

**AGREEMENT**  
**BETWEEN**  
**THE CITY OF MEMPHIS, TENNESSEE**  
**and**  
**SMG**  
**For**  
**MANAGEMENT OF THE LIBERTY BOWL**  
**MEMORIAL STADIUM and the FAIRGROUNDS**

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**AGREEMENT**

**BETWEEN**

**THE CITY OF MEMPHIS, TENNESSEE**

**AND**

**SMG**

**FOR MANAGEMENT OF THE**

**LIBERTY BOWL MEMORIAL STADIUM and the Fairgrounds**

THIS AGREEMENT made and entered into as of the 1st day of July, 2008 by and between the City of Memphis, Tennessee, hereinafter referred to as the “City” or “Owner”, and SMG, a Pennsylvania general partnership, hereinafter referred to as “SMG”.

**WHEREAS**, the City owns and operates the Liberty Bowl Memorial Stadium and the Fairgrounds along with related improvements, comprising part of a public assembly facility, in Memphis, Tennessee (the “FACILITY”); and

**WHEREAS**, the OWNER desires that the FACILITY be promoted, operated and managed in a professional manner in order to increase revenues, decrease expenditures, and in general to maximize the utilization of the FACILITY by and for the benefit of the public; and

**WHEREAS**, SMG, a private company specializing in management of public facilities, agrees to promote, operate and manage the FACILITY for the OWNER on the terms and conditions herein contained.

**NOW, THEREFORE**, in consideration of the premises and of the mutual covenants and agreements hereinafter contained, receipt and legal sufficiency of which is hereby acknowledged, the CITY and SMG hereby agree as follows:

## DEFINITIONS

In addition to the other terms, which are defined elsewhere in this Agreement, the following terms, for purposes of this Agreement, shall have the meanings as set forth in this section.

“**Affiliate**” of a specified entity means a person that directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, the specified entity. For purposes of this definition “control” shall mean the ownership, either directly or indirectly, of equity securities or other ownership interests which represent more than 50% voting power in the controlled entity.

“**Agreement**” shall mean this Agreement, by and between the CITY and SMG for the management of the FACILITY.

“**Approved Budget**” or “**Budget**” shall mean the annual operating budget approved by the CITY for the operation of the FACILITY by SMG for each fiscal year pursuant to Section 5 hereof.

“**Authorized Representative**” shall mean any officer, agent, employer of, or retained or employed by either the CITY or SMG, acting within the scope of authority of their employment or retainer by either party or acting within the terms and conditions of any contract with the parties hereto, as the case may be.

“**Bankruptcy Act**” shall mean the Bankruptcy Code of 1978, as amended, and the U.S. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, as may be amended from time to time.

**“Capital Expenditures”** shall mean all expenditures for building additions, alterations or improvements, and for purchases of additional or replacement furniture, machinery or equipment, the depreciable life of which, according to generally accepted accounting principles, is in excess of three (3) years and expenditures for repairs (normal wear and tear excepted) or replacements which extend the useful life of the assets being repaired or replaced for a period in excess of three (3) years.

**“Capital Improvements”** shall mean all improvements paid for by Capital Expenditures.

**“Capital Improvements Budget”** shall mean any budget for Capital Expenditures approved by the CITY pursuant to Section 5 of this Agreement.

**“City”** shall mean the City of Memphis, Tennessee.

**“Depository”** shall mean the place in which SMG shall maintain or manage the bank account or accounts for the receipt of all Operating Revenues, fees, commissions and other monies, checks, drafts or other commercial instrument tendered as payment to SMG or in respect to events held or to be held at the FACILITY under this Agreement, and approved in writing by the CITY.

**“Emergency Expenditure”** shall mean any Capital and Operating Expenditure which is not included in the then applicable Capital Improvements Budget or Operating Budget, necessary to correct any condition that jeopardizes the structural soundness of the FACILITY or the public safety, as provided in Section 5.7 or 8.7 of this Agreement.

**“Event of Default”** shall have the meaning provided in Section 12.

**“Facility”** shall mean any and all portions or parts of the OWNER’s public assembly

facility commonly known as the Liberty Bowl Memorial Stadium and the Fairgrounds property and related structures and all real property related thereto, including all ancillary parking areas used in connection therewith, as such areas are outlined on Exhibit A attached hereto and made a part hereof. The parties acknowledge that the City is in the process of considering re-development plans for the Fairgrounds property which is likely to result in the re-development of such property in the future.

“**Fiscal Year**” shall mean the twelve month period beginning July 1st and ending June 30th, during each year of the term hereof.

“**General Manager**” shall mean the person duly appointed in writing by SMG to serve as the general manager for the FACILITY.

“**Initial Term**” shall mean the period of time commencing as of the date of this Agreement and ending at 11:59 p.m. on June 30, 2009, unless sooner terminated as set forth herein.

“**Intellectual Property Rights**” shall mean the rights to all trademarks, service marks, copyrights, drawings, photographs, designs, three dimensional mockups, layouts, diagrams, ideas, slogans, software, characters and verbal compositions used or created for the marketing and promotion of the FACILITY.

“**Just Cause**” shall mean any Event of Default.

“**Legal Requirement**” shall mean the laws, rules, and regulations of the United States of America, the State of Tennessee and all other governmental bodies having jurisdiction over the Facility.

**“Management Fee”** shall mean the incentive fee that may be earned by SMG as set forth in Section 6.1 hereof.

**“Net Operating Income”** shall mean the positive difference between Operating Revenues and Operating Expenses.

**“Operating Expenses”** subject to the Approved Budget, shall mean and include all expenditures or obligations of whatever kind or nature incurred (directly or indirectly) or accrued by SMG in any specified period during the term of this Agreement.

**“Operating Fund”** shall mean a fund maintained or managed by SMG under Section 5.

**“Operating Loss”** shall mean the amount by which Operating Expenses for any specified period exceed the Operating Revenues for such period.

**“Operating Revenues”** shall mean all income and other revenue received or collected by SMG from all operations within the Facility, including advertisements and sponsorships.

**“Owner”** shall mean the City of Memphis, Tennessee.

**“Parties”** shall mean the OWNER and SMG.

**“Performance Standard”** shall mean those standards of performance, set out with particularity at Section 8.

**“Pre-existing Agreements”** shall mean all contracts, licenses, agreements, options, leases or commitments, existing as of the date of this Agreement (copies of which have been given to SMG prior to the execution and delivery of this Agreement) that grant any person or entity any right: (i) to license, use, occupy or rent all or any portion of the FACILITY, or (ii) to

provide services to be used in the management, operation, use, possession, occupation, promotion or marketing of all or any portion of the FACILITY.

“**Renewal Term**” shall mean a mutually agreed upon period for which this Agreement may be renewed beyond the Initial Term, as more particularly described in Section 2.

## SECTION 1

### ENGAGEMENT

1.0. **Engagement.** The CITY has determined that it is in its best interest to delegate the responsibility for the management and operation of the FACILITY to a private management company with experience and expertise in the management, operation and marketing of such facilities.

SMG is an organization whose principals have substantial experience and expertise in the management, operation and marketing of facilities such as the FACILITY.

CITY hereby engages SMG to promote, operate and manage the FACILITY, as defined hereinabove, pursuant to all applicable laws and ordinances and SMG hereby undertakes and agrees to perform all such services and to comply with all of the provisions of this Agreement.

1.1. **Property Rights.** The ownership of building(s) and real estate, technical and office equipment and facilities, intellectual property, furniture, displays, fixtures and similar property shall remain the ownership of the OWNER. Property rights will not accrue to SMG, with the exception of any (i) proprietary computer software owned or licensed by SMG or that was purchased or licensed solely from funds of SMG and not with funds of OWNER, (ii) personnel records relating to SMG’s employees, and (iii) intellectual property rights of SMG that are not limited to the FACILITY, all of which shall remain the sole property of SMG. Moreover,

any computer software which is designed specifically for use by the FACILITY will become and remain the property of the OWNER.

Any data, equipment or materials furnished by the OWNER to SMG and any such data, equipment or materials that may be acquired for the OWNER by SMG for use at the FACILITY, including, but not limited to, intellectual property, shall remain the property of the OWNER, and when no longer needed for the performance of this Agreement, shall be returned to the OWNER.

## SECTION 2

### TERM AND RENEWAL

2.0. **Initial Term.** The Initial Term of this Agreement shall be for one (1) year commencing as of the day and year first above written.

2.1. **Renewal.** The parties shall have the right to extend the Initial Term of this Agreement for two (2) one (1) year periods, provided that such intent to renew is mutually approved in writing by both parties at least ninety (90) days prior to the end of the then existing term of this Agreement.

## SECTION 3

### SERVICE REQUIREMENTS

3.0. **Management.** SMG shall utilize standard industry procedures to manage and operate the FACILITY and shall use its best efforts to obtain maximum use of the FACILITY including the rental of the FACILITY. SMG shall provide expert top management personnel experienced in management and operation of similar facilities for the purpose of performing SMG's obligations under this Agreement. SMG shall have the obligation and exclusive authority, subject only to the provisions of this Agreement, to negotiate all contracts, agreements,

permits, leases, licenses and franchises, including but not limited to contracts, agreements, leases, licenses and franchises with suppliers, tenants, exhibitors, concessionaires, joint venturers, promoters, advertisers, television and radio media, other media, and other parties, excluding contracts to be negotiated in FY '08 -- specifically, the contracts with the University of Memphis, Southern Heritage Classic and Liberty Bowl Classic, relating to the utilization, operation and promotion of the FACILITY. Promptly following the City's finalization and execution of such excluded contracts (which is expected by July 1, 2008), the City shall provide SMG with a copy of each such contract. All contracts, instruments and arrangements mentioned above shall be negotiated and executed by SMG in its name and shall not be contracts or obligations of the CITY, except as herein provided. During the term of this Agreement, no person or party other than SMG shall exercise the powers and authority granted herein to SMG, except as provided herein.

3.1. **Limitation on Contract Terms.** All contracts or agreements that extend beyond the Initial Term or any Renewal Term of this Agreement that are entered into by SMG under the authority of this section must be approved, in writing, by the CITY.

3.2. **Employment of SMG's Personnel After Termination.** The CITY hereby agrees that for a period of twenty-four (24) months following termination of this Agreement for any reason, the CITY will not directly employ or hire, or attempt to employ or hire, the following employees of SMG at the FACILITY: the General Manager, the Director of Finance, the Director of Operations and the Director of Event Services, without first obtaining the prior written consent of SMG, which SMG may withhold in its reasonable discretion.

3.3. **Relationship of Parties.** The parties agree that the only relationship created by this Agreement is and shall be that among the OWNER and SMG, with SMG serving as an

independent contractor, providing management, marketing, promotional and operating services. SMG is not an agent, employee, joint venturer, partner or sub-lessee of the OWNER.

3.4. **General Manager Approval.** SMG shall submit in writing to the OWNER the name and qualifications of the General Manager for its approval, which approval shall not be unreasonably withheld. In the event of disapproval, the OWNER shall notify SMG in writing of the reasons for such disapproval within ten (10) days of receipt of SMG's notice, and SMG shall be required to submit to the OWNER the name and qualifications of another candidate, who shall be subject to its approval. The OWNER shall have the option to participate in the interview process of any incoming General Manager at the FACILITY by giving notice of the exercise of such option to SMG.

If SMG wishes to replace the General Manager, SMG shall submit to the OWNER the name and qualifications of such replacement General Manager for its approval, which approval shall not be unreasonably withheld. In the event of disapproval, the OWNER shall notify SMG in writing of the reasons for such disapproval within ten (10) days of receipt of SMG's notice, and SMG shall be required to submit to the OWNER the name and qualifications of a replacement candidate, who shall be subject to its approval.

## **SECTION 4**

### **EMPLOYEES**

4.0. **SMG Employees.** Subject to the approved Operating Budget, SMG shall hire its own employees who will be employees of SMG and not of the OWNER. SMG shall be solely responsible for all compensation, employee benefits and expenses of its employees, which approved costs and expenses shall be an Operating Expense hereunder. Subject to the approved Operating Budget, SMG shall select the number, function, qualifications, compensation and

benefits and may, subject to prior notice and approval by the OWNER, periodically adjust or revise the terms and conditions relating to such employment.

4.1. **Service Provider Employees/Agents.** If at any time the OWNER has any concerns with the performance of any SMG employee, it shall notify SMG of such concerns (including, if applicable, any request by the OWNER that such employee be terminated), and SMG shall promptly take all appropriate actions, including, but not by way of limitation, meeting with the OWNER to discuss and resolve such concerns. The parties, however, acknowledge that the ultimate right to terminate any SMG employee shall reside with SMG.

## SECTION 5

### FINANCIAL CONDITIONS

5.0. **Obligation of Owner to Provide Funds.** There shall be an annual appropriation of funds by Owner. In the event funds are not appropriated for any fiscal period by the Owner, this Agreement may terminate without penalty to or liability of either party to the other party by reason of such lack of appropriation and termination.

5.1. **SMG Options Upon Reduction in Funds.** In the event that the Owner reduces the availability of funds such that the Owner and SMG mutually determine that the management and operation of the FACILITY would not be feasible as contemplated by this Agreement, SMG may elect one or more of the following:

(a) Continuation of management utilizing revenues made available by the Owner and the funds generated at the FACILITY.

(b) Terminate the Agreement without penalty of either party to the other party on a specified date.

(c) For a period of not more the one (1) year, SMG will have the right of the first refusal to resume management of the FACILITY, for a term not exceeding the aggregate months of the initial term, under the terms and conditions of this Agreement at such time as the Owner shall restore the budget to normal levels: provided, however, that the Owner shall not be responsible for compensating SMG for any period it has terminated its rights and management obligations pursuant to this subsection.

5.2. **Operating Budget Request.** SMG is to submit a documented Annual Operating Budget Request each fiscal year of the contract to the OWNER within the time requirement that is established and published by the Finance Department of the OWNER.

The Operating Budget Request is to be presented by SMG to the OWNER for each month of the fiscal year that reflects a separate line item amount for each significantly different category of revenue, personnel, and material and supplies in the month the expense is project to be paid and the revenue is projected to be received.

SMG is required to make a presentation to the OWNER on the details and intricacies of the Operating Budget Request as part of this process at a time and date convenient to the OWNER.

Notwithstanding the foregoing, the Operating Budget for the Fiscal Year ending June 30, 2009 has already been prepared by the City, a copy of which has been given to SMG prior to the execution and delivery of this Agreement.

5.3. **Operating Budget Request Approval Process.** OWNER shall render a decision on the approval of the Operating Budget Request in accordance with its normal budget process (but in no event later than fifteen (15) days prior to the commencement of each Fiscal Year) and

appropriate the funds for spending, as contemplated by the approved cash flow funding budget. The Division of Park Services will facilitate the processing and completion of the expense and revenue transactions with SMG.

5.4. **Operating Cash Flow.** The Owner is responsible for the payment of the operating cash flow requirement. The operating cash flow requirement is predicated on the Approved Operating Budget Request. The Owner will issue payment for the necessary cash flow each month. The payment will be issued by the fifteenth (15th) of the month preceding the month projected for the cash flow requirement up to the amount approved in the Operating Budget Request.

The Owner is also responsible to provide SMG with the cash flow necessary to establish an operating bank to accommodate change transactions for the purposes of food and beverage concession sales and parking sales.

Operating cash flow in excess of operating expense payments will be retained in the Depository.

5.5. **Expenditures in Excess of Budget.** SMG shall not, without prior written authorization from the Owner, incur in any Fiscal Year obligations for operating expenses aggregating in excess of the amount of the total operating expenses contemplated by the then applicable Approved Operating Budget. SMG shall monitor actual and projected Operating Expenses and advise the OWNER if projected costs are likely to exceed the amounts set forth in the Approved Operating Budget.

In the event that SMG anticipates expenditures in excess of the applicable Approved Operating Budget, the following steps must occur:

(a) SMG shall contact the Owner and advise it in writing of the projected excess.

(b) SMG shall have said excess expenditures approved by Owner in writing. Owner acknowledges that SMG has no obligation to perform and will not perform under this Agreement absent the availability of funds provided pursuant to a mutually agreeable and Approved Operating Budget; provided however, if SMG incurs any expense in excess of those amounts in the Approved Operating Budget or any approved amendment thereto, SMG shall be responsible for and assumes any such excess, except to the extent that such excess expenditure is an Emergency Expenditure as provided in Sections 5.7 and 8.7 hereof.

In the event that the Owner does not approve said excess expenditures such that SMG determines that the management and operation of the FACILITY would not be feasible as contemplated by this Agreement, SMG may terminate the Agreement without penalty on a date specified by SMG.

5.6. **Operating Revenue Account.**

(a) **Maintenance of Operating Revenue Account.**

SMG shall collect all Operating Revenues and deposit them into an Operating Fund Account maintained or managed by SMG in its name or as designated by the Owner in the Depository. Monies in the Operating Fund shall be applied to any operating expense then accrued. The balance shall be retained in the Operating Fund as reserve for payment of future operating expenses. If, at the end of any Fiscal Year, there shall be a balance in the Operating Fund in an amount in excess of the anticipated cash working capital and operating expenses for the first month of the ensuing year, SMG shall disburse such excess to the

Owner on or before the fifteenth (15th) day of such month.

(b) **Security for Investment of Funds.**

All funds and accounts required to be maintained or managed by SMG under this Section are and shall be deemed to the property of the Owner and shall be maintained in the Depository, which shall be a bank or branch located in Shelby County, Tennessee. SMG shall require of the Depository that all funds held in any account maintained under this Section be secured to such an extent and in such a manner as is required by applicable law in connection with the deposit of funds of the Owner.

Money on deposit in the Operating Fund shall be retained on deposit in fully secured interest bearing demand deposit accounts or may be invested, to the extent and only, if permitted by applicable laws, in the following obligations or securities, maturing at such time or times so as to enable disbursements to be made for the payment of operating expenses:

(i) Bonds or other obligations of, or unconditionally guaranteed by, the United States of America or any agency or instrumentality thereof or by the State of Tennessee; or

(ii) Other obligations and securities that are lawful investments for funds of the Owner.

All such investments shall be subject to approval of the Owner.

5.7. **Capital Improvements.** Owner is responsible for the planning, design, construction, and funding of all capital improvement projects. SMG may participate in discussions with Owner regarding such improvements or expenditures and/or make

recommendations regarding any capital improvements to be undertaken. The Owner acknowledges and agrees that SMG shall have no obligation hereunder to make any capital expenditures and, therefore, the Owner shall be responsible for and shall repair, provide and maintain (other than ordinary maintenance), at its own expense, from funds set aside for the Capital Improvement Budget, all capital improvements as set forth in this section, including, without limitation, the exterior and structural portions of the FACILITY, together with all mechanical HVAC and electrical systems contained therein.

In addition, if SMG at any time becomes aware of any condition that either jeopardizes the structural soundness or operational capability of the FACILITY or triggers a violation of any applicable federal, state or local laws, as well as presents a danger to the public safety, or the ability of SMG to perform its obligations under this Agreement, SMG shall immediately advise the Owner of same in writing, shall have its opinion verified by the Owner's representative, or such other engineer as the Owner may from time to time designate, and, to the extent allowable by law, the Owner shall make available the funds necessary for the expenditures to correct such condition, within such time as is reasonable under the circumstances.

5.8. **No Obligation of SMG to Advance Funds.** Notwithstanding any provision of this Agreement to the contrary, except as otherwise provided in the proviso in the last paragraph of Section 5.5(b) hereof, SMG shall not be obligated to make any advance to or for the account of the Owner nor to pay any sums incurred for the performance of the Owner, nor shall SMG be obligated to incur any liability or obligation for the account of the Owner, nor shall SMG be responsible for the failure of its performance of its obligations hereunder as a result of the Owner's failure to provide funds as herein set forth. Further, notwithstanding any other

provision of this Agreement, SMG shall be obligated to perform its duties, responsibilities and obligation hereunder only to the extent that funds are made available to SMG for such purpose.

## **SECTION 6**

### **COMPENSATION AND PAYMENT**

6.0. **Total Compensation.** As total compensation for its services pursuant to this Agreement, SMG shall be entitled to and shall receive earned incentive fees as described in Section 6.1 hereof.

6.1. **Incentive Fee.** As set forth above, SMG shall be eligible to earn an Incentive Fee each Fiscal Year equal to 20% of the amount by which Operating Revenues for such Fiscal Year exceed a mutually agreed upon Operating Revenue benchmark (“Operating Revenue Benchmark”) for such Fiscal Year. The parties agree that the Operating Revenue Benchmark for the Fiscal Year ending June 30, 2009 shall be the amount of Operating Revenues as reflected in the Approved Budget for such Fiscal Year.

6.2. **Payment Of Incentive Fee.** The fees due SMG per paragraph 6.1 hereof, shall be paid to SMG upon the OWNER’s audit, but not later than 120 days of the end of the Fiscal Year.

6.3. **Monthly Reports.** SMG shall submit to the OWNER a statement certified correct by one of its Authorized Representatives accounting for all Operating Revenues collected from the FACILITY during the previous month on or before the 21st day of each month.

6.4. **Customer Service Goal.** SMG shall achieve at least an 80% rating on the annual customer satisfaction survey conducted by an independent entity; provided however, that if SMG

fails to obtain at least an 80% rating, SMG shall be solely responsible for the cost of the customer satisfaction survey, which cost should be stated in the budget presentation annually.

## SECTION 7

### CONTRACT MONITORING

7.0. **OWNER Representative.** The OWNER Representative shall be named, in writing, by the OWNER upon execution of this Agreement.

7.1. **Duties of OWNER Representative.** The OWNER Representative shall have the authority to give all approvals for the OWNER while administering this Agreement, with the exception of the items which would require approval of the City Attorney.

The OWNER Representative:

(a) shall be responsible for ensuring that any information supplied by SMG is properly distributed to the OWNER as appropriate.

(b) shall be authorized to periodically consult confidentially with expert consultants and/or legal counsel regarding the interpretation, functioning, and effectiveness of the Agreement herein.

7.2. **General Manager.** SMG's General Manager:

(a) shall be the liaison between the OWNER and SMG on all matters relating to this Agreement;

(b) shall be responsible for the day-to-day management and supervision of the FACILITY; and

(c) shall be responsible for providing supervision and direction to employees at the FACILITY.

## SECTION 8

### SMG'S SERVICES AND REPRESENTATIVES

8.0. **Scope of Services.** SMG hereby agrees to perform and furnish management services, systems and materials necessary to operate, supervise, manage and maintain the FACILITY according to current industry practices and standards, in the most efficient manner consistent with operations of other similar first class facilities. SMG shall have authority over the day-to-day operation of the FACILITY and all activities therein. SMG shall at all times perform its duties and responsibilities under this Agreement in conformity with the policies and procedures established by the OWNER, which shall be of the same nature as those of similar facilities. SMG shall conduct no business at the Facility other than the management, operation, marketing and promotion of any portion of the FACILITY and any activities necessary therefore, unless approved by the OWNER.

8.1. **Covenants of SMG.** SMG covenants and agrees that from and after the date of its execution of this Agreement and until the termination of this Agreement that SMG shall:

(a) Manage and operate the FACILITY so as to minimize Operating Expenses and maximize Operating Revenue; provided, however, that SMG, in establishing and implementing its policies, may schedule not only those events that generate substantial direct revenue to the FACILITY, including the University of Memphis football season, Southern Heritage Classic Bowl football game and the Liberty Bowl Classic football game, but also those events that produce less direct revenue but, in SMG's good faith judgment, generate either a \

significant economic, cultural or other benefit to the OWNER or otherwise serve the public interest;

(b) Subject to pre-existing agreements (copies of which agreements have been provided to SMG prior to the execution and delivery of this Agreement), negotiate, execute and perform contracts, including service contracts required in the ordinary course of business in operating the FACILITY, use agreements, licenses and other agreements (1) for all sponsorships, including, but not limited to, the use of advertising rights of whatever kind or nature related to the FACILITY, and (2) for the sale, promotion, marketing and use of all names, trademarks, trade logos and similar intangible property.

Such licenses and agreements which pertain to the use, operation and occupancy of the FACILITY will be executed by SMG in its own name if for a term of not more than the remaining Term of this Agreement. If such licenses and agreements are for a period that will exceed the term of this Agreement, then they must be approved by the OWNER. No contract shall have a term of longer than the then remaining Initial Term of this Agreement without the approval of the OWNER.

Any contract entered into between SMG and a subsidiary and/or affiliate company for administrative services shall be at terms and for prices customarily charged by such subsidiary and/or affiliated company for comparable services elsewhere and are competitive within the industry. Any such contract shall be subject to the prior written approval of the OWNER (such approval not to be unreasonably withheld) and submittal of documentation evidencing the competitive nature of the services submitted. SMG shall be solely responsible for any licenses, agreements or contracts granted or entered into which are inconsistent with the requirements of this subsection;

(c) Operate directly, or contract with concessionaries for the operation of Concessions within the FACILITY, for the sale of food, beverages, souvenirs, novelties and programs. With respect to the sale of souvenirs and novelties, SMG shall avoid any conflict in the sale of such items with any exclusivity arrangements of the Owner or of any tenant under agreements for the Facility entered into by the Owner (provided that the Owner gives SMG copies of such arrangements or agreements on or prior to the later of the commencement of the Initial Term or the Owner's execution and delivery of such arrangements or agreements);

(d) Furnish or cause to be furnished all services, personnel, materials, tools, machinery, equipment and other items necessary to accomplish the foregoing requirements of this Agreement;

(e) SMG shall not enter into sponsorships or other agreements regarding the use of the FACILITY or advertisement in the FACILITY with companies or other businesses, the advertisement of whose products or services may be considered morally objectionable to the OWNER or the general public; provided, however, the OWNER hereby approves sponsorships and other advertisements for any type of product normally and customarily found in other similar facilities. Additionally, in connection with its entering into of such sponsorships, advertising arrangements or other agreements regarding use of the Facility, SMG shall avoid any conflict in the sale of such items with any exclusivity arrangements of the Owner or of any tenant under agreements for the Facility entered into by the Owner (provided that the Owner gives SMG copies of such arrangements or agreements on or prior to the later of the commencement of the Initial Term or the Owner's execution and delivery of such arrangements or agreements). If the foregoing exclusivity restrictions and/or the exclusivity restrictions contained in Section 8.1(c) hereof materially impact SMG's ability to generate Operating Revenues, the parties will meet to

discuss in good faith an appropriate modification to the then applicable Operating Revenue Benchmark ; and

(f) SMG shall operate the Facility in compliance with all applicable Legal Requirements.

8.2. **Operating Procedures.** SMG shall prepare, implement and furnish to the OWNER written operating procedures, including personnel and purchasing policies and procedures, and develop and furnish to the OWNER written rules and regulations for the operation of the FACILITY for the OWNER's approval and adoption within ninety (90) days of execution of this Agreement, which approval will not be unreasonably withheld;

8.3. **Maintenance Procedures.** To the extent that the OWNER has made budgeted funds available, SMG shall maintain the FACILITY in good condition, reasonable wear and tear excepted, and continue maintenance procedures which will keep the FACILITY in good condition and working order, reasonable wear and tear excepted. For the Initial Term and the first two (2) Renewal Terms, OWNER agrees to fund and perform all routine and non-capital maintenance to the FACILITY which shall include, without limitation, structures, HVAC, and plumbing.

8.4. **Financial Procedures.** With respect to financial matters, SMG agrees to perform the following:

(a) Design and implement a financial accounting system which is in accordance with, generally accepted accounting principles (GAAP) and industry standards and best practices, consistently applied, and which is coordinated with the accounting systems currently used by the OWNER. The OWNER Representative or designee shall have the right to

inspect the books and records of SMG in connection with the FACILITY at any time upon reasonable request;

(b) Maintain the books and records of the FACILITY regarding the management, operation, marketing and promotion of the FACILITY separate and apart from the other books and records of SMG. The OWNER or its designee shall have authority to review, inspect and/or copy the books and records of SMG at all reasonable times;

(c) Hold in escrow, in an interest-bearing account in a banking institution depository in Shelby County, Tennessee as selected by OWNER any ticket sale revenues, which it receives in the contemplation of or arising from, an event pending the completion of the event. Such escrow monies are to be held for the protection of ticket purchasers, the OWNER and SMG. Following the satisfactory completion of events, SMG shall make a deposit into designated operating account(s) no later than three (3) business days from the date of the event. Interest accrued in the escrow account shall be part of the operating revenue. Bank service charges, if any, on such account(s), shall be considered an operating expense of the FACILITY;

(d) Establish and maintain consistent procedures for cost estimating and reporting, maintenance and payment of invoices, including preparation of Budgets and reports as contemplated by Section 5.

8.5. **Marketing and Public Relations.** SMG shall perform the following:

(a) Make SMG's staff reasonably available for press conferences and other public appearances relating to SMG's responsibilities under this Agreement. SMG further agrees that it will not hold any press conferences, issue any press releases, or, to the extent practicable,

engage in any discussions with the media specifically related to the Facility without the prior written consent of the Owner;

(b) Develop and furnish to the OWNER a written marketing plan and schedule of event bookings as consistent with the reporting requirements set forth herein and such other requirements as may be mutually agreed upon by the parties from time to time;

(c) Develop and implement public relations activities for the FACILITY and submit same in the form of a written plan or procedures manual to OWNER within ninety (90) days of execution of this Agreement;

(d) Coordinate all advertising, licensing, promotional activities, marketing, and public relations of the Facility except as directed by the OWNER.

8.6. **Rental and Booking Policy.**

(a) SMG will not permit the use of the FACILITY without reasonable charge for such use, absent the OWNER's prior written consent;

(b) SMG will establish rental rate schedules, subject to the OWNER's approved policies and procedures, which approval shall not be unreasonably withheld;

(c) Survey and recommend prices, rates and rate schedules in accordance with industry standards, best practices and OWNER policies and procedures for any license, agreements, advertising contracts and concession agreements and any other FACILITY commitments to be approved by OWNER and thereafter shall be negotiated by SMG in the course of its management of the FACILITY. In determining such prices and rate schedules, SMG shall evaluate comparable charges for similar goods and services at similar and/or

competing facilities in order to establish a range of prices and rates, and shall consult with the OWNER on any subsequent rate adjustments at the FACILITY;

(d) SMG will cooperate with the OWNER to establish a booking policy. In determining such policy, such parties will consider criteria, which includes, but is not limited to, common and traditional industry standards, the nature of events expected and desired, and revenue to be generated from various events;

(e) SMG will comply with Owner's booking policies once established in the operation of the FACILITY and hold the master set of all booking records and schedules;

(f) SMG shall have the sole authority, subject to the OWNER's booking policies, to approve the scheduling of any event in the FACILITY. All events of a non-traditional nature shall be approved by the OWNER prior to scheduling;

(g) SMG shall require that all users of the FACILITY provide certificates of insurance evidencing appropriate insurance, as agreed upon by the parties hereto and subject to the approval of the City Risk Manager. Copies of these certificates are to be kept on file. Such insurance is to be kept in force at all times by all licensees, users, lessees and concessionaries. All such liability policies shall name the OWNER and SMG as additional insureds. SMG shall also require all users of the FACILITY to execute, among the terms of the license, agreement or occupancy agreement, an indemnification clause containing an obligation to defend, running in favor of the OWNER and SMG, with the form of said clause being subject to the OWNER's approval;

(h) SMG shall require that all persons using the FACILITY or attending events therein comply with all legal requirements of all governmental authorities having

jurisdiction over the FACILITY and that all persons using the FACILITY comply with all insurance requirements established by the OWNER and SMG;

8.7. **Emergency Plan.** SMG shall have the right to act without consent of the OWNER in situations which it determines to be an emergency for the safety, welfare and protection of the general public. Immediately following such action, SMG shall inform the OWNER of the situation and the actions taken. The OWNER shall reimburse SMG for the full amount of any emergency repair. An emergency repair is defined herein as the repair of a condition which, if not performed immediately, creates an imminent danger to persons or property and/or an unsafe condition at the FACILITY threatening persons or property.

8.8. **Reports.** SMG shall perform the following reporting requirements:

(a) Submit a written and oral report to the OWNER quarterly, or as otherwise agreed on between the parties hereto, concerning its activities in the operation, management, supervision, equipping, repair and routine maintenance of the FACILITY. Such report shall, inter alia, set forth bookings, receipts from all sources, expenditures, game day reports and such other and further information as the OWNER may reasonably require or request;

(b) Submit to the OWNER, on a quarterly basis or upon reasonable request by OWNER, copies of all bank statements concerning all bank accounts established by it, in connection with the FACILITY from the Depository Bank.

(c) Furnish to the OWNER as soon as available (consistent with regular reporting requirements as specified by the OWNER), and in any event within thirty (30) days of the end of each Fiscal Year, unaudited financial statements regarding the SMG management, operation, marketing and promotion of the FACILITY as of the close of such Fiscal Year,

including without limitation, a statement of income, expenses and surplus (or deficit) and the results of operation during such year, and a statement of the Operating Expenses and fee for such periods, and within thirty (30) calendar days after the end of each calendar month, unaudited financial statements of the management, operation, marketing and promotion by SMG of the FACILITY, including without limitation, a statement of income, expenses and surplus (or deficit) for such calendar month and for the Fiscal Year to date and a statement of the Operating Expenses and Fee for such periods, such financial statement to be certified by an officer of SMG as true, accurate and complete and fairly and accurately reflecting the results of operations of the FACILITY for such periods and such certificate also to include a statement whether an Event of Default exists. Within ninety (90) calendar days of said Fiscal Year, OWNER, at its expense, will cause to occur an audited report of the financial statements, by a nationally recognized, independent certified public accountant;

(d) Notify the OWNER of any actions, suits or proceedings instituted against SMG arising out of the management, operation, marketing or promotion of the FACILITY, said notice to be given within five (5) business days of the first notice to SMG of the institution of such action, suit or proceeding and to specify the amount of damages being claimed or other relief being sought, the nature of the claim, the person instituting the action, suit or proceeding, the court in which such claim is filed, and any other significant features of the claim.

Additionally, SMG shall notify the OWNER of actions, suits or proceedings instituted by vendors and/or other service providers against SMG arising out of all similar facilities under management by SMG where the amount in controversy is over the sum of One Hundred Thousand Dollars (\$100,000), said notice to be given on a quarterly basis (covering the immediately preceding calendar quarter), commencing October 1, 2008 and continuing on each calendar quarter thereafter;

8.9. **Purchasing of Supplies.**

SMG shall, in accordance with its normal business practices, have full authority and discretion as to purchasing all equipment, materials, supplies, and inventory reasonably required by SMG hereunder. SMG, however, shall use its best efforts to make all such purchases at the best available price and with a view as to the desire of Owner to increase the participation of minority, women or locally owned business doing business with the parties, and SMG shall execute contracts pertaining to such purchases in its own name (except as otherwise provided in this Agreement). Absent notice from the Owner that applicable law, policies and procedures provided otherwise, SMG shall not be subject to any public bid or other law regulating the purchase of goods or services by municipal or other governmental authorities. The Owner shall have the right to review and/or audit SMG's procurement practices to determine whether SMG is effectively utilizing competitive procurement processes that yield the lowest and best bid. In the event SMG enters into any agreement with any Affiliate of SMG to purchase or lease any such equipment, materials, supplies or inventory or to perform any services, SMG additionally agrees that the price or other consideration for such goods or services shall be fair and reasonable and no more favorable to such Affiliate than it could obtain in a comparable arm's length transaction with an entity or person other than an Affiliate.

All purchases by SMG of equipment, fixtures, and furniture and all Capital Improvements shall be made in the name of Owner. SMG and the Owner shall establish an inventory control system to account for all such purchases.

All contracts that extend beyond the term of this Agreement must be approved in writing, by the Owner prior to execution.

8.10. **Miscellaneous.**

(a) SMG shall perform its obligations under this Agreement and conduct the management and operation of the FACILITY at all times in conformity with applicable federal, state and local laws, as well as industry standards and best practices, to which a good operator would operate given the monetary limits set forth in the approved Budgets then in effect;

(b) SMG shall not create, assume or cause to exist any mortgage, pledge, lien, charge or security interest or other encumbrance of any nature whatsoever relating to this Agreement or its rights and obligations under this Agreement, except any pledge or other encumbrance of the fees due SMG pursuant to this Agreement;

(c) SMG shall promptly and fully discharge and pay all of its obligations under this Agreement at or prior to the time specified for the performance or payment thereof, including , without limitation, the payment of all Operating Expenses required by this Agreement to be paid by SMG from the Operating Fund; provided, however, that nothing herein shall prohibit SMG from contesting the validity of any claim against SMG; provided, further, that SMG shall promptly pay any amount found due and owing from SMG upon the conclusion of such dispute;

(d) During the term of this Agreement, SMG shall obtain the Owner's prior written approval to manage, operate or promote any similar stadium facility within a radius of fifty (50) miles from the location of the Facility. This provision shall also apply to any SMG subsidiary or any joint venture company where SMG maintains at least a 50% interest in such joint venture company;

(e) SMG acknowledges that the Facility is currently under review by the Department of Justice for compliance issues in connection with the American with Disabilities Act (“ADA”) and related laws that may cause the OWNER to make certain renovations, or to make other modifications to the Facility. In such event, it is agreed that all such matters have been duly disclosed at the inception of this Agreement and shall be outside of the scope of this Agreement. In the event any such renovations will impact the management and operation of the FACILITY and/or the generation of Operating Revenues, OWNER and SMG will meet and discuss in good faith any modifications to this Agreement that may be necessitated by such renovations. In the event that the OWNER shall request SMG to oversee in such remedial matters, the same shall be the subject of a separate agreement;

(f) SMG shall have the right to retain legal counsel in connection with SMG’s duties herein; provided however that SMG shall abide by the terms and conditions set forth herein regarding the retention of legal services.

(g) After consultation with the CITY Attorney, as appropriate, institute in its own name, but in any event, at the reasonable expenses of the CITY, any and all legal actions or proceedings to collect charges, rents or other income generated by and due to the CITY, or to cancel or terminate any license, use or concession agreement for the breach thereof or default thereunder by any licensee, user, advertiser, or concessionaire of the CITY. SMG agrees to the extent feasible to use the services of the CITY Attorney’s Office, as appropriate, when instituting said legal actions; however, to the extent it is not feasible to use said services, legal expenses shall be included as an operating expense of the FACILITY. However, no legal expense by the City Attorney or legal expense included in the Budget shall be used for the purpose of assisting SMG in its own corporate matters.

## SECTION 9

### INDEMNIFICATION

9.0. **By SMG.** SMG shall indemnify and hold harmless and defend the OWNER from and against all claims, demands, suits; actions and judgments, fees, costs and expenses of every name and description brought against the OWNER based on personal injury, bodily injury (including death), property damages (including destruction) or loss arising from or in connection with any negligent act or commission of SMG and its agents, officers, employees, contractors and subcontractors in the performance hereof.

9.1. **Performance Liability.** The OWNER agrees that no employee, agent, or shareholder of SMG shall be personally liable to the OWNER by reason of any default by SMG under this Agreement or for any amount that may become due to the OWNER by SMG under the terms of this Agreement so long as that employee, agent, director, officer or shareholder is acting within the scope of their authority and/or employment and further provided that said person has acted consistent with his or her duty of loyalty and good faith pursuant to their relationship with the OWNER.

## SECTION 10

### INSURANCE

10.0. **Insurance To Be Maintained By the OWNER.**

(a) At all times the OWNER shall maintain all risk insurance on the FACILITY and flood and earthquake insurance with the amount to be determined by the OWNER. All other risks shall be governed by the Tennessee Governmental Tort Liability Act;

(b) Business Interruption and Boiler and Machinery Insurance Coverage in amounts as determined necessary by the OWNER; and SMG hereby acknowledges that the OWNER self-insures against any and all personal injury liabilities for which it may be responsible.

10.1. **Insurance To Be Maintained By SMG.** SMG will maintain insurance coverages during the term of this Agreement (as an Operating Expense) with companies licensed to do business in the State of Tennessee. Such policies shall name OWNER as additional insured and shall not be subject to material change or cancellation except after ninety (90) days written notice from the insurer to OWNER as to such condition. At all times during the term of this Agreement, SMG shall cause certified copies of the policies to be deposited with OWNER, together with such reasonable proof of payment of premiums as OWNER may reasonably request. The required coverages are as follows:

(a) General Liability Insurance, including liquor liability (or dram shop) insurance providing for limits of liability of not less than \$1,000,000, combined single limit for injuries or death and property damage in any one occurrence with not less than \$5,000,000, aggregate, including fire legal liability in an amount not less than \$1,000,000;

(b) Consumer's Product Liability Insurance, with limits of not less than \$1,000,000.00 combined single limits in respect to injuries to or the death and property damage in any one occurrence with no less than \$5,000,000, aggregate;

(c) Workmen's Compensation Insurance as required by law and Employer's Liability Insurance and other coverages of a similar character in the amount of \$500,000;

(d) Comprehensive Automobile Liability Insurance with limits of not less than \$1,000,000, combined single limits;

(e) Umbrella or Disaster Type Secondary Excess Insurance Coverage of not less than \$10,000,000.00; and

(f) Fidelity (Employee Dishonesty) and Crime Insurance (including forgery, alteration coverages, theft, disappearance and destruction coverage, robbery (on and off premises), and safe burglary coverage in amounts as determined necessary by SMG.

## SECTION 11

### REVENUES, EXPENSES AND CAPITAL ITEMS

11.0. **Operating Revenues.** Gross Operating Revenue shall consist of all funds generated at the FACILITY as defined in this Agreement.

11.1. **Operating Expenses.** Operating Expenses shall consist of all funds required to operate and manage the FACILITY as defined in this Agreement.

11.2. **Adjustments.** The OWNER agrees that Operating Expenses as defined herein shall not include deductions for depreciation, interest or debt service, real estate taxes (or any other similar occupancy tax or Federal and State income taxes), capital improvements or repairs, or any internal service charges by the OWNER.

11.3. **Capital Expenditure.** Capital Expenditure shall mean all expenditures in amounts of \$50,000.00 or more for building additions, alterations or improvements, and for purchases of additional or replacement furniture, machinery or equipment, the depreciable life of which, according to accepted accounting principles, is in excess of three (3) years and

expenditures in amounts of \$50,000.00 or more for repairs (normal wear and tear excepted) or replacements which extend the useful life of the assets being repaired or replaced for a period in excess of three (3) years.

## SECTION 12

### TERMINATION

12.0. **Curable Events of Default.** Each of the following shall constitute an “Event of Default” under this Agreement:

(a) Failure to pay or fund, under Section 5, when due any amount required to be paid or funded under this Agreement, if the failure continues for ten (10) business days after notice has been given to the defaulting party; or, if the failure to pay or fund is not cured within ten (10) business days after notice has been given to the defaulting party, except that if default cannot reasonably be cured within ten (10) business days of notice, such event shall be cured within thirty (30) calendar days of said notice.

(b) Failure to perform any other material obligation under this Agreement (including, without limitation, SMG’s failure to meet the Performance Standards set out in Section 8), if the failure to perform is not cured within thirty (30) calendar days after notice has been given to the defaulting party, except that if the default cannot reasonably be cured within thirty (30) calendar days of notice, such event shall be cured within ninety (90) calendar days of said notice.

12.1. **Interest on Delinquent Payments.** Interest shall accrue on any sums not paid when due from the date on which a default notice is given, until paid at an annual rate equal to the prevailing prime rate in Memphis, Tennessee as determined by the Depository plus 2%.

12.2. **Non-Curable Events of Default.** Each of the following shall constitute a “Non-Curable Event of Default” under this Agreement if:

(a) any representation, warranty or statement of fact made by SMG to the or OWNER in this Agreement, or any other agreement, schedule, or otherwise shall when made or deemed made be false or misleading in any material respect; or

(b) SMG revokes this Agreement or terminates it not in accordance with terms hereof; or

(c) SMG admits in writing its inability to pay any of its debts as they become due, or is generally not paying its debts as such debts become due (unless such debts are the subject of a bona fide dispute as to liability or amount); or a custodian, other than a trustee, receiver or agent appointed or authorized to take charge of less than substantially all of the property of SMG for the purpose of enforcing a lien against such property, was appointed or took possession; or

(d) any judgment for the payment of money not covered by insurance is rendered against SMG in excess of One Hundred Thousand Dollars (\$100,000) in any one case or in excess of One Hundred Thousand Dollars (\$100,000) in the aggregate and shall remain undischarged or unvacated for a period in excess of thirty (30) days or execution shall at any time not be effectively stayed, or any judgment other than for the payment of money, or injunction, attachment, garnishment or execution is rendered against SMG or any of its assets; or

(e) SMG suffers a writ or warrant of attachment or any similar process to be issued by any court against all or any substantial portion of its property and such writ or warrant

of attachment or any similar process is not stayed or is not released within forty-five (45) calendar days after its entry or levy or after any stay is vacated or set aside; or

(f) A judgment lien is placed on the property of SMG and the lien is not released and discharged within forty-five (45) calendar days from the date such lien took effect; or

(g) SMG dissolves or suspends or discontinues doing business; or

(h) SMG becomes insolvent (however defined or evidenced), makes an assignment for the benefit of creditors, calls a meeting of its creditors or principal creditors; or

(i) A case or proceeding under the bankruptcy laws of the United States of America now or hereafter in effect or under any insolvency, reorganization, receivership, readjustment of debt, dissolution or liquidation law or statute of any jurisdiction now or hereafter in effect (whether at law or in equity) is filed against SMG or all or any part of its properties and such petition or application is not dismissed within thirty (30) days after the date of its filing or SMG shall file any answer admitting or not contesting such petition or application or indicates its consent to, acquiescence in or approval of, any such action or proceeding or the relief requested is granted sooner; or

(j) A case or proceeding under the bankruptcy laws of the United States of America now or hereafter in effect or under any insolvency, reorganization, receivership, readjustment of debt, dissolution or liquidation law or statute of any jurisdiction now or hereafter in effect (whether at a law or equity) is filed by SMG for all or any part of its property; or

(k) There occurs any change in the controlling ownership of SMG; or

(l) The indictment or threatened indictment of SMG under any criminal statute, or commencement or threatened commencement of criminal or civil proceedings against SMG, pursuant to which statute or proceedings the penalties or remedies sought or available include forfeiture of any of the property of SMG; or

(m) There shall be a material adverse change in the business, assets or prospects of SMG after the date hereof which remains uncured more than fifteen (15) days after written notice to SMG of such default; or

(n) SMG shall not conceal, remove or permit to be concealed or removed, any part of its respective property, with intent to hinder, delay or defraud their respective creditors or shall make any transfer of any of their respective property to, or for the benefit of a creditor at a time when other creditors similarly situated have not been paid; or shall suffer or permit while insolvent any creditor to obtain a lien upon any of their respective property through legal proceedings, which lien is not vacated within thirty (30) calendar days from the date thereof.

(o) There shall be a final determination, upon completion of review of the FACILITY by the Department of Justice in connection with its Americans With Disability Act review that remedial action is not financially feasible and the OWNER elects to demolish the existing FACILITY and construct a new facility. In such event, if the OWNER constructs a new facility, and intends to provide management at such new facility through a private provider, then the OWNER agrees to negotiate and discuss in good faith a new contract or arrangement with SMG for the provision of such services by SMG at the new facility. The obligation to negotiate with SMG is not intended to guarantee any contract rights for a future contract with SMG or any specific terms of a new contract.

12.3. **Rights of Non-Defaulting Party**. At any time an Event of Default exists or has occurred and is continuing, the non-defaulting party shall have all rights and remedies provided in this Agreement, all of which rights and remedies may be exercised without notice to or consent by the defaulting party, except as such notice or consent is expressly provided for hereunder or required by applicable law. All rights, remedies and powers granted to the non-defaulting party hereunder, or under applicable law, are cumulative, not exclusive and enforceable, in the non-defaulting party's discretion, alternatively, successively, or concurrently on any one or more occasions, and shall include, without limitation, the right to apply to a court of equity for an injunction to restrain a breach or threatened breach by the defaulting party of this Agreement.

At the option of the non-defaulting party, remedies upon an Event of Default by the defaulting party include:

- (a) The right to cure, at the non-defaulting party's cost and expense, a curable default as defined in this Agreement;
- (b) The right to sue to collect any sums not paid when due, together with interest accrued thereon as provided in Section 12.1;
- (c) The right to sue to collect damages suffered by the non-defaulting party by reason of the occurrence of an Event of Default other than default in the payment of money;
- (d) The right to terminate this Agreement; and/or
- (e) The right to seek specific performance of the defaulted obligation.

12.4. **Notice of Event of Default.** SMG shall provide to the OWNER written notice of the existence or occurrence of any condition or event which constitutes an Event of Default under this Agreement.

12.5. **Good Faith Disputes.** In the event that any party shall dispute that any act or omission on its part constitutes or will constitute a default or an Event of Default, such party may give the other party written notice, specifying in reasonable detail the basis for the dispute, and may, thereafter, withhold payment or other action with respect to the amount or matter in dispute (to the extent it is in dispute) and an Event of Default shall not be deemed to have occurred by reason thereof unless and until such dispute is determined adversely to the non-performing party and such party does not thus promptly remedy its non-performance; provided, however, that this provision shall not apply to the obligations of SMG under this Agreement in Sections 8, 10.1, 12.2 and 15.10 of this Agreement.

12.6. **Procedure Upon Termination.**

(a) Surrender of FACILITY. Upon expiration or termination of this Agreement, SMG shall promptly surrender and deliver to the OWNER, the FACILITY and all equipment, supplies, manuals and inventories that are the property of the OWNER or that have been purchased with Operating Revenues or from funds made available by the OWNER, and records, including all books of account relating to the operation of the Facility, escrow accounts and inventories which are the property of the OWNER, as received, normal wear and tear excepted, and the OWNER shall simultaneously make all payments due SMG as set forth in this Agreement. SMG agrees to provide its proprietary software for a period of not less than one hundred eighty (180) calendar days at a specified reasonable monthly charge to allow the OWNER a transitional period for computer conversion. SMG shall also provide to the OWNER,

within thirty (30) calendar days of the termination of this Agreement, a true, accurate and complete copy of all books and records of SMG regarding the management, operation, marketing and promotion of the FACILITY, excluding its employee personnel records as described in clause (ii) of Section 1.1 hereof. SMG further agrees to surrender all software used by SMG for the management of the FACILITY, specifically all software constituting intellectual property under this Agreement, but excluding in any event any software owned or licensed by SMG solely from funds of SMG and not with Operating Revenues or not with funds of the OWNER. Provided, however, for all software not surrendered to the OWNER hereunder, SMG shall produce, in lieu thereof, hard copies of all current data maintained by such software.

(b) Continuation of Performance. In the event of the termination of this Agreement, SMG, at the OWNER's option, shall continue to perform under the provisions of this Agreement for not less than three (3) months nor more than six (6) months to enable the OWNER to make arrangements for a successor as operator of the FACILITY. Should the OWNER elect for SMG to continue its performance pursuant to this subsection, this election by the OWNER shall not be construed as an intention by the OWNER to enter into a new, subsequent or renewal agreement with SMG outside of the terms of this Agreement or any interim agreement that the OWNER and SMG elects to enter into according to this subsection.

(c) Surrender of Improvements. Upon the expiration or termination of this Agreement, SMG hereby quitclaims, transfers, sells, assigns and conveys to the OWNER any and all right, title and interest that it may have to all improvements made to or upon the FACILITY by SMG and all equipment, materials, supplies, inventories and all other property of any kind purchased by SMG with Operating Revenues or with funds made available by the OWNER, excluding its fees hereunder, without any further compensation therefor from the

OWNER. SMG will execute any documents or other instruments reasonably necessary to evidence the foregoing.

(d) Termination for Just Cause. Either party may terminate this Agreement for Just Cause before the expiration of the Term set forth in Section 2.

(e) Interest in Contracts and Agreements. Notwithstanding anything to the contrary contained in this Agreement, upon the expiration or termination of this Agreement for any reason, SMG, without any further compensation from the OWNER, hereby transfers and assigns to the OWNER all of SMG's right, title and interest in and to, and the OWNER accepts and assumes all obligations from and after the date of such termination or expiration of this Agreement under, any contracts or agreements entered into by SMG in the course of the performance of SMG's obligations under this Agreement; provided, however, the OWNER shall not be obligated to assume any contracts or agreements entered into by SMG in violation of the provisions of Sections 5 of this Agreement. SMG hereby agrees to execute any documents or instruments reasonably required by the OWNER to evidence the foregoing. Notwithstanding the foregoing, the OWNER shall not assume and shall not have any liability for any actions, inaction, performance or non-performance by SMG of such contracts or agreements prior to the termination or expiration of this Agreement, unless such action, inaction, performance or non-performance is due to lack of or insufficient funding of the Facility by OWNER.

## **SECTION 13**

### **INVENTORY**

13.0. **Inventory**. The parties acknowledge that for internal audit requirements the City will conduct an inventory of all expendable supplies and fixed assets of the FACILITY and shall provide a copy of the results of such inventory to SMG for its review and written

acknowledgment. When so acknowledged by SMG, such copy shall be attached to this Agreement, as Exhibit B. SMG will not be responsible for loss of any equipment.

## SECTION 14

### CONTRACTS

14.0. **Contracting.** In carrying out its obligations herein, SMG shall observe all applicable laws concerning the awarding of contracts for services at the FACILITY.

14.1. **Nondiscrimination in Employment.** In the performance of this Agreement, SMG will not discriminate against any employee or applicant for employment on the grounds of race, creed, color, national origin, sex, marital status, age or the presence of any sensory, mental or physical disability; provided that the prohibition against discrimination in employment because of a disability shall not apply if the particular disability prevents the proper performance of the particular worker involved. SMG shall ensure that applicants are employed, and that employees are treated during employment without discrimination because of their race, creed, color, national origin, sex, marital status, age or the presence of any sensory, mental or physical disability. Such action shall include, but not be limited to: employment, upgrading, demotion or transfers, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and programs for training including apprenticeships. SMG shall take such action with respect to this Agreement as may be required to ensure full compliance with local, state and federal laws prohibiting discrimination in employment.

14.2. **Nondiscrimination in Services.** SMG will not discriminate against any recipient of any services or benefits provided for in this Agreement on the grounds of race, creed, color, national origin, sex, marital status, age or the presence of any sensory, mental or physical handicap.

14.3. **MWBE**. SMG in performance of its duties and obligations, under this Agreement shall comply with applicable policies of the OWNER related to OWNER's MWBE Program. SMG shall cooperate with City's Contract Compliance Officer to establish a goal for minority participation in all levels of the operation and management of the FACILITY. The goals of the MWBE Program may be amended at a future date based upon the results of any disparity study that may be conducted by the OWNER.

14.4. **Local Preference**. SMG will work proactively to promote the recruitment and hiring of companies and/or individuals that are locally owned and operated, to the extent there are qualified local companies providing services in the particular respective industry. This Section shall be completely integrated with Section 14.3 above, and therefore the procurement of services pursuant to SMG's operation of the FACILITY shall continuously and aggressively contemplate the retention of both locally owned and/or minority companies and/or individuals.

14.5. **Living Wage**. SMG agrees to comply with OWNER's Living Wage Ordinance and in accordance therewith, pay all SMG employees at least \$10.00 with benefits, or \$12.00 an hour without benefits.

## SECTION 15

### MISCELLANEOUS CLAUSES

15.0. **SMG Ownership**. The parties acknowledge that SMG is a joint venture that is organized as a Pennsylvania general partnership. In the event the ownership of SMG should change as presently constituted, either singularly or jointly, so that the current owners do not continue to own a controlling interest in SMG, OWNER shall have the right to terminate this Agreement.

15.1. **Labor Dispute.** In the event of a labor dispute which results in a strike, picket or boycott affecting the FACILITY or services described in this Agreement, SMG shall not hereby be deemed to be in default or to have breached any part of this Agreement unless such dispute shall have been caused solely by practices or violations of SMG with respect to applicable collective bargaining agreements.

15.2. **Use as Directed by OWNER.**

(a) The OWNER shall have the right to use the FACILITY or any part thereof subject to availability for the benefit of the community without the payment of any rental or use fee, except that direct expenses for event related costs, including, but not limited to, usher, ticket-taker, security, cleaners, maintenance and other expenses incurred in connection with the use of the FACILITY by such organization shall either be reimbursed at actual cost to SMG or based on the OWNER directive charged as an Operating Expense budgeted by the OWNER for such purpose. The OWNER's use of the FACILITY shall not be competitive with, nor conflict with paying events booked by SMG and shall be booked in advance upon reasonable notice.

(b) Use by OWNER. Provided that dates are available and the requests SMG to provide use of the FACILITY to OWNER, without payment of rent, OWNER shall be entitled to utilize the FACILITY and OWNER shall be responsible to reimburse SMG, on behalf of the FACILITY, for all actual out-of-pocket expenses incurred as the result of such use, which are in excess of funds already budgeted and expended for such purpose.

(c) Use Other Than by OWNER. In the event the OWNER directs SMG to rent the FACILITY for use, other than by OWNER, at no rent or less than customary or SMG proposed rent, the difference between the rent directed by the OWNER to be charged by SMG

and the lesser of the customary or SMG proposed rental for such use shall be credited to Revenues for the purpose of determining compensation due SMG, pursuant to Section 6 herein and user shall be responsible to SMG for reimbursement of all actual out-of-pocket expenses incurred as the result of such use.

15.3. **Intellectual Property Rights.**

(a) Pursuant to the terms of this Agreement, SMG has agreed to coordinate the advertising, promotional activities, marketing and public relations for the FACILITY. SMG covenants and agrees, subject to the reasonable consent of the OWNER, to develop all Intellectual Property Rights required for the advertising, promotional activities, marketing and public relations for the FACILITY. Any Intellectual Property Rights developed by SMG for the Facility and any existing Intellectual Property Rights, including, without limitation, all names and logos for the Facility, shall be the sole and exclusive property of the OWNER. SMG agrees to disclose promptly to the OWNER all such Intellectual Property Rights developed or created by it or by any person with whom SMG has contracted for the development or creation of such Intellectual Property Rights. SMG hereby conveys to the OWNER, any right, title and interest that it may have in and to any such Intellectual Property Rights and agrees to cause any of its employees or any third party to convey to the OWNER any right, title or interest they may have in and to any such Intellectual Property Rights, including without limitation, all rights at common law, copyrights, rights of copyright renewal, trademark and trademark rights, to the OWNER; and SMG agrees to execute and cause any such third party to execute any documentation reasonably requested by the OWNER to evidence the foregoing.

(b) The OWNER hereby grants to SMG a nonexclusive license during the Term of this Agreement to use the Intellectual Property Rights in connection with the

advertising, promotional activities, marketing and public relations for the FACILITY. The license herein granted shall not permit SMG to sublicense the Intellectual Property Rights without written consent of the OWNER. The OWNER hereby reserves the right to grant a third party the exclusive license to use the Intellectual Property Rights in connection with the sale of merchandise outside the FACILITY. SMG shall have the exclusive license to use the Intellectual Property Rights in connection with the sale of merchandise inside the FACILITY during the Term of the Agreement.

15.3.1. **Patent/Copyright Infringement.**

SMG will defend and indemnify the OWNER from any claimed action, cause or demand brought against the OWNER, to the extent such action is based on the claim that information supplied by SMG infringes any patent or copyright. SMG will pay those costs and damages attributable to any such claims that are finally awarded against the OWNER in any action. Such defense and payments are conditioned upon the following:

a. That SMG shall be notified promptly in writing by the OWNER of any notice of such claim.

b. SMG shall have the right, hereunder, at its option and expense, to obtain for the OWNER the right to continue using the information, in the event such claim of infringement, is made, provided no reduction in performance or loss results to the OWNER

15.3.2. **Logo.** SMG shall have the right to use, for the term of this Agreement, the OWNER'S name and logo on stationery, in advertising and whenever

conducting business for the Facility. The usage of such logo is subject to the prior approval of the OWNER, which approval shall not be unreasonably withheld.

15.4. **Notices.**

All notices, consents, waivers, directions, requests or other instruments or communications provided for under this Agreement shall be deemed properly given if, and only if hand-delivered by use of an authorized courier requiring signature upon receipt or by registered United States mail, postage prepaid, as follows:

(a) If to OWNER:

City Attorney  
125 N. Main Street, Room 336  
Memphis, Tennessee 38103

and

Cynthia Buchanan, Director  
Park Services  
2599 Avery Avenue  
Memphis, Tennessee 38112

(b) If to SMG:

President & CEO  
SMG  
701 Market Street, Fourth Floor  
Philadelphia, Pennsylvania 19106

Senior Vice President  
SMG  
701 Market Street, Fourth Floor  
Philadelphia, Pennsylvania 19106

With copy to:

Stradley, Ronon, Stevens & Young, LLP  
2600 One Commerce Square

Philadelphia, PA 19103  
Attention: William R. Sasso, Esq. or Steven A. Scolari, Esq.

15.5. **Amendments**. This Agreement may be amended only by the written consent of the parties.

15.6. **Title and Captions**. All articles or section titles or captions in this Agreement are for convenience of reference only. They should not be deemed to be part of this Agreement or to in any way define, limit, extend, or describe the scope or intent of any provisions of this Agreement: Except as specifically otherwise provided, reference to “Articles,” “Sections,” “Exhibits,” and “Schedules” are to Articles and Sections of, and Exhibits and Schedules to this Agreement.

15.7. **Pronouns and Plurals**. Whenever the context may require, any pronoun used in this Agreement shall include the corresponding masculine, feminine or neuter forms, and the singular form of nouns, pronouns and verbs shall include the plural and vice versa.

15.8. **Severability**. Each provision of this Agreement shall be considered to be separable and, if, for any reason, any such provision or part thereof, is determined to be invalid and contrary to any existing or future applicable law, such invalidity shall not impair the operation of or affect those portions of this Agreement that are valid, but this Agreement shall be construed and enforced in all respects as if the invalid or unenforceable provision or part thereof had been omitted.

15.9. **Successors**. This Agreement shall be binding upon and inure to the benefit of the parties and their permitted successors and permitted assigns.

15.10. **Assignment**. Neither SMG nor the OWNER shall voluntarily assign or encumber its interest in this Agreement, without first obtaining the other party's written consent. Any assignment or encumbrance without the other party's written consent shall be voidable and, at the other party's election within thirty (30) calendar days of actual knowledge of an assignment or encumbrance, shall constitute a default which shall be an Event of Default unless the assignment or encumbrance is rescinded within thirty (30) calendar days after the other party has given the assigning party notice of its election to treat the assignment or encumbrance as an Event of Default; provided, however, that no such consent is or shall be required in the case of an Approved Assignment, as hereinafter defined. SMG agrees that at all times during the Term of this Agreement, any parent company of SMG, or any person or entity that purchases all or substantially all of the assets of parent company of SMG, shall possess the power to direct or cause the direction of the management and policies of SMG, and parent company of SMG shall own, directly or indirectly, at least 51% of all classes of voting securities of SMG.

(a) For purposes hereof, an "Approved Assignment" shall mean:

(i) a party's pledge, mortgage, or other assignment of the revenues or fees which it is entitled to be paid under this Agreement (but not including the assignment of any other rights under this Agreement) in connection with any credit facilities that may be obtained by either party or any of their Affiliates, it being the express intent hereunder that SMG shall have the right to pledge only its fees hereunder and no other fees or revenues hereunder;

(ii) the assignment of this Agreement by SMG to any Affiliate, or further by an Affiliate only to an Affiliate; or

(iii) the acquisition by a person or an entity of any equity or other beneficial interest in, or all or substantially all of the assets of, the Parent or any Affiliate (other than SMG or any Affiliate then performing the duties of SMG hereunder).

(b) The provisions of this Section shall not prohibit or restrict SMG's entering into subleases, contracts, concessions or licenses for the operation of any portion of the FACILITY, subject to the terms of this Agreement.

15.11. **Reasonableness.** Whenever by the terms of this Agreement, a party has the right or power to grant or withhold its consent or approval, such party agrees not to withhold or delay such consent or approval unreasonably; provided, however, this provision shall not limit the governmental discretion of the OWNER with respect to Budgets and funding.

15.12. **Entire Agreement.** This Agreement, including any attached exhibits, contains the entire agreement of the parties and supersedes all prior and contemporaneous agreements and understandings, oral or otherwise, among the parties with respect to the matters contained in this Agreement and may not be modified or amended except as set forth in this Agreement.

15.13. **Counterparts.** This Agreement may be executed in one or more counterparts and each of such counterparts, for all purposes, shall be deemed to be an original, but all of such counterparts together shall constitute but one and the same instrument, binding upon the parties, notwithstanding that all of the parties may not have executed the same counterpart.

15.14. **Applicable Law.** This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Tennessee. As an integral part of the consideration for the execution and delivery of this Agreement by the OWNER, it is expressly understood and agreed that no suit or action shall be commenced by SMG, or by any successor

or assignee of SMG, with respect to this Agreement, or by reason of any act or omission of the OWNER with respect to this Agreement, other than in a court of competent jurisdiction in and for Shelby County, Tennessee. Nothing contained in this paragraph shall prohibit the OWNER from instituting suit in any court of competent jurisdiction for the enforcement of its rights under this Agreement.

15.15. **Force Majeure.**

(a) Neither party shall be liable or responsible to the other party for any delay, damage, loss, failure, or inability to perform caused by “Force Majeure.” The term “Force Majeure,” as used in this Agreement, shall include the following: an act of God, strike, act of the public enemy, war, mines or other items of ordinance, blockade, public rioting, lightning, fire, storm, flood, explosions, inability after reasonable efforts to obtain materials, supplies, labor permits, servitudes, rights of way, acts of or restraints of any governmental authority, epidemics, landslides, lightning storms, earthquakes, floods, storms, washouts, restraints of rulers and peoples, civil disturbances, explosions, breakage or accident to machinery or lines of equipment, temporary failure of equipment, freezing of equipment and any other cause whether of the kinds specifically enumerated above or otherwise which is not reasonably within the control of the parties hereto and which by the exercise of due diligence could not be reasonably prevented or overcome.

(b) The occurrence of Force Majeure affecting the performance of this Agreement by any party hereto shall not relieve such party of liability it would otherwise have hereunder in the event of its concurring or contributing negligence or in the event of its failure to remedy the situation if it is within its reasonable control or it could have reasonably removed the cause which has prevented its performance.

(c) The parties shall use all reasonable dispatch to remove all contingencies effecting the performance of this Agreement. This Section shall not relieve any party from its obligations to make payments of amounts then due for previous work or obligations contemplated and performed hereunder. Furthermore, the party asserting this privilege shall give a full and complete notice of the facts which it considers to excuse its performance under this “Force Majeure” clause.

(d) In the event time limits are not met under this Agreement as a result of Force Majeure, the parties hereto agree to an extension of said time limit or deadline for the number of days for which Force Majeure condition existed and after said Force Majeure condition has expired, this Agreement shall continue under the same operations and circumstances as existed prior to the Force Majeure event.

**15.16. Available Office Space and Equipment.**

The OWNER shall provide SMG with necessary and reasonable office space in the FACILITY and such furniture and equipment, as is currently available in the FACILITY. Any data, equipment or materials furnished by the OWNER to SMG and any such data, equipment or materials that may be acquired from the OWNER by SMG for use at the FACILITY shall remain the property of the OWNER, and when no longer needed for the performance of this Agreement shall be returned to the OWNER for such use or disposal as the OWNER may determine.

**15.17. Access Parking and Storage.**

The OWNER shall provide SMG with unrestricted egress and ingress to the FACILITY and shall make available to SMG at no cost, parking spaces necessary and reasonable in the performance hereunder by SMG adjacent to the FACILITY located on OWNER’s property. The

OWNER shall also make available at no cost for SMG's exclusive use, certain existing storage areas.

15.18. **Community Participation.**

SMG shall have an ongoing relationship with the various agencies which the OWNER deems critical for its tourism effort and shall request membership if appropriate in such organizations as the Memphis Convention and Visitors Bureau and Memphis Chamber of Commerce. The parties acknowledge that SMG may satisfy its obligations under this Section 15.18 through the efforts of SMG's employees at the Memphis Cook Convention Center.

15.19. **Licenses/Permits.**

OWNER will cooperate to the extent reasonably required to secure all licenses and permits needed for the operation and use of the FACILITY. SMG agrees that it is their sole responsibility to obtain all licenses and permits needed for the operation and use of the FACILITY, the costs of which shall be Operating Expenses hereunder.

[Signatures to Follow on Next Page]

**IN WITNESS WHEREOF**, the parties, by and through their duly authorized representatives, have executed this Agreement as of the date above written.

**CITY OF MEMPHIS**

**SMG**

BY: \_\_\_\_\_

BY: \_\_\_\_\_

TITLE: \_\_\_\_\_

TITLE: \_\_\_\_\_

**APPROVED AS TO FORM:**

\_\_\_\_\_  
CITY ATTORNEY

ATTEST:

\_\_\_\_\_  
COMPTROLLER

**EXHIBIT A**  
**OUTLINE OF THE FACILITY**

See the diagram/outline of the Facility attached hereto.

**EXHIBIT B**  
**INVENTORY**

To be attached by the parties as provided in Section 13.0 hereof.