

**PERFORMING ARTS FACILITIES  
MANAGEMENT AGREEMENT  
BY AND BETWEEN  
THE CITY OF TACOMA  
AND  
THE BROADWAY CENTER FOR  
THE PERFORMING ARTS**

**THIS MANAGEMENT AGREEMENT** (the "**Agreement**") is made and entered into as of the \_\_\_ day of \_\_\_\_\_, 2016 ("Effective Date"), by and between the **CITY OF TACOMA**, a municipal corporation operating as a first class city under the laws of the State of Washington, hereinafter referred to as the "**City**," and the **BROADWAY CENTER FOR THE PERFORMING ARTS**, a nonprofit Washington State corporation duly and currently registered and existing in the State of Washington, hereinafter referred to as the "**Manager**."

**RECITALS:**

**WHEREAS** the City of Tacoma owns three performing arts facilities known and referred to as the Rialto Theater, the Pantages Theater (together with the adjoining Jones Office Building), and the Theater on the Square (hereinafter collectively referred to as the "**Premises**"), all of which are described in Attached Exhibit "A" (Description of Premises), and

**WHEREAS** the Broadway Center for the Performing Arts is a nonprofit corporation organized for the purpose of the advancement of the arts and cultivating, promoting, sponsoring and developing arts in the community, all pursuant to the authority of the Corporation, as provided by its Articles of Incorporation, and

**WHEREAS** the Broadway Center for the Performing Arts has agreed to manage the Premises upon terms and conditions mutually agreeable to the parties;

**NOW, THEREFORE**, in consideration of the mutual undertakings and promises contained herein and the benefits to be realized by each party, the parties hereto agree as follows:

**ARTICLE 1. DEFINITIONS:**

1.1 "Agreement" means this Agreement, as amended and restated or supplemented in writing from time to time, and includes all exhibits and schedules hereto. References to Sections or Exhibits are to this Agreement unless otherwise qualified.

1.2 “Capital Expenses” shall mean all expenditures in excess of \$5,000.00 in the aggregate to repair or replace “building structure”, “non-structural components”, “building systems”, and “performance related components” as defined in section 5.1.

1.3 “City Contract Administrator” shall mean the Director of Public Assembly Facilities of the City of Tacoma.

1.4 “City Manager” means the City Manager of the City of Tacoma or his or her designee.

1.5 “Executive Director” shall mean the person, regardless of name, authorized by the Manager to be the chief executive officer of the Broadway Center for the Performing Arts responsible for the day to day management, maintenance and operation of the Premises.

1.6 “Manage” or any derivation thereof shall mean to direct, control, operate, maintain, govern, determine, oversee and administer the operation of the Premises in accordance and compliance with the terms and conditions of this Agreement and all applicable laws, rules, and regulations.

1.7 “Parties” means City and Manager collectively.

1.8 “Party” means City and Manager individually.

1.9 “Person” means and includes natural persons, corporations, limited partnerships, general partnerships, joint stock companies, joint ventures associations, limited liability companies, limited liability partnerships, trusts, land trusts, business trusts or other organizations, whether or not legal entities.

1.10 “Premises” shall mean all such land, buildings, structures, attachments and appurtenances (including the Jones Building) as described in attached Exhibit “A”.

1.11 “Resident Arts Organization” (RAO) shall mean those non-profit arts organizations operating out of the Premises, as noted in attached Exhibit B.

## **ARTICLE 2. PURPOSE:**

2.1. Incorporation of Recitals: The Parties acknowledge and agree that the above stated recitals are true and correct to the best of their knowledge and are incorporated as though fully set forth herein.

2.2 General: The City requires the services of the Manager to manage the Premises. The purpose of this Agreement is to set forth the rights, duties and obligations of the Parties with regard to the management, maintenance, and operation of the Premises.

2.3 Principal Function. The principal function of the Manager shall be to manage, maintain and operate the Premises in such a manner as to ensure the long-term economic stability of the Premises.

2.4 Business Plan. The Manager shall develop a strategic business plan of management and operations of the Premises that is revised and updated biennially on or before December 1 of every other year during the Management Term for the upcoming calendar year (the "**Business Plan**"). The Business Plan describes the Manager's plan for operation of the Premises and criteria by which progress may be measured and evaluated. The Business Plan shall describe objectives that are consistent with the Manager's principal function, and strategies for achieving those objectives. The Business Plan shall include the proposed biennial operating budget inclusive of requests for known Capital Expenses and shall be submitted to the City Contract Administrator for review and comment on or before December 1 of every other year, beginning December 1, 2016.

2.5 Resident Arts Organizations. The Manager shall meet a minimum three times per year with the Resident Arts Organizations ("**RAOs**") as a group. The purpose of the meetings with the RAOs is to provide a forum for discussion and resolution of concerns that may be raised by the RAOs, the Manager, or the City regarding implementation of the Agreement, and to enhance the relationships between the Manager, the RAOs, and the City.

All RAOs and the City Contract Administrator or designated representative shall be invited by the Manager to participate in the minimum three meetings per year. The Manager's Executive Director will convene and preside over each meeting. The City Contract Administrator shall be the final arbiter of any issue unable to be resolved by mutual agreement between the Manager and the RAOs.

The list of Resident Arts Organizations contained at Exhibit B may be mutually updated by the Parties without the need to formally amend this Agreement.

### **ARTICLE 3 – PREMISES/PERSONAL PROPERTY:**

3.1 Premises. The Premises are described in attached Exhibit "A". The parcel identification numbers for the Premises are as follows:

Pantages:	2009050010
Jones Building:	2009050020
Rialto:	2009070010
Theater on the Square:	2009050034

3.2 Occupancy.

3.2.1 Manager. The Manager shall have the right, duty, and obligation to use and occupy the Premises solely for the purpose of carrying out its rights, duties and obligations under this Agreement.

3.2.2 Resident Arts Organizations. Manager may enter into agreements with, and make office and meeting space within the Premises available to, the Resident Arts Organizations for the purpose of carrying out the day-to-day business of the Resident Arts Organizations, only upon reasonable market-based terms and conditions, including the payment of rent and utility charges.

3.2.3 Presenting. Presenting functions of the Manager, if any, shall be a separate and distinct function from the management of the Premises and shall not be funded from the Management Fee paid to the Manager under this Agreement. Manager may utilize office and meeting space within the Premises for the purpose of carrying out the business of its presenting functions.

3.3 Property and Equipment. Title to all property and equipment furnished by the City shall remain with the City. Any property or equipment the City furnished to the Manager shall, unless otherwise provided herein or approved by the City, be used only for the performance of this Agreement. All personal property, equipment, and portable facilities on the Premises at the time of execution of this Agreement, whether managed by the Manager or not, shall be presumed to be City property and shall be exclusively owned by the City regardless of acquisition of said inventory property by the Manager, unless the personal property or equipment was obtained with Manager's own funds or by its presenting function. This provision intends no assertion of ownership contrary to the rights of any third party. Manager and City shall establish and maintain an inventory of all such personal property, equipment and portable facilities of the premises in a reasonable amount of time after execution of this Agreement. The Manager shall be responsible for any loss or damage up to \$1,000,000 to property of the City, ordinary wear and tear excepted, which results from the negligence of the Manager or which results from the failure on the part of the Manager to maintain and administer that property in accordance with sound management practices. Upon loss or destruction of, or damage to, any City

property, the Manager shall notify the City thereof and shall take all reasonable steps to protect that property from further damage. All reference to the Manager under this clause shall also include Manager's employees, agents or subcontractors. The Manager shall retain the title to all property and equipment it obtained with Manager's own funds or by its presenting function and Manager shall retain title and ownership to all such property and equipment in the event of dissolution of the Manager, or upon the termination or expiration of this Agreement.

3.4 Reservation of Rights. The City reserves the right of access to the Premises at all times for itself and its agents, contractors, and representatives to enter into and upon any part of the Premises for any purpose, provided that, such entry does not contravene the rights of any users of the Premises under agreement with the Manager or unreasonably interfere with management or operations. The City shall at all times have the right to the use and possession of any facility, equipment, or supplies located within the Premises created by and owned by the Manager for its use, provided that the City shall not demand use or possession of any equipment customarily used by or assigned for Manager's use when to do so would interfere with presentation of or preparation for a scheduled event or performance at the Premises. City also has the right to make such other changes to the Premises as City deems appropriate, provided the changes do not materially affect Manager's ability to use the Premises for the permitted use. The City shall pay the same rate as Resident Arts Organizations for all applicable occupancy, labor, equipment and fees. City shall also have the right (but not the obligation) to temporarily close the Premises if the City reasonably determines that there is an imminent danger of significant damage to the buildings or of personal injury to City's employees or any occupants of the buildings. The circumstances under which City may temporarily close the Premises shall include, without limitation, electrical interruptions, earthquakes, and civil disturbances. A closure of the Premises under such circumstances shall not constitute a constructive eviction nor entitle Manager to damages resulting from temporary closure of any part of the Premises. Manager shall include appropriate language in its agreements with third parties protecting it from liability resulting from such temporary closures.

3.5 Alterations. Manager shall not make alterations, additions, or improvements to the Premises (collectively referred to as "**Alterations**"), without first obtaining the written consent of City in each instance. However, City's consent shall not be required for any Alteration that satisfies all of the following criteria (a "**Cosmetic Alteration**"): (1) is of a cosmetic nature, such as painting, wallpapering, hanging pictures, and installing carpeting; (2) is not visible from the exterior of the Premises or building; (3) will not affect the systems or structure of the building; and (4) does not require work to be performed inside the walls or above the ceiling of the Premises. All Alterations shall be constructed in a good and workmanlike manner using materials of a quality that is at least equal to the quality designated by City as the minimum standard for the building. City may

designate reasonable rules, regulations, and procedures for the performance of work in the building. Manager shall assure that the Alterations comply with all insurance requirements and laws. City's approval of an Alteration shall not be a representation by City that the Alteration complies with applicable laws or will be adequate for Manager's use.

3.6 Utilities/Services. Manager shall be liable for and shall pay any and all charges for utilities and other services now or hereafter furnished to or for the benefit of the Premises during the term of the Agreement and any period of hold over, including, but not limited to, heat, air conditioning, electricity, gas, water, sewerage, storm water, security system monitoring, garbage disposal, and janitorial services. Utilities and other services used by Manager in or with respect to the operation of the Premises shall be paid for by Manager by separate charge billed by the applicable utility company or service provider and payable directly by Manager. The City will provide administrative office space for the Manager in the Jones Building at no cost to the Manager. The City shall pay for the following services: annual Business Improvement Area (BIA) assessment, phone systems and services for the Manager, and twenty percent (20%) of utility billings from Tacoma Public Utilities and Puget Sound Energy for the Premises (utility percentage payable upon provision of monthly invoices).

3.7 Concessions. Manager shall have the exclusive right to manage and operate all food, beverage and merchandise concessions in the Premises, or to license others to operate such food, beverage and merchandise concessions in the Premises and to retain revenues generated.

3.8 Exhibits/Displays. Manager shall have the exclusive right to provide for public exhibits, displays or donor recognition within the Premises; provided that, such exhibits, displays, or donor recognition will not tend to mar or deface the Premises. Manager shall develop, implement and enforce an exhibit and display policy and procedures in compliance with all applicable laws, regulations and rules. Notwithstanding the foregoing, the City shall be authorized to utilize exhibit and display space within the Premises for governmental purposes; provided that, such use does not unreasonably interfere with the management of the Premises.

3.9 Naming Rights. The City exclusively retains the naming rights of the Theaters, all parts and components of the Theaters, and the Premises. The City may agree to assign such naming rights in whole or in part to the Manager upon mutually agreeable terms and conditions for the purpose of raising funds for capital improvements or capital replacement specific to the Premises. Proceeds to the Manager of any such naming rights assigned to the Manager shall be deposited in the City's Capital Repair and Improvement Fund unless otherwise agreed to by the Parties. Nothing in this paragraph shall prohibit Manager or its capital campaign from recognizing donors, on an individual basis, as part of its efforts to raise capital for the improvement of the Premises. Notwithstanding any

provision in this Agreement, the Manager retains its own naming rights. The Manager shall be reimbursed for the procurement of naming rights for the Premises at a rate of fifteen percent (15%) of the gross proceeds.

3.10 Condition of Premises. Manager shall keep the Premises neat and clean and in a sanitary condition and will at all times preserve the Premises in good condition and repair.

3.11 Notice. Manager, upon becoming aware, shall promptly notify the City Contract Administrator in writing of any damage to, defects in, or non-operation of any elements of the Building Structure, Non-structural Components, and Building Systems, ordinary wear and tear excepted. City shall promptly acknowledge in writing the Manager's notice and shall provide a plan of action to address the issue or issues raised by the Manager.

3.12 Security. Manager shall provide all security necessary for the Premises and agrees to hold the City harmless from any and all damages incurred as a result of unauthorized use or entrances onto the Premises. The City will in consultation with the Manager, assess the status of the security systems in the Premises and, subject to availability of funds, will repair, upgrade or replace such security systems, as necessary within a reasonable period of time.

3.13 Evacuation of Premises. City reserves the right (but shall not be obligated) to evacuate the Premises for reasons of public safety (e.g., bomb threat).

3.14 Public Safety. Manager agrees that at all times it will:

3.14.1 Conduct its activities with full regard to public safety and will observe and abide by all applicable regulations and requests by duly authorized governmental agencies responsible for public safety to assure such safety;

3.14.2 Not obstruct or use for any purpose other than ingress or egress to and from the Premises portions of the sidewalks, entries, doors, halls, corridors, stairways, and all ways of access to public utilities on the Premises; and

3.14.3 Not bring onto the Premises any material, substance, equipment, or object which is likely to endanger the life of, or cause bodily injury to, any person on the Premises, or which is likely to constitute hazard to property, unless Manager obtains the prior approval of the City Fire Department or City Police Department.

#### **ARTICLE 4 – MANAGER OBLIGATIONS:**

4.1 General. The Manager shall exclusively manage the day-to-day operations of the Premises in accordance with the terms and conditions of this Agreement and the Manager's Business Plan. Sole compensation to the Manager for performance of its obligations shall be as set forth at Article 7 herein. The Manager's maintenance obligations shall be as set forth at Article 5 herein.

4.2 Cost Obligations. Except as may otherwise be set forth in this Agreement, any obligations of the Manager hereunder shall be performed at the sole cost and expense of the Manager.

4.3 Budget. The Manager and the City shall agree upon the form of the Manager's biennial operations budget for the Manager's principal function. Manager shall submit its budget to the City Contract Administrator for review and comment prior to adoption by its governing body. The budget at a minimum will show the Manager's projected costs and expenses and the associated rationale.

4.4 Booking & Rental Policies/Procedures. The Manager shall establish, implement and publish its booking and rental policies, procedures, rates and charges. Manager shall submit its proposed booking and rental policies, procedures, rates and charges, and any substantive amendments thereto, to the City's Contract Administrator for review and comment prior to implementation. The Manager shall book the Premises in accordance with such policies, procedures, rates and charges and shall charge users in accordance with the published rates and charges for the use and occupancy of the Premises and related components and equipment. Notwithstanding any other term or condition of this Agreement, the Manager shall be entitled to use its own discretion with respect to the rental rates and fees charged to the Resident Arts Organizations, except that the Manager shall, except under special circumstances that serve the greater good of the community which are communicated to and agreed upon by the City's Contract Administrator, charge no less than thirty-five percent less than the published commercial rental rates and fees for Resident Arts Organizations, except further that this provision relating to discounted rates shall not apply to educational services.

4.5 Agreements. Booking and rental agreements shall, to the maximum extent reasonable and practical, be based upon standard contract terms and conditions adopted by the Manager. Such standard contract terms and conditions and amendments thereto shall be submitted to the City's Contract Administrator for review and comment prior to implementation. This paragraph does not require review and approval of individual Agreements. The City recognizes that market conditions may require non-standard terms and conditions and that in such circumstances the Manager shall, in its sole discretion, have the authority to use a non-standardized agreement.



4.6. Shortening of Term. Third party agreements for the use of the Premises or any part thereof shall include reasonable provisions for termination of or shortening of the term for use of the Premises or any part thereof in order to accommodate work needed for capital improvements, emergency repairs, and unanticipated major maintenance and for events of force majeure which shall include, without limitation:

If any of the Premises or equipment necessary for Operation is damaged by fire, earthquake, flood, explosion, the public enemy, or acts of God, so as to render the Premises wholly or partially unfit for use, or so as to make it impracticable for User to make reasonable full use of such Premises, or if any of the Premises or equipment cannot be reasonably be occupied or is unfit for reasonable full use as a result of an order or directive of a governmental authority with jurisdiction over the subject matter, or if any of the Premises requires emergency repair to render the Premises fit for use.

4.7 Limitation of City's Liability. Unless consent is given in advance by the City, Manager is not authorized to enter into any agreements, and any such agreements are voidable, related to the use of the Premises that do not include a contract provision in substantially the form of the following:

Notwithstanding any provision in this agreement to the contrary, User agrees that it shall look solely to the estate and interest of Manager for the collection of any judgment arising out of this agreement requiring the payment of money by Manager or for the enforcement of any other judgment or remedy against the Manager arising out of this agreement and no assets of City shall be subject to levy, execution or other procedure for the satisfaction of User's remedies.

4.8 Regulations. Manager agrees that Manager and all of Manager's employees, agents and any Persons connected with Manager's use of Premises, and all third parties using or occupying the Premises under agreement with the Manager, and their employees and agents, shall:

4.8.1 Abide by and conform to all Federal, State and Local ordinances, laws, rules and regulations and all lawful orders of the police and fire departments or other municipal authorities and by all facility rules and regulations.

4.8.2 Adhere to all applicable Federal, State and Local laws, rules and regulations pertaining to, and including but not limited to WISHA and OSHA. Manager will provide all necessary and related safety equipment for its employees and agents to be in compliance with Federal, State and Local laws.

4.8.3 Obtain and pay for all necessary permits and licenses, and will not do, nor suffer to be done, anything on said Premises during the term of this Agreement in violation of any such laws, ordinances, rules or orders.

4.8.4 Abide by and conform to all rules and regulations adopted or prescribed by the City for the protection of the Premises.

4.8.5 Abide by and comply with all aspects of the Americans with Disabilities Act in the presentation of all performances other than requirements directly related to the Premises. Manager shall be responsible for ensuring that all services for individuals with disabilities as outlined in this act are fulfilled in regard to events and performances. The Parties recognize that ensuring compliance with the Americans with Disabilities Act is an appropriate use of the Capital Fund. Notwithstanding any other term or condition of this Agreement, the City shall remain the sole Party responsible for compliance with all applicable Federal, State and Local codes pertaining to the Premises, except that Manager shall be responsible for compliance with those Federal, State and Local codes that are directly related to operation of the Premises.

4.8.6 Not discriminate against any employee or any applicant for employment because of race, national origin, religion, sex, gender identity, sexual orientation, age, marital status, familial status, or the presence of any sensory, mental or physical handicap and further agrees to likewise not discriminate for those same reasons against any persons relative to admission, services or privileges offered to or enjoyed by the general public.

4.8.7 Obtain all releases necessary for the performance, display, re-creation, or use of copyrighted materials.

## **ARTICLE 5 – MAINTENANCE, REPAIR AND REPLACEMENT:**

5.1 The following definitions shall apply for purposes of this Agreement:

5.1.1 “Building Structure” shall mean and include anything constructed or erected to withstand the forces, stresses, and loads the use of which requires more or less permanent location on the ground, or attached to something having a permanent location on the ground, including any part of the supporting members such as footings, bearing walls, columns, beams or girders, roof, and exterior walls.

5.1.2 “Non-Structural Components” shall mean all components not part of the Building Structure, including without limitation, the non-load bearing walls, interior and exterior painting, partitions, the lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, finished flooring and coverings, light fixtures, shutters, awnings, window boxes, doorsteps, brick masonry,

stoops, porches, balconies, patios, doors, windows and any other materials constituting any part of the finished surfaces.

5.1.3 “Building Heating and Air Conditioning System (HVAC)” shall mean and include the building heating and air conditioning system including, the thermostatic controls, the distribution system, the heating and air conditioning coils, the condenser unit, the compressor, the boiler (including elements and relay), hot water tanks, and all of the related parts.

5.1.4 “Building Plumbing Systems”, shall mean and include the building plumbing system and all of its component parts, including without limitation, all lines, toilets, drains, and all kitchen and concession areas.

5.1.5 “Building Elevator Systems”, shall mean and include all parts of the building elevator systems, including the car, the elevator supports, the brake system, the electrical system, the position indicator panel, the lights, flooring materials, and the interior finish.

5.1.6 “Building Fire Protection System” shall mean and include the building fire protection system, including the fire curtain, the batteries in alarm system and backflow prevention devices and all related parts.

5.1.7 “Building Electrical System” shall mean all the fixed, internal, connected systems, including the wiring and ancillary equipment, within the building designed to distribute power and all the related parts. It shall not include Performance Related Components” such as the patch panel, amplifier, and speaker systems, microphones, ballasts, dimmer packs, and mixer.

5.1.8 “Building Systems” shall mean and refer to collectively or in part, the Building Heating and Air Conditioning System, the Building Plumbing Systems, the Building Elevator Systems, the Building Fire Protection System, and/or the Building Electrical System.

5.1.9 “Performance Related Components” shall mean and refer to such items as the stage rigging system, the sound system, the stage lighting system and other items which uniquely relate to performances within the Premises, as opposed to items which are common to general use structures.

5.2 City Obligations. The City shall, at its sole cost and expense, be responsible for maintenance and repair of the Building Structure and shall keep and maintain the Building Structure in good repair and working order. The City shall further, at its sole cost and expense, be responsible for the repair and, if necessary the replacement of, the Non-Structural Components, Building Systems, and Performance Related Components, in order to keep them in working order. The City’s duty to repair and, if necessary, replace, Non-Structural Components shall include but is not limited to those items set forth in Paragraph 5.1.2. City shall promptly make repairs or replacements (considering

the nature and urgency of the repair or replacement) for that which City is responsible, in accordance with and subject to applicable laws and available funds.

5.3 Manager Obligations. Manager shall be responsible for the general and daily preventive maintenance of the Premises including, but not limited to, day-to-day janitorial and cleaning services, replacement of light bulbs, cleaning of floor surfaces and windows, touch up of interior paint, and removal of snow, ice and debris from pedestrian walkways.

Manager shall be responsible for the maintenance, in accordance with the installer's or manufacturer's specifications where applicable, of the Non-structural Components, the Building Systems, and the Performance Related Components to maintain them in good repair and working order. The Manager shall, in consultation with the City, develop and implement a Maintenance Schedule to ensure that the Manager maintains the Building Systems, the Non-Structural Components, and the Performance Related Components in accordance with the applicable standards. The Maintenance Schedule shall identify all Non-Structural Components, Building Systems and other Performance Related Components that require maintenance and set forth a schedule for such maintenance and for anticipated capital replacement.

The City may make its staff available to the Manager on a case by case basis to facilitate and support the maintenance and repairs of the Non-structural Components, Building Systems, and Performance Related Components.

Manager shall notify the City as soon as practical after it becomes aware of any material defects, damage, or failure of the Building Structure, or any element of the Non-Structural Components or Building Systems.

5.4 Inspection and Review of Maintenance Schedule. Every six months Manager and the City shall perform a joint inspection of the Building Structure, the Non-structural Components, the Building Systems and the Performance Related Components for the purposes of determining the condition of the Premises and the components thereof and identifying any maintenance needs or deficiencies and making recommendations for maintenance or repair. A report detailing the scope and findings of each inspection shall be prepared and maintained by the Manager and made available to the City. Additionally, every six months City and Manager shall review the Maintenance Schedule as defined in 5.3, to ensure compliance.

5.5 Access. City, its agents, contractors and representatives may enter the Premises to inspect or show the Premises, to clean and make repairs, alterations, or additions to the Premises, and to conduct or facilitate repairs, alterations, or additions to any portion of the Premises, and for the purpose of ascertaining the condition of the Premises. Manager shall promptly provide City

with a duplicate key for any locks furnished by the Manager which lock secures any doors to or within the Premises. Except in emergencies and where City otherwise has a right or authorization to enter the Premises, City shall provide Manager with reasonable prior notice of entry into the Premises, which may be given orally. If reasonably necessary for the protection and safety of Manager and its employees, City shall have the right to temporarily close all or a portion of the Premises to perform repairs, alterations, and additions. However, except in emergencies, City will not close the Premises if the work can reasonably be completed at a time and in a manner that will not disrupt the operation of the Premises.

#### 5.6 Capital Expenses.

The City agrees to fund a Theater Capital Repair and Improvement Fund, established and controlled by the City, in the amount of \$500,000.00 per year for the term of the Agreement, for the purpose of addressing Capital Expenses. Priority will be given to repairs and improvements that enhance public safety, energy efficiency, and operational function. Funds in the Theater Capital Repair and Improvement Fund may be expended by the City to fulfill its maintenance, repair or replacement obligations in Section 5.2, and may also be available as a one for one match for funds provided by the Manager or any other entity for any capital improvements to the Premises.

The City and the Manager will review on a quarterly basis the annual prioritized list of Capital Expenses as are contained in the Budget.

The City Contract Administrator's approval is required for all disbursements from the Theater Capital Repair and Improvement Fund. The City Contract Administrator shall not withhold approval of any project without reasonable cause, before commencement of any work on any project. The City shall pay invoices on all approved projects within 30 days of submission after project completion.

### **ARTICLE 6 - CONTRACT REPRESENTATIVES:**

6.1 City. The City Public Assembly Facilities Director or designee shall be the City Contract Administrator and shall be responsible for monitoring the performance of the Manager, the approval of actions by the Manager, approval for payment of billings and expenses submitted by the Manager, and the acceptance of any reports by the Manager. All City consent or authorizations provided for under this Agreement may be given in writing by the City Manager except as to such consents or authorizations that are reserved to the City Council by this Agreement, state law, local ordinance or the City Charter.

6.2 Manager. Except as may be otherwise agreed to in writing by the Parties, the Manager's Executive Director or designee shall be the Manager's

Representative and the person for all communications regarding performance of Manager under this Agreement. All communications given or received from the Manager's Representative shall be binding on the Manager. Manager's representative shall ensure supervision and coordination of Manager's obligations under this Contract, and shall take corrective action as necessary to meet the requirements of this Agreement. Manager's Representative shall be available at all times during normal working hours throughout the term of the Agreement.

## **ARTICLE 7 – FINANCIAL TERMS:**

7.1 Revenue. Manager shall have the exclusive right to receipt of all revenue from the use of the Premises, including but not limited to, rental fees, license fees, concessions, and all other charges and fees associated with the use or rental of the Theaters, the Jones Building and City owned equipment. Manager shall maintain accurate records for all receipts and accounts due and all funds received shall be utilized solely to fund the costs and expenses incurred by Manager for the management, maintenance, and operation of the Premises, except as received by Manager for its presenting function.

7.2 Management Fee. Except as otherwise set forth in this Agreement, the City shall pay to Manager as Manager's compensation for the obligations of the Manager pursuant to this Agreement, the following sum:

**July 1, 2016 to December 31, 2016:** a total amount of \$337,500, payable in six (6) equal monthly installments in the amount of \$56,250 each month;

**January 1, 2017 to December 31, 2017:** a total amount of \$700,000, payable in twelve (12) equal monthly installments in the amount of \$58,333 each month.

**Commencing in 2018**, the Management Fee shall be adjusted annually on the first day of each full calendar year during the Term of the Agreement (and any extension thereof) by the percentage change in the Consumer Price Index (CPI for All Urban Consumers Seattle-Tacoma-Bremerton) for the one year period measured from the first day of January to the last day of December of the immediately preceding Calendar Year of the Term, as published by the Bureau of Labor Statistics of the U.S. Department of Labor, or of any revised or successor index hereafter published by the Bureau of Labor Statistics or other agency of the United States Government succeeding to its functions ("CPI"), to a maximum of three percent (3%).

In addition to the Management Fee, Manager shall be entitled to receive an annual Performance Incentive Fee of up to \$30,000 commencing in the first full year of the Agreement, based upon actual results achieved from

January to December in each year of the Agreement. Any Incentive Fee payment will be calculated based on the revenue increase over the previous year, and will be made when a 5% increase in overall revenues over the previous year (revenues inclusive of box office fees, concessions, rent, and production fees) is achieved. Results will be reported by the end of February for the previous January to December timeframe, and any Incentive Fee payment will be made by March 30 of 2017 for the operating year 2016 and by March 30 of 2018 for the operating year 2017. For the operating years 2018, 2019, and 2020, performance incentive measures will be determined once the impact of potential construction related closures is defined through the submitted Business Plan and Budget related to these time frames.

7.2.1 The Manager shall submit an original written invoice in a format comparable to the invoice attached hereto and identified as Exhibit "C", for services completed during the previous month. Regular monthly invoicing by the Manager shall be submitted for payment on the 15<sup>th</sup> of each month beginning the first month of the Agreement, and shall be payable no later than the 6<sup>th</sup> day of each month following Manager's submission of each invoice.

7.2.2 All payments shall be subject to adjustment for any improperly invoiced amounts. In the event the Manager fails to pay any taxes, assessments, penalties, or fees imposed by any governmental body, including a court of law, then the Manager authorizes the City to deduct and withhold or pay over to the appropriate governmental body those unpaid amounts upon demand by the governmental body. It is agreed that this provision shall apply to taxes and fees imposed by City ordinance. Any such payments shall be deducted from the Manager's total compensation.

7.3 City Admission Taxes. The Manager agrees to collect and pay to the City all admission taxes on tickets to Theater events as required by applicable City laws as they now exist or as they may be amended from time to time hereafter.

7.4 Taxes. Manager shall pay and be liable for any rental, sales, and use taxes imposed upon or measured by any rental owed in accordance with all statutes, codes, ordinances, orders, rules, and regulations of any municipal or governmental entity that are applicable to any part of the Premises, and shall indemnify, hold harmless, and defend City against any failure by Manager to duly pay such taxes. If an assessment is payable in installments, taxes for the year shall include the amount of the installment and any interest due and payable during that year. If a change in taxes is obtained for any year of the term during which Manager paid Manager's pro rata share of any taxes, then taxes for that

year will be retroactively adjusted and City shall provide Manager with a credit, if any, or Manager shall promptly pay any increase based on the adjustment. Manager will furnish to City, within 15 days after request, official receipts of the appropriate taxing authority, or other proof satisfactory to City, evidencing the payment of any tax. Manager will pay prior to delinquency all personal property taxes assessed against personal property of Manager located on the Premises. In the event that leasehold excise taxes are levied by the state of Washington pursuant to RCW 82.29A, as hereafter may be amended, the Manager shall be responsible for collecting and paying to the State all such Leasehold excise taxes.

7.5 Accounting Records. The Manager shall maintain books and records as are customarily and necessarily kept for the purpose of managing, maintaining and operating the Premises, according to generally accepted accounting practices. Financial reports shall be prepared at least quarterly and shall be provided to City finance officers for review within 30 days after receipt thereof by the Manager. The Manager's books of account shall be reviewed annually by an independent Certified Public Accountant, and the results of such audit shall be provided to the City Finance Director within thirty (30) days of the adoption of the audit by the Manager's Board of Trustees. The Manager agrees that all of its books and records of every kind, without limitation, pertaining to the operation, maintenance or management of the Premises shall, upon reasonable notice, be open and available for inspection by the City Manager, Director of Finance, Director of Public Assembly Facilities and such other officers or personnel of the City as may be designated by either of them or such officers or personnel of the State Auditor. The City Manager and City officers designated by the City Manager shall have the right to enter upon and inspect the Premises and books and records held by the Manager at any reasonable time during normal business hours.

## **ARTICLE 8 – INSURANCE:**

Manager shall carry and maintain the following insurance (“**Manager’s Insurance**”), at its sole cost and expense:

(1) Commercial General Liability insurance using Insurance Services Office form CG0001(04-13) or the equivalent to cover liability, Bodily injury, Personal Injury, and Property damage, all applicable to the Premises and its appurtenances providing, on an occurrence basis, with a limit not less than \$1,000,000 each occurrence and \$2,000,000 aggregate; Commercial General Liability policy shall include Tenant’s Legal Liability coverage with a limit not less than \$1,000,000;

(2) Commercial Automobile Liability covering all owned autos (if any), non-owned automobiles and hired automobiles;



(3) Employer's Liability with limits not less than \$1,000,000;

(4) Excess or Umbrella Liability with limits not less than \$2,000,000 each occurrence and \$2,000,000 aggregate providing coverage in excess of General Liability, Automobile Liability and Employer's Liability;

(5) Special Form property Insurance with a waiver of subrogation of claims against the City, or its elected or appointed officials, officers, employees or agents, written at replacement cost value and with a replacement cost endorsement covering all of Manager's trade fixtures and personal property within the Premises ("**Manager's Property**");

(6) Wrongful Acts insurance covering legal liability & defense costs claims arising out of the content of performances such as: invasion of the right of privacy, infringement of copyright, libel, slander or other forms of defamation, plagiarism, , and breach of contract, a minimum limit of \$1,000,000 each claim and \$1,000,000 aggregate. If provided on a Claims Made basis, any retroactive date shall not be earlier than the inception of this Agreement. In addition, coverage must be maintained with policy renewals or an extended reporting period endorsement for not less than three years following the end of this Agreement; and

(7) Workers' Compensation Insurance as required by law.

Any company writing any of Manager's Insurance shall have an A.M. Best rating of not less than (A-) VII. All Commercial General Liability Insurance policies shall name Manager as a named insured and City as an additional insured using Insurance Services Office form CG2026(04-13) or the equivalent. Manager shall upon execution of this Agreement, provide City with a certificate of insurance evidencing Manager's Insurance, and upon renewals at least 15 days prior to the expiration of the Insurance coverage. Manager shall notify the City at least 30 days in advance of any policy cancellation.

Except as specifically provided to the contrary, the limits of either party's insurance shall not limit such party's liability under this Agreement. By requiring insurance herein, the City does not represent that coverage and limits will be adequate to protect Manager and such coverage and limits shall not limit Manager's ability under the indemnities and reimbursements granted to the City in this Agreement. Manager agrees to waive all rights of subrogation against City for loss or damage to Manager's property arising out of fire, lightning, and perils of Extended Coverage in, on, or about the Premises. Manager agrees that any policy of insurance acquired pursuant hereto, or sought to be applied to the terms hereof by Manager, shall contain a Waiver of Subrogation clause consistent with the terms of this paragraph.

## **ARTICLE 9 – INDEMNITY:**

9.1 Manager hereby agrees to indemnify, defend and hold harmless the City, its officers, officials, employees, agents, and contractors (excluding Manager) from and against any and all claims, losses, damages, liabilities, actions, judgments or execution of third parties of any kind or nature whatsoever, whether at law or in equity, including, but not limited to, reasonable attorney's fees and court costs, arising out of, relating to, resulting from, or caused by Manager, its officers, board members, employees, agents, servants, contractors, subcontractors and representatives in its use, management, maintenance or operation of the Premises or any part thereof or of any property or equipment related thereto, or the performance of its obligations under this Agreement or any aspect of the management, maintenance, use or operation of the Premises or any part thereof or of any property or equipment related thereto, during the term of this Agreement, regardless of whether or not the same is caused in part by the City or any other person indemnified under this Section, except to the extent that the same is caused by the negligence or willful misconduct of the City or other person to be indemnified under this Section. No claim or litigation shall be settled without prior written approval of City.

9.2 Except for any loss, injury or damage to person or property which may be sustained by reason of the City's own negligence, Manager hereby expressly relieves and discharges City from any and all liability for any loss, injury, or damage to person or property which may be sustained by reason of its use or occupancy of the Premises or any part thereof under this Agreement or by virtue of Manager's agreements with third parties.

9.3 THE MANAGER SPECIFICALLY ASSUMES POTENTIAL LIABILITY FOR ACTIONS BROUGHT BY THE MANAGER'S OWN EMPLOYEES AGAINST THE CITY AND, SOLELY FOR THE PURPOSE OF THIS INDEMNIFICATION AND DEFENSE, THE MANAGER SPECIFICALLY WAIVES ANY IMMUNITY UNDER THE STATE INDUSTRIAL INSURANCE LAW, TITLE 51 RCW.

9.4 Survival. This Article 9 shall remain in force despite termination of this Agreement with respect to acts and omissions occurring before termination of this Agreement (whether by expiration of the term or otherwise) and termination of the services of Manager under this Agreement.

9.5 Manager shall be given prompt notice of any claims for which the indemnification will be sought and shall be given full and complete cooperation from the City, in the defense or settlement of all such claims. When Manager is required to indemnify, defend and hold harmless the City with respect to a claim under this Article 9, the City shall not unreasonably withhold, condition, or delay its consent to any settlement thereof proposed by Manager under which the City would not be required to pay any money or undertake any liability. Notwithstanding anything to the contrary, the obligations of Manager under this Article 9 in respect of injury or death to persons or damage to property, so

long as Manager has maintained the insurance required by Article 8, shall be limited to the proceeds of insurance required to be maintained under Article 8, actually received by Manager. However, if Manager fails to comply with Article 8 (such as by failing to keep in force policies of insurance as required by Article 8), the preceding sentence shall be deemed modified so that the proceeds of insurance “actually received by Manager” shall be the proceeds that Manager would have been entitled to receive had Manager complied with Article 8.

#### **ARTICLE 10 – TERM:**

10.1 Term. This Agreement shall be effective on the Effective Date and shall be in full force and effect until the **31st day of December, 2020** unless sooner terminated by either Party. In the event that this Agreement is executed on or after the Effective Date, the Parties agree that the Agreement, and the rights, duties, and obligations of the Parties, shall be interpreted and applied as though all terms and conditions hereof became effective on the Effective Date.

10.2 Extension. This Agreement may be extended for additional two year terms upon the same terms and conditions by mutual agreement of the Parties provided that, the Parties may mutually agree to adjust the insurance requirements and Management Fee, and provided further that the Parties shall finalize any extension of this Agreement no later than March 30, 2020.

#### **ARTICLE 11 – DISPUTE AVOIDANCE AND RESOLUTION:**

The Parties are fully committed to working with each other throughout the term of this Agreement and agree to communicate regularly with each other at all times so as to avoid or minimize disputes. The Parties agree to act in good faith to prevent and resolve potential sources of conflict before they escalate into a question or controversy. If a question or controversy arises between the Parties concerning the observance, performance, interpretation or implementation of any of the terms, provisions, or conditions contained herein or the rights or obligations of either Party under this Agreement (a “**Dispute**”), the Parties each commit to resolving such Dispute in an amicable, professional and expeditious manner. The Parties further agree that in the event a Dispute arises, they will first attempt to resolve any such Disputes through discussions between representatives of each Party.

The Parties shall attempt to resolve any dispute as to the interpretation or enforcement of any part of this Agreement first, if reasonably possible, by mediation. The Parties shall make all reasonable efforts to select a mutually agreeable mediator. If the Parties are unable to agree upon a mediator, then the Washington Arbitration and Mediation Service shall select a mediator. No

arbitration may proceed to resolve a dispute until after the mediator determines that the Parties have reached an impasse and that further mediation would not likely result in success. The Parties shall each pay their attorneys' fees and costs for the mediation and one-half of the mediator's fees and costs.

If mediation reaches such an impasse, said dispute shall be determined by binding arbitration in accordance with the laws of the State of Washington. The mediator shall not be the arbitrator, unless the Parties so mutually stipulate. If the Parties are not able to agree upon a single arbitrator within ten (10) days following demand therefore, then the arbitrator shall be appointed by the Washington Arbitration and Mediation Service. Any mediator or arbitrator must be independent, and shall have no prior business or personal relationship with any of the Parties and no prior business or personal relationship with the attorneys, accountants or other professional advisors of any of the Parties of such nature as to cause actual bias or a reasonable appearance of bias.

The Parties shall each pay one-half of the arbitrator's fees and costs, unless one Party is ruled the prevailing party by the arbitrator, in which case the arbitrator, subsequent to the arbitration itself, shall award the prevailing Party the arbitrator's fees and costs. Any mediation or arbitration shall be brought in Pierce County, Washington unless the Parties mutually agree on a location outside Pierce County.

The Parties expressly waive the right to an action in state or federal court to enforce any terms in this Agreement and expressly waive the right to trial by jury. It is the intention of the Parties to have all disputes concerning this Agreement decided by binding and final Arbitration as set forth in this Article

## **ARTICLE 12 - BREACH, DEFAULT, TERMINATION:**

12.1 Termination. Either Party may terminate this Agreement, at any time and for any reason stated in the notice of termination by giving sixty (60) calendar days written termination notice to the other Party; provided that, if termination arises out of a Dispute, the Parties must first comply with Article 11 and paragraph 12.2 herein. Upon termination of this Agreement as set forth in this paragraph, Manager shall retain its right to carry out its existing contractual obligations with third parties, unless the City and Manager agree to an assignment and delegation of those rights and obligations and the assignment and delegation of those rights are not prohibited by the Manager's contractual obligations with third parties.

12.2 Remedies. In the event of a breach of this Agreement, either Party shall provide written notice of the breach of the Agreement to the other Party which allows for a period of sixty (60) days for the Party in breach to cure. If the Party in breach fails to cure the breach within sixty (60) days after the notice is

given, either Party may exercise any remedy provided by law or equity, subject to the limitations set forth in Article 11.

### 12.3 Termination Procedure.

Upon termination of this Agreement the City shall pay to the Manager the agreed upon fee pro-rated to the date of termination. The City may withhold any amounts due the Manager such sum as the City determines to be necessary to protect the City against potential loss or liability. The rights and remedies of the City provided in this section shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Agreement.

After receipt of a notice of termination, and except as otherwise directed by the City, the Manager shall:

Stop work under the Agreement on the date, and to the extent specified, in the notice;

Enter into no further agreements for the use of the Premises and place no further orders or subcontracts for materials, services, or facilities except as may be necessary for completion of such portion of the work under the Agreement to be performed prior to the termination date;

Assign to the City in the manner, at the times, and to the extent directed by the City, all of the rights, title, and interest of the Manager under the orders and subcontracts so terminated, in which case the City has the right, at its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts;

Settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the City to the extent City may require, which approval or ratification shall be final for all the purposes of this clause;

Transfer title to the City and deliver in the manner, at the times, and to the extent directed by the City any property which, if the Agreement had been completed, would have been required to be furnished to the City;

Take such action as may be necessary, or as the City may direct, for the protection and preservation of the property related to this Agreement, which is in the possession of the Manager and in which the City has or may acquire an interest.

## **ARTICLE 13 – MISCELLANEOUS:**

13.1 Controlling Law. This Agreement shall be deemed to be made under, shall be construed in accordance with, and shall be governed by the internal, substantive laws of the State of Washington (without reference to conflict of law principles).

13.2 Venue. Manager and City hereby consent and agree that venue of any action brought under this Agreement shall be in Pierce County, Washington; provided, however, that venue of such action is legally proper.

13.3 Time of Essence. Time is of the essence of this Agreement and each provision hereof.

13.4 Liens. Manager shall not cause or permit mechanics' or other liens to be placed upon the Premises in connection with any work or service done or purportedly done for the benefit of the Manager. Manager shall promptly pay and discharge any and all liens arising out of any construction, alterations or repairs done, suffered or permitted to be done by Manager on any part of the Premises. City is hereby authorized to post any notices or take any other action upon or with respect to any part of the Premises that is or may be permitted by law to prevent the attachment of any such liens to the Premises; provided, however, that failure of City to take any such action shall not relieve Manager of any obligation or liability under this Section 13.4 or any other Section of this Agreement.

13.6 Assignment. Manager may transfer or assign this Agreement to another Person, but no transfer or assignment shall be effective except after prior written notice to and consent by the City and transferee/assignee's written commitment, delivered to City, that transferee/assignees shall thereafter be responsible for all obligations under the Agreement. Such an transfer/assignment shall relieve the Manager of any further obligations under the Agreement, including any obligations not fulfilled by Manager's transferee/assignee; provided that, the transfer/assignment shall not in any respect relieve the Manager, or any of its successors in interest, of responsibility for acts or omissions, known or unknown, or the consequences thereof, which acts or omissions occur prior to the time of the transfer/assignment.

13.7 Waiver. The Parties agree that neither the failure nor the delay of any Party to exercise any right, remedy, power or privilege under this Agreement shall operate as a waiver of such right, remedy, power or privilege, nor shall any single or partial exercise of any right, remedy, power or privilege preclude any other or further exercise of the same or of any other right, remedy, power or privilege, nor shall any waiver of any right, remedy, power or privilege with respect to any occurrence be construed as a waiver of such right, remedy, power or privilege with respect to any other occurrence. No waiver shall be effective unless it is in writing and is signed by the Party asserted to have granted such waiver.

13.8 Business Days. If the last day of any time period stated in this Agreement or the date on which any obligation to be performed under this Agreement shall fall on a Saturday, Sunday or legal holiday, then the duration of such time period or the date of performance, as applicable, shall be extended so that it shall end on the next succeeding day which is not a Saturday, Sunday or legal holiday.

13.9 Amendment. This Agreement may be amended only in writing signed by authorized representatives of the City and Manager. In addition to any authority the City Manager may otherwise have to amend this Agreement, the City Manager is authorized to, without prior approval of the governing body of the City, execute amendments to this Agreement that do not increase the term of the Agreement or the compensation to be paid by the City to the Manager and do not otherwise materially increase the monetary obligations of the City.

13.10 Limited Severability. The City and the Manager each believes that the execution, delivery and performance of this Agreement are in compliance with all Applicable Laws. However, in the unlikely event that any provision of this Agreement is declared illegal, invalid, void or unenforceable under present or future laws (or is construed as requiring the City to do any act in violation of any Applicable Laws, constitutional provision, law, regulation, City code or City charter), such provision shall be deemed severed from this Agreement and this Agreement shall otherwise remain in full force and effect; provided that this Agreement shall retroactively be deemed reformed to the extent reasonably possible in such a manner so that the reformed agreement (and any related agreements effective as of the same date) provide essentially the same rights and benefits (economic and otherwise) to the Parties as if such severance and reformation were not required. The Parties further agree, in such circumstances, to do all acts and to execute all amendments, instruments and consents necessary to accomplish and to give effect to the purposes of this Agreement, as reformed.

13.11 Joint and Several Liability. Manager acknowledges that, in any case in which Manager and Manager's Contractors are responsible under the terms of this Agreement, such responsibility is joint and several as between Manager and any such Manager's Contractors; provided that, the Manager is not prohibited from allocating such liability as a matter of contract.

13.12 Notices.

13.12.1. Except as otherwise required by law, any notice, demand or other communication given hereunder, shall be in writing and shall be given by personal delivery or be sent by certified or registered U.S. Mail, return receipt requested, addressed to the Parties at their respective addresses set forth below, or at such other address as a Party may designate in writing pursuant to the

terms of this paragraph, or by facsimile or by any nationally recognized express or overnight delivery service (e.g., Federal Express or UPS), with all postage and other delivery charges prepaid:

To: City of Tacoma  
Public Assembly Facilities Department  
Attention: Director  
1500 Broadway  
Tacoma, WA 98402  
Fax: (253) 830-6605

And To: City Attorney  
747 Market Street, Rm. 1120  
Tacoma, WA 98402  
Fax: (253) 591-5755

To: Broadway Center for the Performing Arts  
Attention: Executive Director  
901 Broadway  
Tacoma, WA 98402  
Fax: (253) 591-2013

With a Copy To: Davies Pearson, P.C.  
Attention: Brian M. King  
920 Fawcett Ave.  
Post Office Box 1657  
Tacoma, WA 98401  
Fax: (253) 572-3052

The address specified herein for either Party may be changed by providing notice to the other Party no less than thirty (30) days' advance written notice of such change in address.

13.12.2 Effective Date of Notices. All such notices, demands or other communications will (i) if delivered personally or delivered through a same day delivery/courier service be deemed effective upon delivery or refusal to accept delivery by the addressee, or (ii) if delivered by U.S. mail in the manner described above be deemed effective upon the earlier of receipt or three business days after deposit in a post office operated by the United States or with a United States postal officer (in each case regardless of whether such notice, demand or other communication is received by any other person to whom a copy of such notice, demand or other communication is to be delivered pursuant to this paragraph). Any notice sent by a recognized national overnight delivery service shall be deemed effective one (1) business day after deposit with such service. Any notice sent by facsimile shall be deemed effective upon confirmation



of the successful transmission by the sender's facsimile. Notwithstanding the foregoing, no payment shall be deemed to be made until actually received in good and available funds by the intended payee.

13.13 Force Majeure. Neither Party hereto shall be liable to the other Party for any failure to perform any obligation set forth herein to the extent such failure is caused by war, natural disasters (including but not limited to earthquakes, floods and volcanic eruptions), act of terrorism, war, riot or civil unrest, performance failures outside the control of the Parties (including but not limited to work stoppages, strikes), an act of God, or other delays outside a Party's reasonable control, provided that such Party has made and is making all reasonable efforts to perform such obligation and minimize any and all resulting loss or damage.

13.14 Annual Review. Commencing on the first anniversary of the first full year of this Agreement and on or about each one-year anniversary of this Agreement thereafter, Manager and City shall, except as may be otherwise agreed to by the Parties, meet face-to-face to discuss implementation of this Agreement and any changes that either Party believes should be made. The Parties shall negotiate any proposed amendments to this Agreement in good faith.

13.15 Performance Monitoring. The City will monitor the performance of the Manager against the goals and performance standards required herein. Substandard performance as reasonably determined by the City will constitute non-compliance with this agreement. If action to correct such substandard performance is not taken by the Manager within sixty (60) days after being notified by the City, contract termination procedures may be initiated.

13.16 Subsequent Action. In the event that after this Agreement becomes effective, (a) there is a change in the law which requires the City or the Manager to perform any act or cease performing any act which is inconsistent with this Agreement; (b) there is a change in the law which broadens the authority of the City or the Manager with respect to any act permitted or authorized under this Agreement; or (c) the City or the Manager believe that amendments to this Agreement are necessary or appropriate, then the City and the Manager agree to enter into good faith negotiations to amend this Agreement so as to enable the Parties to address, in a manner reasonably acceptable to all Parties, such change or other development which formed the basis for the negotiations. The Parties recognize that the purpose of the negotiations would be to preserve, to the maximum extent consistent with law, the scope and purpose of this Agreement.

13.17 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. The obligation to be reasonable shall only be negated if arbitrariness is clearly and explicitly permitted as to the specific item in question, such as in the case of a Party being given “sole discretion” or being allowed to make a decision in its “sole judgment.”

13.18 Section Headings. The Section headings contained in this Agreement are for convenience in reference only and are not intended to define or limit the scope of any provision of this Agreement.

13.19 Construction The terms and provisions of this Agreement represent the results of negotiations between the Parties, each of which has been or has had the opportunity to be represented by counsel of its own choosing, and none of which has acted under any duress or compulsion, whether legal, economic or otherwise. Consequently, the terms and provisions of this Agreement shall be interpreted and construed in accordance with their usual and customary meanings. The Parties each hereby waive the application of any rule of law which would otherwise be applicable in connection with the interpretation and construction of this Agreement that ambiguous or conflicting terms or provisions contained in this Agreement shall be interpreted or construed against the Party who prepared or whose attorney prepared the executed Agreement or any earlier draft of the same.

13.20 Rights Limited. Manager may not enter into agreements with a third party for use or occupancy of the Premises or use of equipment that provide any rights that are greater than the rights granted to the Manager herein or for a term longer than the term of this Agreement, or for a term that extends beyond termination of this Agreement. Any provisions in such agreements that are in conflict with any provisions herein shall be voidable by the City or Manager.

13.21 Third Party Beneficiaries. No person or entity shall be a third Party beneficiary to this Agreement, except for permitted transferees or assignees to the extent that they assume or succeed to the rights and/or obligations of the Manager under this Agreement, and except that the indemnified Parties referred to in the indemnification provisions of this Agreement shall be third Party beneficiaries of such indemnification provisions.

13.22 Independent Contractor. Nothing contained in this agreement is intended to, or shall be construed in any manners, as creating or establishing the relationship of employer/employee between the parties. The Manager shall at all times remain an independent contractor with respect to the services to be performed under this agreement. Any and all employees of Manager or other persons engaged in the performance of any work or services required by Manager under this agreement shall be considered employees or sub-contractors of the Manager only and not of the City; and any and all claims that might arise, including worker’s Compensation claims under the Worker’s Compensation laws of the State of Washington or any other state, on behalf of

said employees or other persons while so engaged in any of the work or services provided to be rendered herein, shall be the sole obligation and responsibility of the Manager.

13.23 Books and Records. The Manager shall maintain books, records, documents and other evidence of accounting procedures and practices, which sufficiently and properly reflect all direct and indirect costs of any nature expended in the performance of this Contract and reflect all sums received by the Manager for the use of the Premises. These records shall be subject at all reasonable times to inspection, review, or audit by personnel duly authorized by the City. The Manager will retain all books, records, documents, and other materials relevant to this Agreement for six years after settlement, and make them available for inspection by persons authorized under this provision.

13.24 Nonliability. No City Council member, official, representative, agent, attorney or employee of the City shall be personally liable to any of the other Parties hereto, or to any successor in interest to any of the other Parties, in the event of any default or breach by the City or for any amount which may become due to any of the other Parties or their successors, or with respect to any obligation of the City under the terms of this Agreement. Notwithstanding anything contained in this Agreement to the contrary, the liability of the Manager under this Agreement shall be limited solely to the assets of the Manager and shall not extend to or be enforceable against: (i) the individual assets of any of the individuals or entities who are shareholders, members, managers constituent partners, officers or directors of the general partners or members of the Manager; (ii) the shareholders, members or managers or constituent partners of the Manager; or (iii) officers of the Manager.

13.25 Survival. All obligations to release, hold harmless, defend and indemnify contained in this Agreement shall survive the execution and delivery of this Agreement, the closing of any transaction contemplated herein, and the rescission, cancellation, expiration or termination of this Agreement upon the terms and for the period set forth in each respective Section.

13.26 Exhibits. The Parties agree that all references to this Agreement include all Exhibits designated in and attached to this Agreement, such Exhibits being incorporated into and made an integral part of this Agreement for all purposes.

13.27 Entire Agreement. This Agreement is the full and complete agreement of City and Manager with respect to all matters covered herein, and all prior and contemporaneous agreements, representations, negotiations and understandings of the Parties hereto, oral or written, are hereby superseded and merged herein. The foregoing sentence shall in no way affect the validity of any instruments executed by the Parties in the form of the exhibits attached to this

Agreement. As of the Effective Date, this Agreement replaces and supersedes any and all prior Management Agreements between the Parties,

13.28 Representations of Parties.

13.28.1 The City's Representations. The City hereby represents and warrants to Manager that it has full statutory right, power and authority to enter into this Agreement and perform in accordance with its terms and provisions; that the Parties signing this Agreement on behalf of the City have the authority to bind the City and to enter into this transaction; and that the City has taken all requisite action and steps to legally authorize the execution, delivery, and performance of this Agreement.

13.28.2 Manager's Representations and Warranties. Manager hereby represents and warrants to the City that it has full power and authority to enter into this Agreement and perform in accordance with its terms and provisions; that the Parties signing this Agreement on behalf of the Manager have the authority to bind Manager and to enter into this transaction; and that Manager has taken all requisite action and steps to legally authorize the execution, delivery, and performance of this Agreement.

13.29 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.

13.30 Discrimination. Manager, for itself and its successors and assigns, agrees that during the term of this Agreement, Manager will not discriminate in any employment action because of race, creed, color, national origin, marital status, sex, sexual orientation, age, or the presence of any sensory, mental or physical handicap. In the event of non-compliance by the Manager with any of the non-discrimination provisions of this Agreement, the City shall provide written notice of said non-compliance and provide Manager sixty (60) days to cure the non-compliance. Should the Manager not have cured the non-compliance within sixty (60) days, the City shall be deemed to have cause to terminate this Agreement, in whole or in part.

13.31 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original and all so executed shall constitute one agreement, binding on the Parties.

IN WITNESS WHEREOF, authorized representatives of City and Manager hereby execute this Agreement as of the date first set forth herein.

**CITY OF TACOMA**

**BROADWAY CENTER FOR THE  
PERFORMING ARTS**

\_\_\_\_\_  
City Manager

\_\_\_\_\_  
Its President

\_\_\_\_\_  
Director  
Public Assembly Facilities

\_\_\_\_\_  
Its Treasurer

\_\_\_\_\_  
Director  
Finance Department

\_\_\_\_\_  
David Fischer,  
Its Executive Director

Attest:

UBI# \_\_\_\_\_

\_\_\_\_\_  
Doris Sorum, City Clerk

Approved as to form:

\_\_\_\_\_  
Deputy City Attorney

**EXHIBIT "A"**

Description of Premises

**EXHIBIT “B”**

List of Resident Arts Organizations as of July 01, 2016

**EXHIBIT "C"**

Invoice

This form is intended to illustrate the information the CITY needs to process contract payments. The CITY prefers that CONTRACTORS use their standard business invoice forms so long as they include the following information. CONTRACTORS who do not have a standard business invoice form may use this form as their invoice. Your cooperation in providing us the information we are requesting will ensure prompt processing of your payments.

**I HEREBY REQUEST PAYMENT FOR SERVICES:**

AS PER CONTRACT No.: \_\_\_\_\_ AMOUNT DUE: \_\_\_\_\_

I HEREBY CERTIFY THAT THIS BILL IS CORRECT AND JUST AND THAT PAYMENT HAS NOT BEEN RECEIVED. I FURTHER CERTIFY THAT ALL SERVICES UNDER THIS AGREEMENT HAVE BEEN PERFORMED.

BY: \_\_\_\_\_ DATE SIGNED: \_\_\_\_\_  
SIGNATURE:

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

ORGANIZATION NAME: \_\_\_\_\_

SS No. OR FEDERAL TAX ID No.: \_\_\_\_\_

TELEPHONE NUMBER: \_\_\_\_\_

PLEASE REMIT PAYMENT TO: (Name & Address of Vendor)

I attest that these services have been completed as per the contract.

\_\_\_\_\_  
Contract Coordinator Signature

747 Market Street, Room #(Req Dept Info) Tacoma, WA 98402-3721 (253) 591- FAX (253) 591-