable to the City's Risk Manager, and any replacement or substitute company shall also be subject to the prior written approval of the City's Risk Manager. Should CONTRACTOR 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 CONTRACTOR to City, plus ten percent (10%) of the amount of premiums paid to compensate City for its administrative costs. If CONTRACTOR 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%) until paid, and such failure shall be deemed an event of default hereunder.

**SECTION 10. FINES AND PENALTIES .**

The City reserves the right to levy fines against the CONTRACTOR when the City determines that CONTRACTOR is not meeting the necessary work requirements. The following table below depicts areas where fines will be levied:

<b>Work Activity</b>	<b>Grace Period</b>
Quality of Operations	24 hours
Personnel Shortages	4 hours
Personnel Dress Code	8 hours
Equipment Deficiencies	72 hours
Supplies	8 hours
Program Management	24 hours
Communications	48 hours
Life Safety Maintenance	2 hours

Fines for failures to complete corrective action for any of the work activities listed above are as follows:

- \$100 after failing to complete corrective action after two (2) notifications
- \$200 after failing to complete corrective action after three (3) notifications
- \$500 after failing to complete corrective action after four (4) notifications

If additional time is required to complete corrective action, a written request must be submitted for approval to the City prior to the end of the grace period. The basis for the implementation of fines and penalties includes but is not limited to the following:

- a. Personnel Shortages – Failure to provide a staffing plan that meets the maintenance coverage requirements of the service area, and/or failure to provide the necessary on-site personnel in accordance to the staffing plan.
- b. Personnel Dress Code – Failure of employees to meet uniform requirements, including wearing clean uniforms.
- c. Equipment Deficiencies – Inability to fully operate; in non-functional condition; in state of disrepair and or visibly damaged; lacking maintenance; and not generally maintained and in clean condition.
- d. Supplies – Failure to provide the supplies necessary for the proper execution of the program or maintenance service specified.
- e. Program Management - Failure to implement a comprehensive management program to respond to City and/ or stakeholder requests for services and maintenance issues covered by the Contract.
- f. Communications – Failure to submit an approved communications plan addressing routine, scheduled, and emergency maintenance and repair activities, and failure to provide timely notifications as previous prescribed.
- g. Safety Regulations – Failure to adhere to OSHA's most recently published Safety and Health Regulations and general Occupational Safety and Health Standards.

## **SECTION 11. INDEMNITY.**

- 11.1 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, CONTRACTOR shall indemnify, hold harmless and defend the City, its agents, servants and employees from and against any claim, demand or cause of action of whatsoever kind or nature arising out of error, omission, or negligent act of CONTRACTOR, its subcontractor(s), agents, servants or employees in the performance of services under this Agreement unless such claim, demand or cause of action arises as a result of the City's gross negligence or willful misconduct.
- 11.2 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, CONTRACTOR shall indemnify, hold harmless and defend the City, its agents, servants and employees from and against any claim, demand or cause of action of whatever kind or nature arising out of any misconduct of CONTRACTOR not included in the paragraph in the subsection above and for which the City, its agents, servants or employees are alleged to be liable.
- 11.3 Subsections 11.1 and 11.2 shall survive the termination or expiration of this Agreement. Subsections 11.1 and 11.2 shall not apply, however, to any such liability, that arises as a result of the willful misconduct or gross negligence of the City, its agents, servants or employees.
- 11.4 Subrogation.  
The terms of insurance policies referred to in Section 9 shall preclude subrogation claims against CONTRACTOR, the City and their respective officers, employees and agents.
- 11.5 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 cumulative facilities unusable and which is not caused by negligence of CONTRACTOR;
  - b. Earthquake; hurricane; flood; act of God; civil commotion occurring at the Center 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 CONTRACTOR'S obligations and benefits hereunder may be negatively affected by an event of Force Majeure. If an event of Force Majeure occurs during the term of this Agreement, and provided further that CONTRACTOR'S payment(s) to the City for that contract year is greater than the applicable percentage payment, then the City Manager, or his designee, in his sole discretion, may extend the term of this Agreement for a reasonable period of time; provided, however, such extension shall take effect only if CONTRACTOR agrees to such extension.

- 11.6 Labor Dispute.  
In the event of a labor dispute which results in a strike, picket or boycott affecting the Center

or operation described in this Agreement, CONTRACTOR 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 CONTRACTOR of applicable collective bargaining agreements and there has been a final determination of such fact which is not cured by CONTRACTOR within thirty (30) days.

11.7 Waiver of Loss from Hazards.

The CONTRACTOR hereby expressly waives all claims against the City for loss or damage sustained by the CONTRACTOR resulting from fire, water, natural disasters/acts of God (e.g. hurricane, tornado, etc.), civil commotion, riot, or any other Force Majeure contemplated in Subsection 14.5 and Labor Dispute in Subsection 14.6 above, and the CONTRACTOR 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 12. DEFAULT AND TERMINATION.**

Subsections 12.1 through 12.5 shall constitute events of default under this Agreement. An event of default by CONTRACTOR 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 15.4. An event of default by City shall entitle CONTRACTOR to exercise any and all remedies described as CONTRACTOR'S remedies under this Agreement, including but not limited to those set forth in Subsection 15.5.

12.1 Bankruptcy.

If either the City or CONTRACTOR 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.

12.2 Non-Monetary Default.

In the event that CONTRACTOR 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 a defaulting party cures any default pursuant to this subsection, it shall promptly provide the other party with written notice of same.

### 12.3 Remedies for CONTRACTOR'S Default.

If any of the events of default, as set forth in this Section, by CONTRACTOR 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 CONTRACTOR 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 CONTRACTOR. On the date so specified, CONTRACTOR shall then quit and surrender the Center to City pursuant to the provisions of Subsection 15.6. Upon the termination of this Agreement, all rights and interest of CONTRACTOR in and to the Center 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 CONTRACTOR under this Agreement, including but not limited to, beginning procedures to collect the Performance Bond or Alternate Security required in Section 4.1 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 CONTRACTOR; 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 CONTRACTOR'S default.

If any of the events of default, as set forth in this Section, by the City shall occur, the CONTRACTOR 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 CONTRACTOR 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, CONTRACTOR shall quit and surrender the Center, to City pursuant to the provisions of Subsection 12.5.

### 12.4 Surrender of Center.

At the expiration of this Agreement, or earlier termination in accordance with the terms of this Agreement, CONTRACTOR shall surrender programming at the Center in the same condition as the Center was prior to the commencement of this Agreement, reasonable wear and tear, and City maintenance and repair obligations, excepted. CONTRACTOR shall remove all its equipment, fixtures, personal property, etc. upon five (5)-business days written notice from the City Manager, or his designee, unless a longer time period is agreed to by the City. The CONTRACTOR'S obligation to observe or perform this covenant shall survive the expiration or other termination of this Agreement. Continued occupancy of the Center after termination of the Agreement without the City's approval shall constitute trespass by the CONTRACTOR, and may be prosecuted as such. In addition, the CONTRACTOR shall pay to the City two hundred dollars (\$200) per day as liquidated damages for such breach of this Agreement.

### 12.5 Termination for Convenience.

Term of this Agreement, during which the City may only terminate this Agreement for cause, the City may terminate this Agreement at any time, at its convenience and without cause, upon providing the CONTRACTOR with sixty (60) days written notice. In the event of termination for convenience pursuant to this subsection, CONTRACTOR shall quit and surrender the Centers to City pursuant to the provisions of Subsection 15.6 hereof.

### **SECTION 13. ASSIGNMENT.**

Except as otherwise provided in this subsection, CONTRACTOR shall not assign; sublease; grant any concession or license; permit the use of by any other person other than CONTRACTOR; or otherwise transfer all or any portion of this Agreement and/or of the Center (all of the forgoing are herein after referred to collectively as "transfers"), without the prior written consent of the City, which consent shall not be unreasonably withheld.

If there is a change in control of CONTRACTOR, 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 10% of the voting or ownership interest or right to profits in such CONTRACTOR, 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 CONTRACTOR 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 subsection 4.2.1 hereof; (ii) any transfer to other owners of CONTRACTOR or to trusts the beneficiaries of which are any owner(s) of CONTRACTOR or member(s) of their immediate family; or (iii) a change in the ownership of CONTRACTOR through a registered public offering of shares in CONTRACTOR ((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 10% or less of the voting or ownership interest or right to profits in such CONTRACTOR (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 designee.

CONTRACTOR shall notify the City of any proposed transfer, and shall notify the City Manager, or his designee, of any proposed Minor Change, prior to consummation of same and the City or the City Manager, 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, CONTRACTOR 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 CONTRACTOR or any transferee of the CONTRACTOR without proceeding in any way against any other person.

### **SECTION 14. SPECIAL EVENTS.**

14.1 CONTRACTOR'S proposed uses, as defined in Section 3 herein, contemplates the production, promotion or sponsorship by the CONTRACTOR of tennis related special events at the Center. For purpose of this subsection 14.1 only, CONTRACTOR'S "Special Event" shall mean any event in which CONTRACTOR shall dedicate, and close to the general public, 50% or more of the Center's tennis courts. In the event CONTRACTOR does produce, promote or sponsor a Special Event at the Center, other than those provided for in this Agreement; it shall abide by the City's Special Events Permit Requirements and Guidelines. For any use, other than those provided for in this Agreement, a Special Events Permit may be required, and if required, shall be obtained through the City's Office of Arts, Culture and Entertainment. The City Manager's, or his designee's, authorization must be obtained for any such Special Event. The City Administration shall evaluate requests for Special Events Permits on a case by case basis, in accordance with the City's Special Event Permit Requirements and Guidelines.

14.1.1 City Special Events.

Notwithstanding Subsection 14.1 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 utilize the Center for City produced tennis related special events and/or other City-produced special events productions. In such cases, the City will coordinate with the CONTRACTOR to cooperatively produce such events. The City shall make its best effort to negotiate with CONTRACTOR including utilization of off-site City-owned neighborhood tennis courts, but if unsuccessful the CONTRACTOR shall cease and desist operations during the term of, and in the area of the special event and/or production. If the CONTRACTOR is not required to close, or chooses to remain open without interference to the special event and/or production, CONTRACTOR agrees to cooperate with the City. If the CONTRACTOR is allowed to remain open during special events and/or productions, the CONTRACTOR 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 CONTRACTOR has available for the public on a normal day, 365 days per year. Such equipment or staff shall not be increased or altered during special events and/or productions without the prior written permission of the City Manager, or his designee. To the extent that the normal daily complement of equipment and staff is displaced by the special event and/or production, the CONTRACTOR may reallocate such displaced equipment and staff on a pro-rata basis within the Center not being utilized by the special event.

**SECTION 15. NO IMPROPER USE.**

The CONTRACTOR will not use, nor suffer or permit any person to use in any manner whatsoever, the Center or any facilities herein 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 CONTRACTOR will protect, indemnify, and forever save and keep harmless the City, its agents, employees and contractors 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 the CONTRACTOR, or any of its subcontractors, employees or agents. In the event of any violation by the CONTRACTOR or if the City or its authorized representative shall deem any conduct on the part of the CONTRACTOR to be objectionable or improper, CONTRACTOR shall be deemed to be in default of this Agreement should CONTRACTOR fail to correct any such violation, conduct, or practice to the satisfaction of

the City within twenty-four (24) hours after receiving written notice of the nature and extent of such violation, conduct, or practice.

**SECTION 16. NOTICES.**

All notices, consents, waivers, directions, requests or other instruments of communications provided for under this Agreement, shall be deemed properly given if, and only if, delivered personally or sent by registered or certified U.S. mail, postage pre-paid, as follows:

IF TO THE CITY:	Jimmy L. Morales City Manager City of Miami Beach 1700 Convention Center Drive Miami Beach, Florida 33139
With copies to:	John Rebar, Director Parks and Recreation 2100 Washington Avenue Miami Beach, Florida 33139
IF TO CONTRACTOR:	Mr. Martin Van Daalen, Van Daalen Tennis, LLC 15051 Royal Oaks Lane, Apt 1604 North Miami, Florida 33181

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

**SECTION 17. LAWS.**

17.1 Compliance.

CONTRACTOR 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.

17.2 Governing Law.

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. In case of any inconsistency between the terms of this Agreement, and any applicable general or special law, said general, special law shall prevail.

17.3 Equal Employment Opportunity.

Neither CONTRACTOR nor any affiliate of CONTRACTOR performing services hereunder, or pursuant hereto, will discriminate against any employee or applicant for employment because of race, creed, sex, color, national origin, sexual orientation, and disability, as defined in Title I of ADA.

17.4 No Discrimination.

The CONTRACTOR agrees that there shall be no discrimination as to race, color, national origin, religion, sex, intersexuality, gender identity, sexual orientation, marital and familial



status, and age or disability, in its employment practices or in the operations referred to by this Agreement; and further, there shall be no discrimination regarding any use, service, maintenance, or operation within the Center. All services offered at the Center shall be made available to the public, subject to the right of the CONTRACTOR and the City to establish and enforce rules and regulations to provide for the safety, orderly operation and security of the Center.

Pursuant to Sections 62-90 and 62-91, of Chapter 62, of the Miami Beach City Code entitled "Human Relations", CONTRACTOR, by executing this Agreement, certifies that it does not discriminate in its membership or policies based on race, color, national origin, religion, sex, intersexuality, gender identity, sexual orientation, marital and familial status and age or disability.

## **SECTION 18. MISCELLANEOUS.**

### 18.1 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 CONTRACTOR.

### 18.2 Modifications.

This Agreement cannot be changed or modified except by agreement in writing executed by all parties hereto. CONTRACTOR acknowledges that no modification to this Agreement shall be binding on 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.

### 18.3 Complete Agreement.

This Agreement, together with all exhibits attached hereto, constitutes all the understandings and agreements of whatsoever nature or kind existing between the parties with respect to the matters as contemplated herein.

### 18.4 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.

### 18.5 Binding Effect.

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

### 18.6 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 or benefits that either party is to receive under this Agreement or materially affects the continuing operation of this Agreement.

### 18.7 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 shall not be affected thereby and this Agreement as so modified shall remain in full force and effect.

18.8 Right of Entry.

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

18.9 Not a Lease.

It is expressly understood and agreed that no part, parcel, building, facility, equipment or space is leased to the CONTRACTOR, that CONTRACTOR is a contractor providing management services for the City and not a lessee; and that the CONTRACTOR'S right to manage and operate the Center for the City shall continue only so long as this Agreement remains in effect.

18.10 Signage.

CONTRACTOR shall provide, at its sole cost and expense, any required signs on the Center. 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 CONTRACTOR at the Center shall be subject to the prior written approval of the City as to size, shape and placement of same.

18.11 Conflict of Interest.

CONTRACTOR shall perform its services under this Agreement and conduct the professional tennis management and operations contemplated herein, in a manner so as to show no preference for other tennis operations/facilities owned, operated, managed, or otherwise controlled by CONTRACTOR with regard to its responsibilities pursuant to this Agreement.

18.12 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 designee is allowed or required in this Agreement, such approval, consent or other action shall not be unreasonably withheld, conditioned or delayed.

18.13 Procedure for Approvals and/or Consents.

In each instance in which the approval or consent of the City Manager or his 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 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 designee is allowed or required in this Agreement, CONTRACTOR shall send to the City Manager a written request for approval or consent (the "Approval Request"). The City Manager or his designee shall have up to sixty (60) days from the date of Approval Request to provide written notice to CONTRACTOR approving of, consenting to or disapproving of the request. However, the City Manager or his designee's failure to consider such request within this time provided shall not be deemed a waiver, nor shall CONTRACTOR 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.

18.14 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.

18.15 No Third Party Beneficiary.

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

**SECTION 19. LIMITATION OF LIABILITY.**

The City desires to enter into this Agreement placing the operation and management of the Center 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. CONTRACTOR 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 separate consideration of \$100,000.00, the receipt of which is hereby acknowledged, the City shall not be liable to CONTRACTOR for damages to CONTRACTOR 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 20. VENUE.**

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 CONTRACTOR HEREBY KNOWINGLY AND INTENTIONALLY WAIVE THE RIGHT TO TRIAL BY JURY IN ANY ACTION OR PROCEEDING THAT CITY AND CONTRACTOR MAY HEREIN AFTER INSTITUTE AGAINST EACH OTHER WITH RESPECT TO ANY MATTER ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE CENTER.**

**SECTION 21. FLORIDA PUBLIC RECORDS LAW.**

Pursuant to Section 119.0701 of the Florida Statutes, if the CONTRACTOR meets the definition of "CONTRACTOR" as defined in Section 119.0701(1)(a), the CONTRACTOR shall:

- a) Keep and maintain public records that ordinarily and necessarily would be required by the public agency in order to perform the service;

- b) Provide the public with access to public records on the same terms and conditions that the public agency would provide the records and at a cost that does not exceed the cost provided in this chapter or as otherwise provided by law;
- c) Ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law; and
- d) Meet all requirements for retaining public records and transfer to the City, at no City cost, all public records created, received, maintained and/or directly related to the performance of this Agreement that are in possession of the CONTRACTOR upon termination of this Agreement. Upon termination of this Agreement, the CONTRACTOR shall destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. All records stored electronically must be provided to the City in a format that is compatible with the information technology systems of the City.

For purposes of this Article, the term "public records" shall mean all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business of the City.

CONTRACTOR'S failure to comply with the public records disclosure requirement set forth in Section 119.0701 of the Florida Statutes shall be a breach of this Agreement.

In the event the CONTRACTOR does not comply with the public records disclosure requirement set forth in Section 119.0701 of the Florida Statutes, the City may, at the City's sole discretion, avail itself of the remedies set forth under this Agreement and available at law.

## **SECTION 22. PROHIBITIONS REGARDING SALE OR USE OF EXPANDED POLYSTYRENE FOOD SERVICE ARTICLES.**

Expanded polystyrene, a petroleum byproduct commonly known as Styrofoam, is neither readily recyclable nor biodegradable and takes hundreds to thousands of years to degrade. Expanded polystyrene is a common pollutant, which fragments into smaller, non-biodegradable pieces that are harmful to marine life, other wildlife, and the environment. The City's goals are to reduce the use of expanded polystyrene and encourage the use of reusable, recyclable, or compostable alternatives.

*Expanded polystyrene* means 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.

CONTRACTOR agrees not to sell, use, provide food in, or offer the use of expanded polystyrene food service articles at any of the Center. A violation of this section shall be deemed a default under

the terms of this Agreement. This subsection shall not apply to expanded polystyrene food service articles used for prepackaged food that have been filled and sealed prior to receipt by the CONTRACTOR.

**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.

**CITY OF MIAMI BEACH**  
a municipal corporation of the  
State of Florida

By: \_\_\_\_\_

Print Name: Jimmy Morales

Print Title: City Manager

Date: \_\_\_\_\_

**ATTEST:**

\_\_\_\_\_  
Rafael E. Granado, City Clerk

**VAN DAALEN TENNIS, LLC.**  
a Florida limited liability company

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Print Title: \_\_\_\_\_

Date: \_\_\_\_\_

**ATTEST:**

By: \_\_\_\_\_

\_\_\_\_\_  
Name and Title

STATE OF FLORIDA )

SS:

COUNTY OF \_\_\_\_\_ )

**I HEREBY CERTIFY** that on this day, before me, an officer duly authorized in the State aforesaid and in the County aforesaid to take acknowledgments, the foregoing instrument was acknowledged before me by \_\_\_\_\_, as \_\_\_\_\_ of **VAN DAALEN TENNIS, LLC.**, a Florida limited liability company, who is personally known to me or who has produced a valid \_\_\_\_\_ driver's license as identification.

**WITNESS** my hand and official seal in the County and State last aforesaid this \_\_\_ day of \_\_\_\_\_, 2017.

\_\_\_\_\_  
Notary Public, State of Florida

My Commission Expires: