

City and County of San Francisco
Office of the City Administrator
Convention Facilities Department

**Fifth Amendment to the Management Agreement for
George R. Moscone Convention Center, Brooks Hall, and Civic Auditorium**

THIS FIFTH AMENDMENT (this "Amendment") is made as of January 14, 2009, in San Francisco, California, by and between **Moscone Center Joint Venture** ("MCJV" or "Contractor"), and the **City and County of San Francisco**, a municipal corporation ("City").

RECITALS

WHEREAS, Pursuant to Board of Supervisors Resolution No. 895-90, on November 6, 1990, the City and Facility Management Incorporated of California ("FMI") entered into a Management Agreement (the "Agreement") for the management of George R. Moscone Convention Center, Brooks Hall, and Civic Auditorium; and,

WHEREAS, Pursuant to a certain Agreement to Assignment dated March 18, 1991, the City consented to an assignment of the Agreement from FMI to Spectator Management Group ("SMG"); and,

WHEREAS, Under the Agreement, the City has an option to renew the Agreement for a term of five years; and,

WHEREAS, By the First Amendment to the Agreement, dated December 20, 1993, the City exercised its option to renew the term of the Agreement for an additional five years commencing July 1, 1994, and ending June 30, 1999; and in order to increase the participation of minority owned businesses in the management of the Moscone Convention Center and Civic Auditorium, the City agreed to SMG's assignment of an interest in the Agreement to Thigpen Limited, Incorporated, a certified local woman-owned business, with further assignment by Thigpen and SMG of their interests in the Agreement to Moscone Center Joint Venture; and,

WHEREAS, By the Second Amendment to the Agreement, dated January 14, 1999, the City exercised its option to renew the term of the Agreement for an additional five year term commencing July 1, 1999, and ending June 30, 2004; and,

WHEREAS, By the Third Amendment to the Agreement, dated June 10, 2003, the City exercised its option to renew the term of the Agreement for an additional five year term commencing July 1, 2004, and ending June 30, 2009; and,

WHEREAS, By the Fourth Amendment to the Agreement, dated October 22, 2007, the City and Contractor agreed that Contractor would perform certain public works improvements on behalf of the City through the hiring of contractors pursuant to Section 6.66 of the San Francisco Administrative Code; and,

WHEREAS, the City and Contractor desire to amend the Agreement on the terms and conditions set forth herein to (i) extend the term of the Agreement for the management of the George R. Moscone Convention Center for an additional eight years commencing July 1, 2009, and ending June 30, 2017; (ii) require Contractor to make certain capital contributions to the City in the amount of \$8,500,000; and (iii) revise certain contractual clauses regarding the calculation and payment of fees for food, beverage and merchandise; and,

WHEREAS, approval for this Fifth Amendment was obtained from the Board of Supervisors by Resolution No. 0529-08 on December 16, 2008;

NOW, THEREFORE, the Contractor and the City agree as follows:

A. Definitions. The following definitions shall apply to this Amendment:

1. **Agreement.** The term "Agreement" shall mean the Management Agreement for George R. Moscone Convention Center, Brooks Hall and Civic Auditorium between the City and County of San Francisco, a municipal corporation ("City"), and Facility Management Incorporated of California ("FMI"), dated November 6, 1990, as amended by the:

- First Amendment to the Agreement, dated December 20, 1993.
- Second Amendment to the Agreement, dated January 14, 1999.
- Third Amendment to the Agreement, dated June 10, 2003.
- Fourth Amendment to the Agreement, dated October 22, 2007.

2. **Other terms.** Terms used and not defined in this Amendment shall have the meanings assigned to such terms in the Agreement.

B. Modifications to the Agreement. The Agreement is hereby modified as follows:

1. The term of the Agreement is hereby extended for an additional eight years, commencing July 1, 2009, and ending June 30, 2017. This extension applies only to the management of the George R. Moscone Convention Center; it does not apply to Brooks Hall or the Civic Auditorium.

2. **Capital Contributions.** Contractor shall pay two Capital Contributions to the City, as follows:

- Contractor shall pay the City the lump sum amount of five-hundred thousand dollars (\$500,000) upon final execution and approval of this Fifth Amendment by the City; and
- Contractor shall pay the City the lump sum amount of eight million dollars (\$8,000,000) on July 1, 2009.

The payment of the Capital Contributions by Contractor are in addition to payment of all fees, advances and other amounts specified in the Agreement.

3. Article 9.D of the Agreement currently reads as follows:

D. Calculation and Payment of Fees

FMI shall pay to the City the following fees for each category as defined above:

1. Alcoholic Beverages, Food and Beverage Concessions – Twenty percent (20%) of gross revenues.
2. Other Sales – Twenty percent (20%) of gross sales.
3. Services – Twenty percent (20%) of the first two million dollars (\$2 million) per annum in gross sales and twenty-five percent (25%) of all gross sales over two million dollars (\$2 million) per annum.

Such Article is hereby amended to read as follows:

D. Calculation and Payment of Fees

Contractor shall pay to the City the following fees for each category as defined above:

1. Alcoholic Beverages, Food and Beverage Concessions, Other Sales – Twenty percent (20%) of gross revenues, plus an additional five percent (5%) of gross revenues or two million dollars (\$2,000,000) guaranteed per annum, whichever is greater.
 - a. Contractor shall advance the \$2,000,000 per annum guaranteed amount at the beginning of each contract year, payable to the City on July 1. At the City's option, Contractor shall advance the \$2,000,000 guaranteed amount for year eight (otherwise due on July 1, 2016) to year two of the Agreement, payable to the City on July 1, 2010.
2. Services – Twenty percent (20%) of the first two million dollars per annum in gross sales and twenty-five percent (25%) of all gross sales over two million dollars per annum.

4. Article 26 of the Agreement, Termination, currently reads as follows:

- A. If either party defaults in any terms, conditions, agreement, covenant or provision set forth in this Agreement applicable to such party and such default continues unremedied for sixty days after written notice of default to such defaulting party from the other party, the non-defaulting party may, at its option, terminate this Agreement; provided, however, that if the default is of a nature that cannot be reasonably expected to be cured within sixty days, then this Agreement shall not be terminated as long as the party allegedly in default undertakes with such sixty day period reasonable steps to cure the alleged default, diligently attempts to cure and remedy the default and in fact cures the default within 120 days after such notice is given.
- B. This agreement may be terminated in writing by the City in whole or in part for its convenience; provided FMI is given not less than one hundred eighty (180) days written notice (delivered by certified mail, return receipt requested) of intent to terminate. In the event of notice of termination, FMI shall take all necessary measures to mitigate termination expenses. If the City terminates the agreement in part and the fee it proposes to pay FMI is not acceptable to FMI, then FMI may terminate the agreement with such termination to be concurrent with the City's termination set forth above.
- C. This Agreement may be immediately terminated in writing by the City upon termination by the Redevelopment Agency of the Project Lease under Section 11 of such lease but the City shall remain financially responsible for all obligations incurred by FMI before receipt of such notice or which are reasonably necessary to terminate operations. FMI may terminate this Agreement if such Project Lease is terminated unless the Redevelopment Agency agrees in writing to assume the City's obligations under this Agreement.
- D. If termination pursuant to Paragraph A above is effected by the City, FMI will be paid for work actually performed to the date of termination plus any fee earned to date of termination, less the cost to the City for making good any deficiencies, correcting all work improperly performed, and any additional cost to the City for removing or replacing FMI, exclusive of fees paid to firm(s) hired to replace FMI.
- E. If termination pursuant to paragraph B above is effected by the City, FMI will be paid for work actually performed to the date of termination plus:
 - 1. Any fee earned to date of termination;
 - 2. Any costs for lease cancellations;
 - 3. Any obligations of FMI resulting from termination;
 - 4. Any reasonable demobilization charges.

- F. Upon the effective date of a termination notice pursuant to Paragraph A or B above, FMI shall (unless the notice directs otherwise) (i) promptly discontinue all services affected and (ii) deliver or otherwise make available to the City all data, documents, procedures, reports, estimates, summaries, and such other information and materials ('documents and materials') as may have been accumulated by FMI in performing this agreement, whether completed or in process. FMI may, however, keep copies of such documents and materials for its record.
- G. Upon termination pursuant to Paragraph A or B above, the City may take over the work and see that the same is completed by agreement with another party or otherwise, all without liability to FMI.
- H. If, after termination for failure of FMI to fulfill contractual obligations, it is determined by a court of competent jurisdiction that FMI had not so failed, the termination shall be deemed to have been effected for the convenience of the City. In such event, adjustment for the compensation provided for in this agreement shall be made as provided in Paragraph E above.

Termination under the provisions of Paragraph A above shall be deemed effective as a result of, but not limited to, the following actions:

1. The occurrence of any act or omission on the part of FMI that deprives it of the rights, powers, licenses, permits and authorizations necessary for the lawful and proper conduct and operation of the services and activities authorized herein;
2. The filing by or against FMI of any petition in bankruptcy – either voluntary or involuntary – or the making by FMI of any assignment for the benefit of creditors, either of which actions shall automatically terminate this agreement and bar the passing thereunder of any benefits to creditors, assignees, or transferee of FMI;
3. The abandonment, discontinuance, or assignment by FMI, without written consent of the CAO, of any or all of the operations and services permitted or required herein;
4. The failure of FMI to account for, and pay to the City, as provided in Article 6 hereof, any and all amounts of gross revenue due and owing to the City from FMI;
5. The cessation or deterioration of services for a period that, in the reasonable opinion of the CAO, materially and adversely affects the operation of the public services required to be performed by FMI under this Agreement.

The exercise by the City of the remedies and rights provided in this Agreement shall in no way affect any other right or remedy available to the City.

Such Article is hereby amended to read as follows:

- A. If either party defaults in any terms, conditions, agreement, covenant or provision set forth in this Agreement applicable to such party and such default continues unremedied for sixty days after written notice of default to such defaulting party from the other party, the non-defaulting party may, at its option, terminate this Agreement; provided, however, that if the default is of a nature that cannot be reasonably expected to be cured within sixty days, then this Agreement shall not be terminated as long as the party allegedly in default undertakes within such sixty day period reasonable steps to cure the alleged default, diligently attempts to cure and remedy the default and in fact cures the default within 120 days after such notice is given.
- B. This agreement may be terminated in writing by the City in whole or in part for its convenience; provided Contractor is given not less than one hundred eighty (180) days written notice (delivered by certified mail, return receipt requested) of intent to terminate. In the event of notice of termination, Contractor shall take all necessary measures to mitigate termination expenses. If the City terminates the agreement in part and the fee it proposes to pay Contractor is not acceptable to Contractor, then Contractor may terminate the agreement with such termination to be concurrent with the City's termination set forth above. If the City terminates for convenience the City shall reimburse Contractor for any unamortized balance of Contractor's Capital Contributions as provided in Article 26.G.5, below, and for any unearned portion of the annual advance payment of fees provided in Article 9.D.1.a (above).
- C. This Agreement may be immediately terminated in writing by the City upon termination by the Redevelopment Agency of the Project Lease under Section 11 of such lease but the City shall remain financially responsible for all obligations incurred by Contractor before receipt of such notice or which are reasonably necessary to terminate operations, and shall reimburse Contractor for any unamortized balance of Contractor's Capital Contributions as provided in Article 26.G.5, below, and for any unearned portion of the annual advance payment of fees provided in Article 9.D.1.a (above).
- D. If termination pursuant to Paragraph A above is effected by the City, Contractor will be paid for work actually performed to the date of termination plus any fee earned to date of termination, less the cost to the City for making good any deficiencies, correcting all work improperly performed, and any additional cost to the City for removing or replacing Contractor, exclusive of fees paid to firm(s) hired to replace Contractor.

- E. Upon the effective date of a termination notice pursuant to Paragraph A above, Contractor shall (unless the notice directs otherwise) (i) promptly discontinue all services affected and (ii) deliver or otherwise make available to the City all data, documents, procedures, reports, estimates, summaries, and such other information and materials ('documents and materials') as may have been accumulated by Contractor in performing this agreement, whether completed or in process. Contractor may, however, keep copies of such documents and materials for its record.
- F. Upon termination pursuant to Paragraph A above, the City may take over the work and see that the same is completed by agreement with another party or otherwise, all without liability to Contractor.
- G. If, after termination for failure of Contractor to fulfill contractual obligations, it is determined by a court of competent jurisdiction that Contractor had not so failed, Contractor will be paid for work actually performed to the date of termination plus:
1. Any fee earned to date of termination;
 2. Any costs for lease cancellations;
 3. Any obligations of Contractor resulting from termination;
 4. Any reasonable demobilization charges.
 5. The reimbursement of any unamortized balance of Contractor's Capital Contributions as defined in Section B.2 of the Fifth Amendment to the Agreement. Contractor's Capital Contributions shall be amortized over the eight year period, July 1, 2009, through June 30, 2017, regardless of when the Capital Contributions are paid to the City, and for any unearned portion of the annual advance payment of fees provided in Article 9.D.1.a (above).

Termination under the provisions of Paragraph A above shall be deemed effective as a result of, but not limited to, the following actions:

1. The occurrence of any act or omission on the part of Contractor that deprives it of the rights, powers, licenses, permits and authorizations necessary for the lawful and proper conduct and operation of the services and activities authorized herein;
2. The filing by or against Contractor of any petition in bankruptcy – either voluntary or involuntary – or the making by Contractor of any assignment for the benefit of creditors, either of which actions shall automatically terminate this agreement and bar the passing thereunder of any benefits to creditors, assignees, of transferee of Contractor;
3. The abandonment, discontinuance, or assignment by Contractor, without written consent of the CAO, of any or all of the operations and services permitted or required herein;

4. The failure of Contractor to account for, and pay to the City, as provided in Article 6 hereof, any and all amounts of gross revenue due and owing to the City from Contractor;
5. The cessation or deterioration of services for a period that, in the reasonable opinion of the CAO, materially and adversely affects the operation of the public services required to be performed by Contractor under this Agreement.

The exercise by the City of the remedies and rights provided in this Agreement shall in no way affect any other right or remedy available to the City.

C. Effective Date. Each of the modifications set forth in this Amendment shall be effective on and after July 1, 2009, except for the modification in the first bullet of paragraph B.2 of this Amendment (i.e., payment of \$500,000 to the City), which shall be effective on and after January 14, 2009.

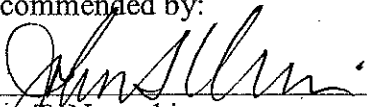
D. Legal Effect. Except as expressly modified by this Amendment, all of the terms and conditions of the Agreement shall remain unchanged and in full force and effect.

IN WITNESS WHEREOF, the Contractor and the City have executed this Amendment as of the date first mentioned above.

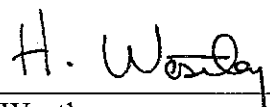
CITY

CONTRACTOR

Recommended by:



John T. Noguchi
Director, Convention Facilities Dept.



Wes Westley
President and CEO
Moscone Center Joint Venture

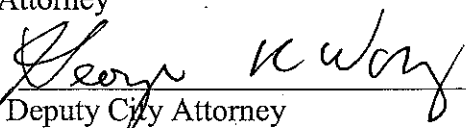
Approved:



Edwin M. Lee
City Administrator

Approved as to Form:

Dennis J. Herrera
City Attorney

By: 

Deputy City Attorney