

CONCESSION AGREEMENT v.24

THIS CONCESSION AGREEMENT (“the Agreement”) is made this ___ day of _____, in the year _____, and shall become effective on the Commencement Date as defined in Section 2(b), between the CITY OF MIAMI BEACH, FLORIDA, a municipal corporation organized and existing under the laws of the State of Florida, operating in its proprietary capacity (hereinafter called the "City"), having its principal address at 1700 Convention Center Drive, Miami Beach, Florida, 33139, and the Concessionaire listed in Section 1 below (hereinafter called “Concessionaire”). The City and Concessionaire are sometimes hereinafter referred to collectively as the “Parties” and individually as a “Party”.

WHEREAS, the City has created a concession program (the “Program”) on the City’s property for valid public purposes, including increasing the quality of the outdoor dining experience for the City’s residents and visitors and promoting the City’s iconic worldwide by allowing residents and visitors to enjoy food and beverage service while surrounded by the City’s world-renowned architecture and scenic sun-drenched vistas; and

WHEREAS, the City has created this Program in its proprietary capacity with respect to the use of City-owned property or rights-of-way dedicated to the public and not in any regulatory capacity; and

WHEREAS, participation in the Program will be limited to restaurant operators who, in the City Manager’s sole discretion, best reflect the City’s vision to be a cleaner, safer, more beautiful and vibrant, mature and stable cultural, entertainment and tourism capital the restaurants in the City, chosen at the City Manager’s sole discretion, who are offered a contract to represent the City’s proprietary interests by selling food and beverages for dining at outdoor cafes on the right-of way abutting the restaurant’s indoor establishment.

NOW, THEREFORE, in consideration of the Recitals and the mutual promises herein made and for other good and valuable consideration, the receipt and sufficiency of which the Parties hereby acknowledge, the City and Concessionaire hereby agree as follows:

1) **PURPOSE:**

The Parties hereby incorporate by this reference the Recitals set forth above. The Parties mutually agree that the Program and its objectives are in the vital and best interests of the City and in furtherance of the public purposes set forth above.

2) **CONCESSION:**

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

- a) The Concessionaire is: [Owner/Tenant/Operator of restaurant space]

- b) The Concession site is: [Restaurant name and address]
- c) All Current Ultimate Beneficial Owners and/or Corporate Officers of this Restaurant: [List all]

(Failure to accurately disclose all ultimate beneficial owners and corporate officers shall constitute an incurable breach of this Agreement pursuant to Section 8(a)(iii)(below)).

3) **AGREEMENT TERM/TIMELINE:**

- a) Term: October 1, 2022 through September 30,2023.

Contract Manager: [Right-of-way Manager for the City’s Public Works Department or his/her designee].

4) **PAYMENT FOR CONCESSION:**

- a) **CONCESSION FEE:** Concessionaire agrees to pay to the City:

- i. FOR SIDEWALK SPACE SOUTH OF 63RD STREET: [\$150 x square feet annually]
- ii. FOR ON-STREET PARKING SPACES SOUTH OF 63RD STREET: [\$185 x sq ft]
- iii. FOR SIDEWALK SPACE AND ON-STREET PARKING SPACES SOUTH OF 63RD STREET: [\$125 x sq ft]
- iv. plus (for all Concessionaire’s) an administrative fee of \$x to cover costs of administering the Program, including monitoring the Concessionaire’s compliance with the terms of this Agreement (collectively, the “Concession Fee”).

- b) **PAYMENT TERMS:** The Concession Fee shall be paid by or before the commencement of the Term. Notwithstanding the foregoing, if the Concession Fee is higher than \$2,500, the Concession Fee may be paid in two installments as follows: (i) fifty percent (50%) of the Concession Fee shall be paid by or before _____ and (ii) the remaining fifty percent (50%) shall be paid by or before _____ [INSERT DATE THAT IS 6 MONTHS AFTER THE FIRST INSTALLMENT.]

- c) **TAXES, ASSESSMENTS:** 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.

5) **NOTICES:**

Any notices required under this agreement shall be delivered via e-mail to the following addresses:

FOR THE CONCESSIONAIRE:

FOR THE CITY: concessionnotices@miamibeachfl.gov

6) **DEFINITIONS:**

- a) **CITY MANAGER shall be defined as:** the City Manager or his or her designee(s).
- b) **CONCESSION shall be defined as:** the use by Concessionaire of an approved Concession Area (as defined herein) for outdoor seating in connection with the operation of food and beverage services, ancillary to the operation of Concessionaire's Full-Service Restaurant, that is primarily characterized by tables and chairs, which may be shaded by awnings, canopies or umbrellas, but may also include such other Concession Facilities (as defined herein) for the purpose of advancing the City's purposes for the Concession program.
- c) **CONCESSION AREA shall be defined as:** the area set forth for food and beverage service on the Approved Site Plan, signed and sealed by a duly licensed engineer or architect, and approved by the City's Public Works Department, attached as Exhibit A and incorporated herein.
- d) **CONCESSION FACILITIES shall be defined as:** nonpermanent fixtures, furnishings and equipment associated with the operation of the Concession and approved administratively by the City Manager and by the required City Departments, including, without limitation, tables, chairs, umbrellas, planters, heaters, fans, rolling service stations, service carts, bussing stations, menus, sandwich boards, and/or menu boards.
- e) **FULL-SERVICE RESTAURANT shall be defined as:** a brick-and-mortar food service establishment that is maintained and operated as a place where food and/or beverages are prepared and/or served and sold for consumption within the premises, or a business establishment which has, as an ancillary or secondary use, or part thereof, where food and/or beverages are prepared and/or served and sold for consumption within the premises. A restaurant that has an occupational license or certificate of use that is limited to take-out service and does not have inside seating will not qualify as a Full-Service Restaurant.
- f) **RIGHT-OF-WAY shall be defined as:** land in which the state, the Florida Department of Transportation, Miami-Dade County, or the City owns the fee or has an easement or other rights devoted to or required for use as a transportation facility or street.

- g) **SIDEWALK** shall be defined as: that portion of the right-of-way which is located between the curb line or the lateral line of a street and the adjacent property line, and which is intended for use by pedestrians; provided that on Lincoln Road Mall, a sidewalk shall mean a right-of-way as defined in this section, but shall only refer to that area between the property line and the centerline of the right-of-way, exclusive of landscaped areas and a 12 foot wide clear path for emergency and maintenance vehicular access.

7) **GENERAL CONTRACT SPECIFICATIONS:**

- a) The Concessionaire agrees to be bound by all terms and conditions contained in this Agreement and to comply with all federal, state, and local laws and regulations that may govern the Concessionaire's business. Without limiting the generality of the foregoing, the Concessionaire specifically agrees to fully and strictly comply with the rules and regulations set forth in the Guidelines attached as Exhibit B and incorporated herein and the Concessionaire's Code of Conduct attached as Exhibit C and incorporated herein.
- b) The Concessionaire shall not make any change to the Concession Facilities or to the configuration of the Approved Site Plan without the prior written consent of the Right-of-Way Manager for the City's Public Works Department or his/her designee, which consent (if given at all) shall be at the Right-of-Way Manager's (or his/her designee's) sole discretion.
- c) The parties agree that violation of any of these terms and conditions set forth in subsections (a) – (c) above will be considered material breaches of this Agreement, subjecting the Concessionaire to the Termination for Cause provisions set forth in Section 8(a).

8) **TERMINATION:**

- a) **Termination for Cause:**
 - i. **Monetary Default:** If the Concessionaire fails to pay any money due to the City under this Agreement, or due to the City under any other authority, by the due date, then upon 15 days prior written notice from the City, the City may, at its sole discretion, suspend this Agreement until all outstanding amounts are paid, or terminate the Agreement altogether.
 - ii. **Non-Monetary Default:** If the Concessionaire breaches any non-monetary provision of this Agreement, the City Manager may (after at least one prior Notice of Breach of Concession Agreement for the same breach), suspend this Agreement until they are satisfied that the breach has been cured and will not be repeated, or terminate the Agreement altogether.

- iii. **Uncurable Default:** If the default is of a nature that cannot be cured, such as, without limitation, fraud against a consumer or against the City, or a material misrepresentation in connection with Contractor's performance under this Agreement, such as concealing or attempting to conceal the true current and past ownership interests and corporate officers in Concessionaire's current or past corporate entity(ies), so as to avoid disclosure to the City of any person who, at any time, serves or previously served as a corporate officer or owner of Concessionaire's business, the termination shall be effective upon receipt of the termination notice and no cure period shall apply.
 - iv. **Cross-Default:** In the event that the City has terminated the Concessionaire for cause under a separate concession agreement under the Program, the City Manager, at his or her sole discretion, shall have the right to terminate this Agreement for cause, upon providing Concessionaire with ninety (90) days prior written notice.
- b. **Termination Without Cause:** Either party may terminate this Agreement without cause upon 90 days prior written notice to the other party. If the Concession Area consists of both space on City parking spaces and space on other City rights-of-way, either party may terminate the Agreement as to either or both of those areas under this provision.
- i. **Termination without cause by the City:** If the City Manager terminates this Agreement without cause, upon written request by the Concessionaire, the City shall pay to the Concessionaire the unamortized value of any Concession Facilities, as defined in Section 6(b) of this Agreement, that are subject to removal, which shall be computed as the purchase price actually paid minus three percent (3%) of that amount for each month after purchase, up to a maximum payment of \$100,000. To be eligible for this payment, the Concessionaire must provide the City with itemized evidence of each purchase and itemized evidence of payment within ten (10) days of the effective date of this Agreement or within ten (10) days of delivery, whichever occurs later. This itemized Concession Facilities proof of purchase and payment shall be attached as Exhibit E to this Agreement. Only Concession Facilities appearing on the approved Site Plan shall be eligible for reimbursement. If the City terminates this Agreement without cause, the prorated Concession Fee representing the remainder of the contract year shall also be refunded. Concessionaire's SOLE REMEDY upon termination without cause shall be the payment of the unamortized value of the Concession Facilities per this Section and refund of the prorated Concession Fee; and upon payment thereof neither party shall have or owe any further obligation or liability to the other party, except for any obligation that survives the expiration or termination of this Agreement.

- ii. **Termination without cause by Concessionaire:** If Concessionaire terminates this Agreement without cause, the City shall be entitled to retain the Concession Fee, but shall refund any portion of the Security Deposit then being held by the City, subject to all other terms and conditions of this Agreement.
- iii. **Termination or Suspension by the City due to Public Health, Welfare or Safety Concern:** In the event of public health, welfare, or safety concern, upon verbal or written notice, the City Manager may immediately suspend use of the Concession Area for a time certain, or terminate the Agreement on a given date. If the City terminates this Agreement due to a public health, welfare or safety concern, a pro rata portion of the Concession Fee representing the remainder of the Term shall be refunded. If the City suspends this Agreement due to a public health, welfare or safety concern, a pro rata portion of the Concession Fee representing the length of the suspension shall be refunded.
- iv. **Termination or Suspension by the City due to City Project:** In the event of a current or upcoming City project (or project of another governmental entity) at the Concession Site, upon verbal or written notice, the City Manager may immediately suspend use of the Concession Area for a time certain, or terminate the Agreement on a given date. A project includes, but is not limited to, maintenance, repairs, and/or construction on or around the Concession Area. If the City terminates this Agreement due to a City project, a pro rata portion of the Concession Fee representing the remainder of the Term shall be refunded. If the City suspends this Agreement due to a City project, a pro rata portion of the Concession Fee representing the length of the suspension shall be refunded.
- v. **Clearing the Public Right-of-Way:** Upon termination or suspension of this Agreement, by any party for any reason, Concessionaire shall immediately remove all Concession Facilities and employees/agents from the public right-of-way, including from the Concession Area. If the Concessionaire fails to do so, the City may remove all property from the public right-of-way and store it or dispose of it as it sees fit at Concessionaire's expense, without any liability to the City. Alternatively, or in addition, the City may cite the Concessionaire under the City Code or criminally charge the Concessionaire under applicable criminal ordinances and/or statutes for any applicable offenses.

9. **NO ASSIGNMENT:**

Concessionaire shall not have the right to assign or transfer all or any part of the Concession Area or the Concession Agreement.

10. **USE:**

The Concession Area shall be used solely for the purpose of outdoor cafe dining. If the Concession Area is used for any other purpose, the City Manager shall have the option of immediately terminating this Agreement.

11. **NO CITY LIABILITY FOR CONCESSIONAIRE'S ACTIVITIES ON RIGHT-OF-WAY; INDEMNIFICATION BY CONCESSIONAIRE:**

The City shall not be liable for any of Concessionaire's activities on the public right-of-way and/or arising out of the Concessionaire's use of the Concession Area. Concessionaire shall defend, indemnify and hold harmless the City, its agents and employees, from and against any and all claims, demands, liabilities, damages, judgments, orders, decrees, actions, proceedings, fines, penalties, costs and expenses, including without limitation, court costs and reasonable attorneys' fees (collectively, "Claims") arising from or relating to any violation of law, loss of life, damage or injury to persons, property or business occurring in, about or from the Concession Area or any area adjacent thereto, or directly or indirectly caused by or in connection with any violation of this Agreement or use of the Concession Area by, or any other act or omission of, Concessionaire, any other occupant of the Concession Area, or any of their respective agents, employees, invitees or contractors.

12. **INSURANCE REQUIREMENTS REQUIRED TO BE MAINTAINED DURING THE CONTRACT TERM:**

Concessionaire agrees to indemnify, defend, save and hold harmless the City, its commissioners, officers and employees, from any and all claims, liability, lawsuits, damages and causes of action which may arise out of this Agreement or the Concessionaire's activity on the public right-of-way. Concessionaire agrees to meet and maintain for the entire contract term, at its own expense, the following requirements:

- a) Commercial general liability insurance, in the amount of \$1,000,000.00 per occurrence for bodily injury and property damage. The City of Miami Beach, Florida, must be named as an additional insured on this policy, and an endorsement must be issued as part of the policy reflecting compliance with this requirement.
- b) For Concession operations which serve alcoholic beverages, liquor liability insurance, in the amount of \$1,000,000.00 per occurrence for bodily injury and property damage. The City of Miami Beach, Florida, must be named as an additional insured on this policy, and an endorsement must be issued as part of the policy reflecting compliance with this requirement.
- c) Workers' compensation and employers' liability as required by the State of Florida.
- d) All policies must be issued by companies authorized to do business in the state and rated B+:VI or better per Best's Key Rating Guide, latest edition.
- e) The City must receive 30 days' written notice prior to any cancellation, non-renewal or material change in the coverage provided.

- f) Concessionaire must provide and have approved by the City an original certificate of insurance as evidence that the requirements set forth in this section have been met prior to commencing operations.
- g) Failure to comply with these requirements at any time shall cause an immediate suspension or revocation of the use of the Concession Area.

13. **ACCESS TO CONCESSION AREA:**

The City may enter the Concession Area at any time without prior notice to Concessionaire for any purpose, including, without limitation: (1) to confirm performance under the Agreement; (2) observe and inspect the Concession Area; (3) to maintain, repair and improve the Concession Area; and (4) any other lawful purpose the City determines necessary for the conduct of its business.

14. **OTHER GOVERNMENTAL APPROVALS:**

Concessionaire agrees that it will secure all necessary contracts, permits, leases, or any other required permissions from any governmental authority requiring it in the location where the Concession Area is located. This includes obtaining a Business Tax Receipt from the City prior to opening. Also, a separate review and approval from the Florida Department of Transportation ("FDOT") or Miami-Dade County may be necessary for a concession on state or county rights-of-way, respectively.

15. **GOVERNMENTAL REGULATIONS AND COMPLIANCE WITH LAWS:**

The Concessionaire covenants and agrees to fulfill and comply with all statutes, ordinances, rules, orders, regulations, and requirements of any and all governmental bodies, including but not limited to Federal, State, Miami-Dade County, and City governments, and any and all of their departments and bureaus applicable to the Concession Area and Concessionaire's proposed use(s) thereof, and shall also comply with and fulfill all rules, orders, and regulations for the prevention of fire, all at Concessionaire's own cost and expense. The Concessionaire shall pay all cost, expenses, claims, fines, penalties, and damages that may be imposed because of the failure of the Concessionaire to comply with the Agreement, and shall indemnify and hold harmless the City from all liability arising from each non-compliance, except where such non-compliance is caused by the sole negligence or willful misconduct of the City or its officers, agents and employees.

16. **WAIVER OF ANY CLAIMED FIRST AMENDMENT RIGHT TO SOLICIT PASSERSBY:**

Concessionaire acknowledges and agrees that it is offered this Agreement in order for it to market, advance, and promote the City's iconic worldwide brand through its outdoor dining operation on City property. Concessionaire further acknowledges and agrees that Concessionaire's sales tactics in or around the Concession Area are or may reasonably be construed as reflections of the City's brand. Soliciting passersby defeats the public purpose advanced by this Agreement by damaging the City's brand, and taking away from

residents', visitors', and tourists' ability to relax and enjoy a stroll on the City's scenic promenades. Therefore, Concessionaire specifically agrees not to solicit passersby or to distribute commercial handbills to passersby as set forth in paragraph 10 of the Concessionaire's Code of Conduct, Exhibit C. Concessionaire hereby knowingly, intelligently, and voluntarily waives any putative free speech right under the First Amendment to the United States Constitution or under any provision of the Florida Constitution (or any other source of such a putative right) to do so. Concessionaire has had the opportunity to consult an attorney prior to executing this Agreement (including the foregoing waiver), and has made the informed decision to do so.

17) **DISPUTES:**

This Agreement shall be governed by, construed, and enforced in accordance with the Laws of the State of Florida, to the fullest extent permitted by such laws, without giving effect to its conflicts of law rules. Any dispute between or among the Parties (in any combination), including disputes arising out of, relating to, or in connection with this Agreement, shall be resolved by binding arbitration before one arbitrator, fluent in English, pursuant to the Commercial Arbitration Rules of the American Arbitration Association ("AAA Rules") in force on the date of the Request for Arbitration. The venue and seat of the arbitration shall be Miami Beach, Florida. The language of the arbitration shall be English.

The Parties agree that, for the sake of efficiency, Notice(s) of Breach of Concession Agreement shall not be subject to arbitration unless and until the City Manager suspends or terminates this Agreement. If the City Manager suspends or terminates this Agreement, it is the intent of the Parties that all matters prerequisite to a suspension or termination, and/or matters regarding payment due from the City upon a termination without cause, shall be arbitrated once, only after a suspension or termination has been ordered. Terminations or suspensions by the City due to a public health, welfare or safety concern, and/or due to a City project, shall be final and not subject to challenge.

The Parties also specifically waive any possible right to collect prevailing party attorney's fees.

The Parties also waive any and all rights to seeks lost profits, consequential, special or punitive damages for any breach of this Agreement or for any breach of any duty, obligation, or other rule under any statutory or common law cause of action that may be waived by contract under applicable law.

18) **NO PROPERTY RIGHTS CONFERRED BY THE AGREEMENT:**

Concessionaire acknowledges and agrees that the nature of the Concessionaire's relationship with the City is that of a City contractor and that no other relationship either expressed or implied shall be deemed to apply to the parties under this Agreement. No property rights of any nature whatsoever shall be created on the part of the Concessionaire by this Agreement, and termination of this Agreement for any reason shall not be deemed to implicate any property right or to be a taking under any statutory or constitutional provision.

19) **INSPECTOR GENERAL AUDIT RIGHTS:**

- a) Pursuant to Section 2-256 of the Code of the City of Miami Beach, the City has established the Office of the Inspector General which may, on a random basis, perform reviews, audits, inspections and investigations on all City contracts, throughout the duration of said contracts. This random audit is separate and distinct from any other audit performed by or on behalf of the City.
- b) The Office of the Inspector General is authorized to investigate City affairs and empowered to review past, present and proposed City programs, accounts, records, contracts and transactions. In addition, the Inspector General has the power to subpoena witnesses, administer oaths, require the production of witnesses and monitor City projects and programs. Monitoring of an existing City project or program may include a report concerning whether the project is on time, within budget and in conformance with the contract documents and applicable law. The Inspector General shall have the power, as it relates to any violation of this Agreement, to audit, investigate, monitor, oversee, inspect and review operations, activities, performance, activities of Concessionaire, its officers, agents and employees, lobbyists, City staff and elected officials to ensure compliance with the terms of the Concession Agreement and to detect fraud and corruption. For the avoidance of doubt, nothing set forth herein shall be construed to grant to the City or the Inspector General any audit or other rights with respect to any matter or activity that is unrelated to the Concession Agreement.
- c) Upon ten (10) days written notice to Concessionaire, Concessionaire shall make all requested records and documents relating to an alleged violation of the Concession Agreement available to the Inspector General for inspection and copying. The Inspector General is empowered to retain the services of independent private sector auditors to audit, investigate, monitor, oversee, inspect and review operations activities, performance and procurement process including but not limited to project design, bid specifications, (bid/proposal) submittals, activities of Concessionaire, its officers, agents and employees, lobbyists, City staff and elected officials to ensure compliance with the contract documents and to detect fraud and corruption.
- d) The Inspector General shall have the right to inspect and copy all documents and records specific to the participation in this Concession Agreement in Concessionaire's possession, custody or control which in the Inspector General's sole judgment, pertain to performance of the Agreement.
- e) Concessionaire shall make available at its office at all reasonable times the records, materials, and other evidence relating to any alleged violation and performance of this Agreement, for examination, audit, or reproduction, until three (3) years after final payment under this Agreement or for any longer period required by statute or by other clauses of this contract. In addition:
 - i. If this Agreement is completely or partially terminated, Concessionaire shall make available records relating to the work terminated until three (3) years after any resulting final termination settlement; and

- ii. Concessionaire shall make available records relating to appeals or to litigation or the settlement of claims arising under or relating to this Agreement until such appeals, litigation, or claims are finally resolved.
- f) The provisions in this section shall apply to Concessionaire, its officers, agents, and employees.
- g) Nothing in this section shall impair any independent right to the City to conduct audits or investigative activities. The provisions of this section are neither intended nor shall they be construed to impose any liability on the City by Concessionaire or third parties.

20) **FLORIDA PUBLIC RECORDS LAW:**

- a) Concessionaire shall comply with Florida Public Records law under Chapter 119, Florida Statutes, as may be amended from time to time, for any records directly associated with this Agreement or alleged violation thereof.
- b) The term “public records” shall have the meaning set forth in Section 119.011(12), which means 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.
- c) Pursuant to Section 119.0701 of the Florida Statutes, if Concessionaire meets the definition of “Contractor” as defined in Section 119.0701(1)(a), Concessionaire shall:
 - i Keep and maintain public records required by the City to perform the service;
 - ii Upon request from the City's custodian of public records, provide the City with a copy of the requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided in Chapter 119, Florida Statutes or as otherwise provided by law;
 - iii. Ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed, except as authorized by law, for the duration of the contract term and following completion of this Agreement if Concessionaire does not transfer the records to the City;
 - iv. Upon completion of this Agreement, transfer, at no cost to the City, all public records in possession of Concessionaire or keep and maintain public records required by the City to perform the service. If Concessionaire transfers all public records to the City upon completion of this Agreement, Concessionaire shall destroy any duplicate public

records that are exempt or confidential and exempt from public records disclosure requirements. If Concessionaire keeps and maintains public records upon completion of this Agreement, Concessionaire shall meet all applicable requirements for retaining public records. All records stored electronically must be provided to the City, upon request from the City's custodian of public records, in a format that is compatible with the information technology systems of the City.

d) **REQUEST FOR RECORDS; NONCOMPLIANCE**

- i. A request to inspect or copy public records relating to the City's contract for services must be made directly to the City. If the City does not possess the requested records, the City shall immediately notify Concessionaire of the request, and Concessionaire must provide the records to the City or allow the records to be inspected or copied within a reasonable time.
- ii. Concessionaire's failure to comply with the City's request for records shall constitute a breach of this Agreement, and the City, at its sole discretion, may: (1) unilaterally terminate this Agreement and/or (2) avail itself of the remedies set forth under this Agreement.
- iii. If Concessionaire fails to provide the public records to the City within a reasonable time, the Concessionaire may be subject to penalties under s. 119.10.
- iv. [In the event the City is found liable as of the the Concessionaires failure to comply with Florida's Public Records Act, the Concessionaire shall indemnify the City for any fees, costs or other liability the City may incur].

e) The Concessionaire represents and warrants that it is familiar with the terms and requirements of Florida's Public Records Act, Chapter 119.

f) **IF CONCESSIONAIRE HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO CONCESSIONAIRE'S DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THIS AGREEMENT, CONTACT THE CUSTODIAN OF PUBLIC RECORDS AT:**

21) **FORCE MAJEURE:**

No party hereto shall be liable for its failure to carry out its obligations under the Agreement during a period when such party is rendered unable, in whole or in part, by Force Majeure to carry out such obligations. A "Force Majeure" event is an event that (i) in fact causes a delay in the performance of the Concessionaire or the City's obligations under the Agreement, and (ii) is beyond the reasonable control of such party, which may include events such as war, civil insurrection, riot, fires, epidemics, pandemics, terrorism, sabotage, explosions, embargo restrictions, quarantine restrictions, transportation accidents, strikes, strong hurricanes or tornadoes, earthquakes, or other acts of God which prevent performance. Force Majeure shall not include technological impossibility, inclement weather, or failure to secure any of the required permits pursuant to the

Agreement. If the City or Concessionaire's performance of its contractual obligations is prevented or delayed by an event believed by to be Force Majeure, such party shall immediately, upon learning of the occurrence of the event or of the commencement of any such delay, but in any case within fifteen (15) business days thereof, provide notice to the other party. The timely delivery of the notice of the occurrence of a Force Majeure event is a condition precedent to allowance of any relief pursuant to this section; however, receipt of such notice shall not constitute acceptance that the event claimed to be a Force Majeure event is in fact Force Majeure, and the burden of proof of the occurrence of a Force Majeure event shall be on the requesting party. In no event will any condition of Force Majeure extend this Agreement beyond its stated term.

22) **NO WAIVER OF SOVEREIGN IMMUNITY:**

- a) The City desires to enter into this Agreement only if in so doing the City can place a limit on the City's liability for any cause of action, for money damages due to an alleged breach by the City of this Agreement, so that its liability for any such breach never exceeds the sum of \$100,000. Concessionaire hereby expresses its willingness to enter into this Agreement with Concessionaire's recovery from the City for any damage action for breach of contract to be limited to a maximum amount of \$100,000.

Accordingly, and notwithstanding any other term or condition of this Agreement, Concessionaire hereby agrees that the City shall not be liable to the Concessionaire for damages in an amount in excess of \$100,000 for any action or claim for breach of contract arising out of the performance or non-performance of any obligations imposed upon the City by this Agreement.

- b) Moreover, nothing in this Agreement shall be deemed or otherwise interpreted as waiving the City's sovereign immunity protections, or as increasing the limits of liability set forth in §768.28, Fla. Stat. (2008). The limit of the City's liability for breach of this Agreement shall be limited in amount and shall not exceed the limitations of liability for tort actions set forth in §768.28(5), Fla. Stat..

23) **ENTIRE AGREEMENT:**

This Agreement and attached exhibits contain the entire agreement of the Parties and no representations or promises have been made except those that are specifically set out in this Agreement. All prior and contemporaneous conversations, negotiations, possible and alleged agreements and representations, covenants, and warranties with respect to the subject matter of this Agreement, and any part hereof, are waived, merged herein and superseded hereby.

24) **SEVERABILITY:**

If any section, paragraph, clause or provision of this Agreement is adjudged by a court, agency or authority of competent jurisdiction to be invalid, illegal or otherwise unenforceable, all remaining parts of this Agreement shall remain in full force and effect and the Parties shall be bound thereby so long as principle purposes of this Agreement remain enforceable.

- 25) **THIRD PARTY BENEFICIARIES:**
This Agreement shall be binding upon and inure to the benefit of the Parties hereto. Nothing in this Agreement is intended to confer any rights, privileges, benefits, obligations or remedies upon any other person or entity except as expressly provided for herein.
- 26) **COMPUTATION OF TIME:**
In computing any period of time prescribed in this Agreement, the day of the act, event or default from which the designated period of time begins to run, shall not be included. The last day of the period shall be included unless it is a Saturday, Sunday or legal holiday, in which event the period shall run until the end of the next day which is not a Saturday, Sunday or legal holiday.
- 27) **CONSIDERATION:**
By their signature below, the parties hereby acknowledge the adequacy and sufficiency of consideration provided in this Lease and forever waive the right to object to or otherwise challenge the same.
- 28) **NO PARTNERSHIP OR JOINT VENTURE:** It is understood and agreed that nothing contained in this Agreement shall be deemed or construed as creating a partnership or joint venture between the parties or any third party, or cause any party to be responsible in any way for the debts and obligations of the other party. Concessionaire shall be solely liable for all claims arising out of the use of the Concession Area.
- 29) **CONSULTATION:** Notwithstanding any provision to the contrary in this Agreement, nothing herein shall preclude the City Manager from seeking direction from the City Commission regarding any matter arising out of or related to this Agreement, including, without limitation, any approval contemplated under this Agreement (within the timeframe specified therefor) or any proposed amendment or modification to this Agreement.
- 30) **NOT A LEASE:** It is expressly understood and agreed that no part, parcel, building, facility, equipment or space is leased to the Concessionaire, that it is a concessionaire and not a lessee; that the Concessionaire's right to operate the Concession shall continue only so long as this Agreement remains in effect.
- 31) **NO LIEN:** In the event any notice or claim of lien shall be asserted against the interest of the City on account of or arising from any work done by or for Concessionaire, or any person claiming by, through or under Concessionaire, or for improvements or work, the cost of which is the responsibility of Concessionaire, Concessionaire agrees to have such notice or claim of lien cancelled and discharged within fifteen (15) days after notice to Concessionaire by City. In the event Concessionaire fails to do so, City may terminate this Agreement for cause without liability to City.

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

**FOR THE CITY:
CITY OF MIAMI BEACH, FLORIDA**

FOR CONCESSIONAIRE:

By: _____
CITY MANAGER

By: _____

Print Name

Name and Title of Signatory

FOR CITY:

APPROVED AS TO FORM:

By: _____
City Attorney Date

DRAFT