

PANTAGES THEATER
RESTORATION PROJECT AGREEMENT

THIS PANTAGES THEATER RESTORATION PROJECT AGREEMENT (“Agreement”) is made as of this ____ day of _____, 2018, (“Effective Date”) between the CITY OF TACOMA, a Washington first-class city (“City”), and the BROADWAY CENTER FOR THE PERFORMING ARTS, a Washington nonprofit corporation (“BCPA”).

RECITALS

WHEREAS the BCPA operates the Pantages Theater for the City, pursuant to a Management Agreement, and

WHEREAS the BCPA makes the Pantages Theater available to various community performing arts groups in furtherance of the City’s desire to provide a performing arts center for the benefit of the public, and

WHEREAS, as operator of the facility, the BCPA has identified certain necessary work to maintain and restore (“Restoration”) the historic interior and other areas within the Pantages Theater, including seats, lighting, and skylight, and

WHEREAS the Restoration will provide functional upgrades to the Pantages Theater that will enhance operations, long-range marketability of the facility, and patrons experience, and

WHEREAS the City has previously budgeted funds to pay for a portion of the Restoration, and

WHEREAS the BCPA is conducting a campaign to raise private funds for the Restoration, and

WHEREAS, in order to secure the participation of such donors, the BCPA desires involvement in design decisions relative to layout, level of finish, and donor recognition with respect to the Restoration of the Pantages Theater, and

WHEREAS pursuant to its authority under the Management Agreement, the BCPA competitively selected a design firm and contractor to carry out the Restoration, and entered into design and preconstruction services agreements, and

WHEREAS the City and the BCPA have identified a portion of the Restoration work that should proceed as a first phase utilizing various funding sources including funds previously budgeted by the City, with future phases to be funded by other sources including private funds raised by the BCPA, without reliance on City-provided monies, and

WHEREAS the BCPA agrees that, as the owner of the facility, the City will be the entity that contracts with the contractor to manage the work for the Restoration of the Pantages Theater, and

WHEREAS in order to effectuate the City's ability to manage the Restoration of the Pantages Theater, the BCPA agrees to assign its design and construction agreements to the City, and

WHEREAS by this Agreement, the City and the BCPA desire to define the City and the BCPA's roles in the design and construction process for Restoration to the Pantages Theater.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual undertaking and promises contained herein, including the matters described in the recitals to this Agreement and the benefits to be realized by each party and, in future consideration of the benefit to the general public by the Restoration to the Pantages Theater and other valuable consideration, the adequacy of which is hereby acknowledged, the parties agree as follows:

Section 1. First Phase Roles and Responsibilities of the Parties for the Pantages Theater Restoration.

1.1. First Phase Responsibilities of the BCPA:

A. The BCPA hereby fully assigns its rights in the existing design and construction agreements with BCRA Design and Korsmo Construction to the City. The design and construction agreements are attached as Exhibits 1, and 2, respectively.

1.2. First Phase Responsibilities of the City.

A. The City will manage the first phase Restoration work as more particularly described in Exhibit 2. Funding for the first phase may include various funding sources, including but not limited to: funds budgeted by the City, grants from the State or other sources, private donations, and contributions in-kind and other sources.

Section 2. Second and Future Phase Roles and Responsibilities of the Parties for the Pantages Theater Restoration.

2.1. Second Phase Responsibilities of the BCPA.

A. The BCPA is responsible for raising funds to pay for all second and future phase design and construction of the Restoration of the Pantages Theater, without reliance on City-provided monies. If the BCPA contemplates the use of the sale of naming rights, the BCPA shall work in coordination with the City and shall seek prior approval from the City for any naming rights, as required by the Management Agreement.

B. The BCPA is responsible for representing the interests of the private benefactors and the various community performing arts groups who use the theater in the design and implementation of the Restoration.

C. The BCPA is responsible for fulfilling any commitments to private donors. The BCPA must identify and seek approval from the City for any requirements from donors that are to be considered during the design and construction phases. The City acknowledges that the BCPA desires to be directly involved in design and construction decisions that relate to incorporating donor recognition features into the project.

D. The BCPA is responsible for receipt and prompt transfer to the City of all funds donated to the BCPA to fund the Restoration of the Pantages Theater, pursuant to the terms and conditions of Section 3, Funding and Payments, of this Agreement. The BCPA agrees to provide the City with any and all data and financial information necessary for the City to adequately account for donated funds.

2.2. Second Phase Responsibilities of the City.

B. The City will select, contract with and have direct administration and control, including payment, over both the designer and contractor for the second and future phase Restoration to the Pantages Theater.

C. The City will, in consultation with the BCPA, make all final decisions regarding the budget, schedule and scope of work for the second and future phase Restoration. The determination of the final project budget will be based in part on the actual funds generated by the BCPA, pursuant to this Agreement. During design and construction, the City shall have the right to modify the scope of the Restoration, as it deems appropriate, to meet available funds while keeping within the City's long-term plans for the Pantages Theater.

Section 3. Second and Future Phase Funding and Payments.

3.1. Deposit of Funds with the City.

Except for funds utilized by the BCPA to pay its fundraising costs, the BCPA will deposit with the City all funds raised to pay for the Restoration. All funds deposited with the City will be maintained in a segregated fund. The City may provide an accounting to the BCPA of expenditure of the funds upon request.

3.2 Payment for Second and Future Phase Design and/or Construction.

Prior to the City's solicitation of bids for design and/or construction of the second and future phase Restoration, the BCPA agrees to deposit with the City funds equal to the City's total estimated cost for design and/or construction of the Restoration, as the case may be, including the cost of City procurement and contract management and administration services. After receipt of these BCPA funds, the City will solicit bids for design and/or construction of the Restoration. Should the low bid exceed the City's estimated cost for the second and future phase Restoration, in consultation with the BCPA, the City will determine whether to reduce the scope of second and future phase Restoration, or, if sufficient additional funds are transferred to the City from the BCPA, to proceed with the second and future phase Restoration as bid.

Section 4. General Project Administration.

4.1 Project Management.

The City will be the project manager for the Restoration of the Pantages Theater. The Public Works Department will assign a Project Manager to oversee the Restoration.

4.2 BCPA Liaison.

The BCPA will appoint a Liaison Manager to provide coordination assistance to the City's Project Manager.

4.3 Submittal Review and Progress Payments.

The City's Project Manager and BCPA'S Liaison Manager will jointly review progress payments on the Restoration. The City will approve and issue all progress payments for the design and construction work as the project manager.

4.4 Site Access.

Upon reasonable notification, BCPA representatives, to be identified by mutual agreement of the parties, will be allowed access to the project site during normal business hours as coordinated with the City and the general contractor.

4.5 Contract Changes.

The City will be responsible for initiating proposed changes to the contracted scope of work. The BCPA must propose any desired changes through the BCPA Liaison Manager to the City's Project Manager. The City's Project Manager and the BCPA's Liaison Manager will jointly review, and the City will approve or reject change orders and revisions to the scope of the contracted work.

4.6 Acceptance.

The City's Project Manager, in consultation with the BCPA's Liaison Manager, will be responsible for acceptance of the completed Restoration.

Section 6. Indemnification of City. The BCPA shall indemnify, defend and hold the City harmless from and against all claims, liability, loss, damage, cost, or expense (including reasonable attorneys' fees, court costs, and amounts paid in settlements and judgment) arising out of any fault, negligence, act, or omission of the BCPA or its members, agents, employees, representatives, contractors, subcontractors, successors, or assigns related to the performance of the Agreement.

Section 7. Default. The BCPA's failure to keep, observe, or perform any of its duties or obligations under this Agreement shall be a default hereunder, including, without limitation, any of the following specific events:

7.1 The failure of the BCPA to deposit funds with the City as required in Section 3 of this Agreement.

7.2 The failure of the BCPA to satisfy the indemnities set out in this Agreement.

7.3 The making by the BCPA of an assignment for the benefit of creditors, contrary to the terms of this Agreement, or filing a petition in bankruptcy or of reorganization under any bankruptcy or insolvency law or filing a petition to effect a composition or extension of time to pay its debts.

7.4 The appointment of a receiver or trustee of the property of the BCPA, which appointment is not vacated or stayed within 60 days, or the filing of a petition in bankruptcy against the BCPA or for its reorganization under any bankruptcy or insolvency law which not dismissed or stayed by the court within 60 days after such filing.

Section 8. Miscellaneous.

8.1 Entire Agreement. This Agreement and any collateral instruments referenced herein contain the entire agreement between the parties as to the subject matter hereof and supersedes all prior discussions and understandings between them.

8.2 Modification. This Agreement may not be amended or rescinded in any manner except by an instrument in writing signed by a duly authorized representative of each party hereto in the same manner as such party has authorized this Agreement.

8.3 Good Faith and Reasonableness. The parties intend that the obligations of good faith and fair dealing apply to this Agreement generally and that no negative inference be drawn by the absence of an explicit obligation to be reasonable in any portion of this Agreement.

8.4 Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the heirs, administrators, executors, successors in interest, and assigns of each of the parties hereto except that there shall be no transfer of any interest by any of the parties hereto, except pursuant to the express terms of this Agreement. Any reference in this Agreement to a specifically named party shall be deemed to apply to any successor, heir, administrator, executor, or assign of such party who has acquired its interest in compliance with the terms of this Agreement, or under law.

8.5 Notices. All notices which may be or are required to be given pursuant to this Agreement shall be in writing and delivered to the parties at the following addresses:

To City: City of Tacoma
Attn: Public Works Director
747 Market Street, Room 408
Tacoma, WA 98402

Copy: Venues and Events Director
1500 Commerce Street
Tacoma, WA 98402

To BCPA: Broadway Center for the Performing Arts
Attn: Director
901 Broadway Center
Tacoma, WA 98421

Any such notices shall be: (a) sent by certified mail, return receipt requested, in which case notice shall be deemed delivered three days after deposit, postage prepaid in the U.S. mail; (b) sent by a nationally recognized overnight courier, in which case notice shall be deemed delivered when actually delivered pursuant to the records of such courier; (c) sent by facsimile transmission to the party and its counsel, receipt of which has been confirmed by telephone, and by regular mail, in which case notice shall be deemed delivered on the next business day following confirmed receipt; or (d) hand delivered, in which case notice shall be deemed delivered when actually delivered. The above addresses and phone numbers may be changed by written notice to the other party; provided, however, that no notice of a change of address shall be effective until actual receipt of such notice. Copies of notices are for informational purposes only, and a failure to give or receive copies of any notice shall not be deemed a failure to give notice.

8.6 Waiver. No waiver by any party of any provision of this Agreement or any breach thereof shall be of any force or effect unless in writing by the party granting the waiver, and no such waiver shall be construed to be a continuing waiver. The waiver by one party of the performance of any covenant, condition, or promise shall not invalidate this Agreement nor shall it be considered a waiver by such party of any other covenant, condition, or promise hereunder. The waiver by either or both parties of the time for performing any act shall not constitute a waiver of the time for performing any other act or an identical act required to be performed at a later time.

8.7 Rights and Remedies Cumulative. Except as otherwise expressly stated in this Agreement, the rights and remedies of the parties are cumulative, and the exercise or failure to exercise one or more of such rights or remedies by either party shall not preclude the exercise by it, at the same time or

different times, of any right or remedy for the same default or any other default by the other party.

8.8 Applicable Law; Jurisdiction. This Agreement shall be interpreted under and pursuant to the laws of the state of Washington. In the event any action is brought to enforce any of the provisions of this Agreement, the parties agree to be subject to the jurisdiction in the Pierce County Superior Court for the State of Washington or in the United States District Court for the Western District of Washington.

8.9 No Joint Venture. Nothing contained in this Agreement shall create any partnership, joint venture, or other arrangement between City and BCPA. The parties intend that the rights, obligations, and covenants in this Agreement and the collateral instruments shall be exclusively enforceable by City and BCPA, their successors, and assigns. No term or provision of this Agreement shall be for the benefit of any person, firm, organization, or corporation not a party hereto, and no such other person, firm, organization, or corporation shall have any right or cause of action hereunder, except as may be otherwise expressly provided herein.

8.10 Consents. Whenever consent or approval by City is required under the terms of this Agreement, all such consents or approvals, if given, shall be given in writing from the City Manager unless the City in its sole discretion determines that additional action by the Tacoma City Council is necessary. Approval of any document that may be approved by the City Manager under this Agreement shall be given, if given, in writing, by the City Manager, and the City Attorney shall approve such document as to form.

8.11 Calculation of Time. All periods of time referred to herein shall include Saturdays, Sundays, and legal holidays in the state of Washington, except that if the last day of any period falls on any Saturday, Sunday, or legal holiday in the state of Washington, the period shall be extended to include the next day which is not a Saturday, Sunday, or legal holiday in the state of Washington.

8.12 Conflict of Interest. No member, official, or employee of the City shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official, or employee participate in any decision relating to this Agreement which affects his personal interests or the interest of any corporation, partnership, or association in which he is, directly or indirectly, interested. No member, official, or employee of City shall be personally liable to the BCPA or any successor in interest upon the occurrence of any default or breach by the City or for any amount which may become due to the BCPA or its successor or on any obligations under the terms of this Agreement.

8.14 Nonwaiver of Government Rights. The City, by making and entering into this Agreement, is not obligating the City to give governmental approvals, to take particular action or to be financially responsible for any obligations of the BCPA.

8.15 Captions; Exhibits. The headings and captions of this Agreement are for convenience of reference only and shall be disregarded in constructing or interpreting any part of the Agreement. All exhibits and appendices annexed hereto at the time of execution of this Agreement, or in the future as contemplated herein, are hereby incorporated by reference as though fully set forth herein.

8.16 Fair Construction; Severability. All pronouns and any variations thereof shall be deemed to refer to the masculine, feminine or neutral, singular or plural, as the context may require. The parties hereby acknowledge and agree that each was properly represented by counsel and this Agreement was negotiated and drafted at arms' length so that the judicial rule of construction to the effect that any ambiguities are to be construed against the drafting party shall be inapplicable in the interpretation of this Agreement. The provisions of this Agreement shall be construed as a whole according to their common meaning and consistent with the other provisions contained herein in order to achieve the objectives and purposes of this Agreement. If any term, provision, covenant, clause, sentence, or any other portion of the terms and conditions of this Agreement, or the application thereof, to any person or circumstances shall apply, to any extent, become invalid or unenforceable, the remainder of this Agreement shall continue in full force and effect, unless rights and obligations of the parties have been materially altered or abridged by such invalidation or unenforceability.

**Signature Page to
Pantages Construction Agreement**

IN WITNESS WHEREOF, the parties hereto have executed this document as of the day and year first above written.

City OF TACOMA

**BROADWAY CENTER FOR THE
PERFORMING ARTS**

By: _____
Elizabeth Pauli
City Manager

By: _____
David Fischer, Chair

Countersigned:

Andrew Cherullo
Finance Director

Kurtis Kingsolver, Director
Public Works Department

Attest:

Approved as to form:

Doris Sorum
City Clerk

Steve Victor
Deputy City Attorney

Saada Gegoux
Risk Manager