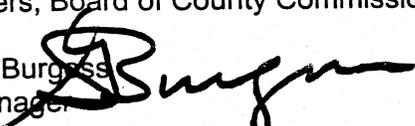


Date: April 25, 2006

To: Honorable Chairman Joe A. Martinez  
and Members, Board of County Commissioners

From: George M. Burgess  
County Manager



Subject: Amendment Number Five to the Operating Management Agreement Between Miami-Dade County and the Performing Arts Center Trust, Inc. and to the Cooperation Agreement Between the Performing Arts Center Foundation and the Performing Arts Center Trust, Inc.

Amended  
Agenda Item No. 12 (A) (5)

R#480-06

## RECOMMENDATION

It is recommended that the Board approve the attached Amendment No. 5 to the Operating Management Agreement between Miami-Dade County and the Performing Arts Center Trust, Inc. (PACT) (Attachment A) and to the Cooperation Agreement Between the Performing Arts Center Foundation (the Foundation) and the PACT (Attachment B). These amended agreements provide for a ten-month and four day extension (from September 30, 2005 to August 4, 2006) for the PACT and the Foundation to deliver to the County the next installment of the private sector funding of \$20.0 million for the construction of the Performing Arts Center.

Changes in the Cooperation Agreement parallel the changes in the Operating Management Agreement.

Furthermore, it is recommended that Resolution R-377-04, providing for a reconsideration period, and Resolution R-130-06, providing for fully negotiated agreements in final form, be waived.

## BACKGROUND

The PACT is a non-profit corporation formed by the Board of County Commissioners (Board) in 1991 to oversee the planning, design, construction and operation of the Performing Arts Center (the Project or PAC).

On July 13, 1993, the Board approved the Operating Management Agreement between Miami-Dade County and the PACT (Resolution R-860-93).

### **Prior Amendments Nos. 1-4**

Amendment Number One to the Operating Management Agreement, approved on March 21, 1996, (Resolution R-279-96) extended this initial term by a period of three years, amended the private contributions for design and construction from \$19.0 million to \$22.2 million, updated project phases and timetables, amended the County's responsibilities under certain termination provisions, and introduced the Cooperation Agreement between the PACT and the Foundation. The Foundation is the non-profit corporation established to represent the PAC's then five resident companies and to work with the PACT to raise the private sector funds committed to this Project.

Amendment Number Two to the Operating Management Agreement, approved on December 19, 2000, (Resolution R-1409-00), amended the private contributions for design and construction from \$22.2 million to \$42.2 million, updated timetables for conveyance of monies and amended language in the Cooperation Agreement, which gave the PACT the authority to approve non-monetary amendments to the Cooperation Agreement between it and the Foundation on behalf of Miami-Dade County. Simultaneously, an Amendment was also executed to the Cooperation Agreement obligating the Foundation to fulfill the increased funding requirements contained in the Agreement between the County and the PACT.

Amendment Number Three to the Operating Management Agreement, approved on January 23, 2003, (Resolution R-099-03), amended the private sector contribution for construction from \$42.2 million to \$44.594 million, an increase of \$2.394 million to fund certain enhancements to the project (Owner Scope Additions). These Owner Scope Additions to the construction of the PAC were the following: 1) installation of compensating stage lifts for the Ballet/Opera House (\$1.135 million); 2) the curved donors' walls at both the Ballet/Opera House and the Concert Hall (\$248,000); and 3) the sound-proof door at the side-stage of the Ballet/Opera House (\$1.011 million).

Amendment Number Four to the Operating Management Agreement, approved on July 27, 2004, (Resolution R-1018-04), primarily provided a two year extension (from September 30, 2003 to September 30, 2005) for the PACT to deliver to the County the last installment of the private sector funding of \$20.0 million for the construction. This Amendment also provided a one year extensions for delivering each of the two installments of private sector funding of the PACT's \$21 million endowment as follows: \$15.750 million from September 1, 2004 to September 1, 2005 or the completion of construction (whichever is latest) and \$5.250 million from September 1, 2005 to September 1, 2006 or one year after the completion of construction (whichever is latest). This Amendment also allowed the Foundation to advance the PACT up to a maximum of \$5.0 million for the operation of the PACT prior to the Center's opening and allow the advance of these funds to be deducted from the first endowment installment of \$15.750 million. The sound-proof door at the side-stage of the Ballet/Opera House (\$1.011 million) which was an Owner Scope Addition in Amendment Number 3 was deleted.

Finally, the Amendment transfers a list of operating policies from the body of the agreement to an Exhibit A to allow the PACT Management Committee the flexibility to review and revise operating policies as necessary.

Table A below summarizes the amounts and the timetables associated with the Operating Management Agreement and the associated amendments.

### **Amendment Number 5**

Amendment Number 5 extends the PACT's prior construction commitment of \$20 million that was originally due September 30, 2005 to no later than August 4, 2006, which is at Project completion.

Also, as the Board will recall, as part of the July 27, 2004 Restructuring Plan, the PACT committed to raise an additional \$5 million for the project. This amendment will memorialize this commitment.

These funds will be paid to the County in one installment within twenty (20) days after Board approval of this amendment.

In recognition of the fact that the Project is on an accelerated schedule and the construction costs have escalated as presented to the Board in my September 20, 2005 report, the PACT has committed

to assist in the funding of the construction acceleration and recovery to ensure an August 2006 completion. These agreements provide for payments by the PACT to assist in the funding of the Performing Arts Center Acceleration/Recovery Construction plan and annually transmit to the County \$1.5 million per year beginning October 1, 2007 and continuing for a period of twenty (20) years. These payments shall be received by the County no later than October 1 of each year, time being of the essence, beginning October 1, 2007. The PACT may elect to pay these annual payments from the PACT's Endowment Fund, which shall be maintained at a minimum level of \$16 million during the term of this Agreement. In accordance with the Fiscal Year 2005-2006 Adopted Budget, the County has included operational support to the PACT Annual Operating Budget an estimated amount of \$5.344 million and approximately \$11.054 million is recommended for Fiscal Year 2006-07 through Fiscal Year 2009-10.

The County and the PACT are jointly and mutually committed to the success and financial stability of the future operations of the Performing Arts Center. To ensure this financial stability and operational success, the County, in consultation with the PACT, will annually recommend funds to be set aside in a trust to be used solely for payment of operating expenses of the PACT. These recommendations will be reviewed annually based on the operational needs of the PACT. All such recommendations are subject to approval by the Miami-Dade County Board of County Commissioners.

The term of this Agreement is recommended to be extended for twenty (20) years beginning March 1, 2006. Six months prior to the expiration of this extension the County may exercise its option, in its sole discretion, to extend this Agreement for an additional ten (10) year term.



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Assistant County Manager

Honorable Chairman Joe A. Martinez and Members,  
Board of County Commissioners

TABLE A: HISTORICAL SUMMARY OF THE OPERATING MANAGEMENT AGREEMENT BETWEEN MIAMI-DADE COUNTY AND THE PACT					
Original Amounts (R-860-93)	Amendment One Amounts (R-279-96)	Amendment Two Amounts (R-1409-00)	Amendment Three Amounts (R-099-03)	Amendment Four Amounts (R-1018-04)	New Amendment Five Amounts
\$3 M	\$3.33 M All funds provided to County in 1996	\$3.33 M No Change	\$3.33 M No Change	\$3.33 M No Change	\$3.33 M No Change
\$17 M	\$18.87 M All funds provided to County in 2001	\$18.87 M No Change	\$18.87 M No Change	\$18.87 M No Change	\$18.87 M No Change
\$0 M	\$0 M	\$20 M Funds to be provided to the County in one payment by 9/30/03	\$20 M No Change	\$20 M Change in timetable ONLY Funds to be provided to the County in one payment installment, at any time after the commencement of the Construction Phase, but in no event later than 9/30/05,	\$20 M Change in timetable ONLY Funds to be provided to the County in one payment installment, on 8/4/06 or when the Center receives Temporary Certificate of Occupancy, whichever is later
\$0 M	\$0 M	\$0 M	\$2,394 M Funds to be provided to the County by 10/1/03 for the following Owner Scope Additions to the Facility: 1) installation of compensating stage lifts for the Ballet/Opera House (\$1.135 million); 2) the sound-proof door at the side-stage of the Ballet/Opera House (\$1.011 million) and 3) the curved donors' walls at both the Ballet/Opera House and the Concert Hall (\$248,000).	\$1,383 M Funds to be provided to the County by 10/1/04, for the following Owner Scope Additions to the construction of the Facility: 1) installation of compensating stage lifts for the Ballet/Opera House (\$1.135 million) and 2) the curved donors' walls at both the Ballet/Opera House and the Concert Hall (\$248,000).  The sound-proof door at the side-stage of the Ballet/Opera House (\$1,011 million) has been eliminated at this time.	\$1,383 M No Change
\$0 M	\$0 M	\$0 M	\$0 M	\$0 M	\$5 M Funds to be provided to the County 20 days after BCC approval of Amendment 5
\$20 M	\$22.2 M	\$42.2 M	\$44,594 M	\$43,563 M	\$48,583 M
<b>SUB-TOTAL: DESIGN AND CONSTRUCTION</b>					

*(Handwritten mark)*

ENDOWMENT					
Original Amounts (R-860-93)	Amendment One Amounts (R-279-96)	Amendment Two Amounts (R-1409-00)	Amendment Three Amounts (R-099-03)	Amendment Four Amounts (R-1018-04)	New Amendment Five Amounts
\$15 M	\$15.75 M The later of 9/1/01 or completion of construction	\$15.75 M By 9/1/04 or completion of construction	\$15.75 M	\$15.75 M The 9/1/05 or the completion of construction	\$15.75 M No Change
\$5 M	\$5.25 M The later of 9/1/02 or one year after completion of construction	\$5.25 M The later of September 1, 2005 or one year after completion of construction	\$5.25 M	\$5.25 M The later of 9/1/06 or 1 year after the completion of construction	\$5.25 M No Change
\$20 M	\$21 M	\$21 M	\$21 M	\$21 M	\$21 M
\$40 M	\$43.2 M	\$63.2 M	\$65.594 M	\$64.583 M	\$69.583 M
SUB-TOTAL: ENDOWMENT					
TOTAL:					

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# MEMORANDUM

(Revised)

**TO:** Honorable Chairman Joe A. Martinez  
and Members, Board of County Commissioners

**DATE:** April 25, 2006

**FROM:** Murray A. Greenberg  
County Attorney

**SUBJECT:** Amended  
Agenda Item No. 12(A)(5)

Please note any items checked.

- "4-Day Rule" ("3-Day Rule" for committees) applicable if raised
- 6 weeks required between first reading and public hearing
- 4 weeks notification to municipal officials required prior to public hearing
- Decreases revenues or increases expenditures without balancing budget
- Budget required
- Statement of fiscal impact required
- Bid waiver requiring County Manager's written recommendation
- Ordinance creating a new board requires detailed County Manager's report for public hearing
- Housekeeping item (no policy decision required)
- No committee review

Approved \_\_\_\_\_ Mayor  
Veto \_\_\_\_\_  
Override \_\_\_\_\_

Amended  
Agenda Item No. 12(A)(5)  
4-25-06

RESOLUTION NO. 480-06

**RESOLUTION APPROVING AMENDMENT NUMBER FIVE TO THE AMENDED AND RESTATED OPERATING MANAGEMENT AGREEMENT BETWEEN MIAMI-DADE COUNTY AND THE PERFORMING ARTS CENTER TRUST, INC. AND APPROVING AMENDMENT NUMBER FIVE TO AMENDED AND RESTATED COOPERATION AGREEMENT BETWEEN PERFORMING ARTS CENTER FOUNDATION AND THE PERFORMING ARTS CENTER TRUST INC., AUTHORIZING THE COUNTY MANAGER TO EXECUTE SAME AND TO EXERCISE CANCELLATION PROVISIONS CONTAINED THEREIN AND WAIVING THE REQUIREMENTS OF RESOLUTION NO. R-130-06 AND RESOLUTION NO. R-377-04**

WHEREAS, this Board desires to accomplish the purposes outlined in the accompanying memorandum, a copy of which is incorporated herein by reference,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MIAMI-DADE COUNTY, FLORIDA, that this Board approves Amendment Number Five to the Amended and Restated Operating Management Agreement between Miami-Dade County and the Performing Arts Center Trust, Inc., and Amendment Number Five to the Amended and Restated Cooperation Agreement between Performing Arts Center Foundation and the Performing Arts Center Trust, Inc., both in substantially the forms attached hereto, and authorizes County Manager to execute the Amended and Restated Operating Management Agreement for and on behalf of Miami-Dade County, and to exercise the cancellation provisions contained therein, and waives the requirements of Resolution No. R-130-06 and Resolution No. R-377-04.

The foregoing resolution was offered by Commissioner \_\_\_\_\_, who moved its adoption. The motion was seconded by Commissioner \_\_\_\_\_ and upon being put to a vote, the vote was as follows:

Joe A. Martinez, Chairman	
Dennis C. Moss, Vice-Chairman	
Bruno A. Barreiro	Jose "Pepe" Diaz
Audrey M. Edmonson	Carlos A. Gimenez
Sally A. Heyman	Barbara J. Jordan
Dorrin D. Rolle	Natacha Seijas
Katy Sorenson	Rebeca Sosa
Sen. Javier D. Souto	

The Chairperson thereupon declared the resolution duly passed and adopted this 25<sup>th</sup> day of April, 2006. This resolution shall become effective ten (10) days after the date of its adoption unless vetoed by the Mayor, and if vetoed, shall become effective only upon an override by this Board.

MIAMI-DADE COUNTY, FLORIDA  
BY ITS BOARD OF  
COUNTY COMMISSIONERS

HARVEY RUVIN, CLERK

By: \_\_\_\_\_  
Deputy Clerk

Approved by County Attorney as  
to form and legal sufficiency.

RAP

Rafael A. Paz

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**AMENDED AND RESTATED**  
**Attachment A**  
**AMENDMENT NUMBER 5**  
**TO THE**  
**OPERATING MANAGEMENT AGREEMENT BETWEEN**  
**MIAMI- DADE COUNTY AND**  
**PERFORMING ARTS CENTER TRUST, INC.**

This Amendment Number 5 to the Operating Management Agreement (the "Agreement"), entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2005, by and between MIAMI- DADE COUNTY, FLORIDA, (the "County"), a political subdivision of the State of Florida, and PERFORMING ARTS CENTER TRUST, INC., a not for profit Florida corporation, (the "Corporation") replaces the Operating Management Agreement originally approved on July 19, 1993 (Resolution R-860-93) and amended on March 19, 1996 (Resolution R-279-96), December 19, 2000 (Resolution R-1409-00), January 23, 2003 (Resolution R-099-03), and July 27, 2004 (Resolution R-1018-04).

**W I T N E S S E T H:**

Whereas, it is contemplated that Miami- Dade County ("County") will accept a donation of land for the construction and operation of a Performing Arts Center; and

Whereas, it is also contemplated that Miami- Dade County will issue bonds or will otherwise incur debt backed by the revenues generated by the Convention Development Tax and by applicable revenues which may be generated by the Omni tax increment financing district (subject to approval by the City of Miami), all in accordance with the Financing Plan approved by the Board of County Commissioners on November 6, 1990, and in accordance with such future financing plans or bond ordinances as the Board may in its discretion adopt, to finance the construction of a publicly owned Performing Arts Center on land to be donated; and

Whereas, the Board of County Commissioners intends to cause a Performing Arts Center to be designed, built and operated directly or indirectly with public funds for the benefit of residents and visitors to Miami-Dade County; and

Whereas, it is contemplated that the County will own the site, the structures and the appurtenances of the Performing Arts Center and will be responsible for the repayment of the debt incurred to finance the initial construction of the Performing Arts Center; and

Whereas, the Board of County Commissioners has approved the Articles of Incorporation of the Performing Arts Center Trust, Inc. ("Corporation") as a not for profit corporation organized under the laws of the State of Florida and has appointed directors to the board of directors of the Corporation in accordance with the Corporation's Articles of Incorporation, to represent the full spectrum of community and performing arts interests; and

Whereas, the purpose of the Board of County Commissioners in approving the Articles of Incorporation of the Corporation and in appointing directors to the Corporation's board of directors is to obtain the benefit of professional management services from the Corporation in connection with the design, construction and operation of the Performing Arts Center; and

Whereas, the Corporation has committed to provide the County with private funds, in the amount of \$43.583 million, for the design and construction of the Performing Arts Center and in addition agreed to fund an operating endowment in the amount of \$21 million so as to help ensure that the Performing Arts Center will be affordable and accessible to its resident companies which are the Designated Primary Artistic Organizations as defined in the Articles of Incorporation of the Corporation, approved by the Board of County Commissioners; and

Whereas, the Corporation will operate the Performing Arts Center with a balanced annual budget, utilizing earned revenue and contributed income, along with state, federal and private funds so that there can be no operational reliance on general funds from Miami- Dade County or any agency or instrumentality thereof; and

Whereas, the terms and conditions of these professional management services to be provided by the Corporation to the County need to be defined and stated; and

Whereas, this Management Agreement has been negotiated to define and state the terms and conditions of the management services to be provided by the Corporation to the County.

Whereas, this Management Agreement has been amended on March 21, 1996, December 19, 2000, January 23, 2003, and July 27, 2004 and in mutual consideration of the promises and obligations contained herein, the parties wish to amend this Management Agreement as follows:

## **A. GENERAL TERMS**

### **A.1. RECITATIONS INCORPORATED.**

The recitations stated above are incorporated into the terms of this Agreement.

### **A.2. PARTIES.**

The parties to this Agreement are Miami- Dade County, a political subdivision of the State of Florida, ("County") and the Performing Arts Center Trust, Inc., a not for profit Florida corporation, ("Corporation").

### **A.3. SCOPE OF AGREEMENT.**

This Agreement shall encompass all matters relating to the services to be provided and the obligations to be performed by the Corporation to the County and the County's obligations to the Corporation in connection with the planning, design, construction, furnishing and operations of the proposed performing arts facilities on County owned property ("Facility") consisting of one or more structures, all owned by the County, as may be established in the Building Program which will be recommended by the Corporation and is subject to the approval of the Board of County Commissioners of Miami-Dade County, Florida (the "Board").

A.4. TERM.

The initial term of this Agreement shall be 10 years, beginning March 1, 1993. This initial term shall be extended by a period of three years for an initial term totaling 13 years, beginning March 1, 1993. This Agreement may be terminated before the end of the initial or renewal terms pursuant to the provisions herein. In this Amendment Number 5 this Agreement shall be extended for twenty (20) years beginning March 1, 2006. Six months prior to the expiration of this extension the County may exercise its option, in its sole discretion, to extend this Agreement for an additional ten (10) year term. This Amendment Number 5 supercedes the term of any renewal period otherwise in effect as of the date of its adoption.

A.5. CLAIMS.

- a. Third Party Claims. In the event of third party claims brought against either the County or the Corporation in connection with matters arising under this Agreement, each party will be responsible for its own acts and omissions. The Corporation agrees to indemnify the County for any loss which the County incurs as a result of the acts or omissions of the Corporation.
- b. Claims Between the Parties. Both parties agree to waive all rights to file any lawsuit against the other arising out of the subject matter of this Agreement, except as specifically provided herein; providing however, that if the Corporation has by the act or omission of its employees or agents caused damage to County property which damage is covered by insurance, then the County shall have the right to sue the Corporation, but only to the extent of that insurance coverage.

A.6. PRESIDENT.

The Corporation and the County shall jointly select a chief executive officer ("the President & CEO"), , who shall be an employee of the Corporation. The salary and other employment benefits of the President shall be determined and paid by the Corporation. The President shall report directly to the Board of Directors of the Corporation.

A.7. CORPORATION PERSONNEL.

No employee of the Corporation shall be an employee of the County. The Corporation shall abide by all applicable federal, state, and local mandates with regard to its employment practices. The Corporation shall not discriminate in hiring or promotions on the basis of race, sex, national origin, religion, creed, age or disability.

A. 8. CORPORATION BUDGET AND RECORDS.

The Corporation shall maintain the same fiscal year as does the County. The Corporation shall submit to the County by May 1st of each year the entire annual operating budget, including all classes of revenues and expenditures, for the coming fiscal year, for inspection by the County. The Corporation shall not develop nor

submit a budget that includes revenues from the general fund of the County. The Corporation shall submit to the County annual reports and annual independent audits. Annual reports shall consist of (a) a summary of the programming and marketing activities of the Corporation; (b) a balance sheet; (c) a statement of revenues and expenditures; and (d) a statement of changes in fund balance since the prior submittal. The annual and audit reports shall be submitted to the County by December 31 of each year. The Corporation shall keep its financial books and records in accordance with generally accepted accounting principles. All books and records of the Corporation shall be kept in Miami-Dade County, Florida in accounts owned by the Corporation. Failure to submit such reports at the time required or in the form as required herein shall be a material failure and cause for termination under Section G. All bank accounts and deposits of the Corporation shall be in institutions located within Miami-Dade County, Florida. The County shall have the right to inspect, to copy or to audit any and all books and records of the Corporation during the term of this Agreement and for a period of 3 years after the expiration of this Agreement. Failure to comply with any provision of this Section shall be cause for termination under Section G.

A.9. DEBT.

At no time may the Corporation incur any aggregate outstanding debt in excess of 20% of the Corporation's annual operating budget without the consent of the County. The above limitations shall include lease-purchase agreements. The Facility and its contents owned by the County may not be used to secure any debt. County consent required under this Paragraph may be withheld for any reason within the sole discretion of the Board of County Commissioners. The Corporation will not incur any debt that requires funding support from the County's general fund.

A.10. ANTI-LOBBYING.

- a. No Corporation Director as presently defined in the Articles of Incorporation of the Corporation, *as they may be amended from time to time*, shall discuss any pending solicitation for commodities, services or construction in connection with the Facility with any County commissioner, officer or employee, except at a public meeting which satisfies the requirements of the Florida Government in the Sunshine Law. All communications regarding pending solicitations shall occur through the Corporation staff.
- b. The bid, proposal or submission of any bidder or proposer who, itself or through its representative, discusses any pending solicitation for commodities, services or construction in connection with the Facility with any Corporation director, officer or employee or with any County commissioner, officer or employee, except at a public meeting which satisfies the requirements of the Florida Government in the Sunshine Law, may be rejected as non-responsive. This Section shall not preclude the submission in writing to the County or the Corporation staff, by a potential bidder or proposer of questions related to factual matters concerning the bid/proposal or bid/proposal process.

*7006*

- c. The provisions of this Section shall be included in the specifications for each solicitation for goods or services issued by the Corporation in connection with the Facility.

A.11. **RECOMMENDATION AND APPROVAL.**

Where this document provides for approval by the County upon the recommendation of the Corporation, it shall be understood that the procedure shall be as follows. The Corporation shall formulate its recommendation at a duly noticed meeting. Upon consideration of that recommendation, the Board of County Commissioners (i) may accept the recommendation, or (ii) may reject the recommendation and request that the Corporation furnish a new recommendation for it to consider. This process shall continue until the Board of County Commissioners approves a recommendation.

A.12. **ASSIGNMENT, SUBLETTING AND DELEGATION.**

The Corporation was selected to perform the services set forth in this Agreement because the composition of the Board of Directors of the Corporation was carefully selected to balance a variety of community interests. The Corporation shall not assign or subcontract any portion of its obligations under this Agreement. The Board of Directors of the Corporation shall not delegate its authority under this Agreement to any committee or to any other person or entity; provided that the Corporation may authorize individuals or committees to take actions, always subject to approval or ratification by the Corporation Board and without relieving the Corporation Board of full responsibility for any action taken by such individual or committee; further provided however, that the Construction Committee described in Article D shall have full discretion as described in that Article. This provision shall not limit the authority of the Corporation to enter into concession agreements, leases of space in the Facility pursuant to this Agreement, or agreements for the use of space in the Facility pursuant to the Booking Policy provided herein.

## **B. PLANNING PHASE**

The Planning Phase of this Agreement shall commence upon the execution of this Agreement and shall continue until the award of a professional design services agreement for the architectural and engineering design for the Facility.

B.1. **COUNTY RIGHTS AND OBLIGATIONS DURING PLANNING PHASE**

B.1.1. The County shall contract with qualified professional theater and acoustical consultants upon the recommendation of the Corporation.

B.1.2. Upon the Corporation's recommendation, the County shall designate a suitable site or sites, on land already owned by the County, and/or on land that has already been formally offered to the County to be conveyed in fee-simple title, free of charge with suitable amenities and on such terms and conditions which the County at its sole discretion deems acceptable for the construction of the Facility and for the staging area for the Contractor or

Construction Management Firm ("CM") engaged to construct the Facility. Under no circumstances shall the County be obliged to spend funds to purchase a site. The Corporation shall also make recommendations in connection with improvements to and programs for certain existing facilities and for the appropriate funding thereof.

B.1.3. The result of the Planning Phase shall be a building program and an existing facilities program to be approved by the Board of County Commissioners.

**B.2. CORPORATION RIGHTS AND OBLIGATIONS DURING PLANNING PHASE**

B.2.1. The Corporation in conjunction with the theater and acoustical consultants shall prepare the Building Program for the Facility. The County shall only be obligated to proceed to the design phase if the cost of the design and construction of the Facility as contemplated by the Building Program is less than the construction funds provided by bonds to be issued by the County; except that the Corporation shall have the option of supplementing that amount with its own resources; provided however, that at the time the County is called upon to approve any contract in connection with the planning, design, furnishing or construction of the Facility, the full amount of the Corporation's contribution to that contract must be then on-hand in the County's account, and the full amount of County's portion must be then on hand in the County's account or the ability to pay for such contract must have been budgeted by the Board of County Commissioners.

B.2.2. The Corporation shall recommend to the County a competitive architectural selection process which shall be subject to the approval of the Board of County Commissioners. The architectural selection process for the Architect shall be consistent with the requirements of Section 287.055 Florida Statute and Section 2-10.4 Code, Miami-Dade County. The County Manager will appoint a sufficient number of the Corporation directors to the selection committee so as to constitute a majority of the committee. The Architect and/or engineer shall be recommended by the selection committee which shall not only evaluate qualifications but shall rank the proposers. The County Manager will recommend a firm from the ranked list to the Board of County Commissioners. The Board of County Commissioners (i) may accept the recommendation presented to it, or (ii) may reject the recommendation and request that the selection committee furnish a new recommendation to the County Manager for the Board to consider.

**C. DESIGN PHASE**

The Design Phase of this Agreement shall commence upon the execution of a professional design services agreement for the architectural and engineering design for the Facility and shall continue until execution of a contract for the construction of the Facility.

C.1.

COUNTY RIGHTS AND OBLIGATIONS DURING DESIGN PHASE.

- C.1.1. The County shall contract with an experienced architectural firm ("the Architect") selected by the competitive selection process set forth in Article B.2.2. for the design and construction supervision of the Facility in accordance with the Building Program prepared and recommended by the Corporation and approved by the County. Facility acoustics will be a primary design consideration.
- C.1.2. The County shall allocate and pay the architectural, engineering, and other reasonable and necessary fees for the architectural and engineering design of the Facility, as provided in this Agreement.
- C.1.3. After acceptance by the Corporation and the County of the architectural, engineering and acoustical design plans prepared by the Architect, the County shall issue an invitation for bids for the construction of the Facility. The invitation for bids will be upon specifications for a complete structure or structures, usable for its intended purpose. The County shall contract with the lowest responsible and responsive Contractor or CM submitting a bid to construct the Facility in accordance with the plans and specifications prepared by the Architect and approved by the County.
- C.1.4. The County shall provide the construction management services for its own benefit. The cost of these services shall be reimbursed from the bond proceeds to be issued by the County, and shall be considered part of the County's cost of the Facility.
- C.1.5. The County shall insure that the total compensation due to the Architect and to the Contractor or CM does not exceed available funds. The County may reduce the scope of the Building Program or the Facility plans and specifications in order to keep the costs within available funds; provided however, that as a prerequisite to any such modification, the County shall first provide the Corporation with a reasonable opportunity to recommend the appropriate modifications or to provide sufficient additional funds to build the Facility as proposed.
- C.1.6. The County shall only be obligated to proceed to the Construction Phase if the cost of the design and construction of the Facility as shown on the winning bid together with the Planning and Design Phase costs is less than the construction funds provided by bonds issued by the County and other non-bond sources in addition to the Corporation's contributions provided in cash to the County to that date; except that the Corporation shall have the option of supplementing that amount with its own additional resources, provided however that at the time the County is called upon to award the contract for the construction of the Facility, the full amount of the Corporation's contribution and the County's portion to that contract must be in the form of a financing plan approved by the Board of County Commissioners.

C.2. CORPORATION RIGHTS AND OBLIGATIONS DURING DESIGN PHASE

C.2.1. The Corporation shall provide \$ 42.2 million to the County to supplement the County's budget for the architectural fees and construction cost of the Facility. \$3.33 million in cash shall be provided to the County prior to execution of the contract with the Architect but in no event shall it be required earlier than March 21, 1996; the County shall use these monies provided by the Corporation and the County's public funds to make the payments to the Architect in proportionate shares based on the Corporation's and the County's contributions for the Architect's contract. \$18.87 million in cash shall be provided to the County prior to execution of a contract with the Contractor or CM but in no event shall it be required earlier than March 1, 1999. The County shall use the \$18.87 million provided by the Corporation and the County's public funds to make the payments to the Contractor or CM in proportionate shares based on the Corporation's and the County's contributions for the Contractor or CM's contract. An additional \$20.0 million in cash shall be provided to the County during the Construction Phase as described in Section D.2.1.

C.2.1.A. In addition, \$21 million in cash, less any credit to the Foundation by reason of its payments to the Corporation as set forth below, shall be paid into an endowment fund controlled by the Corporation, with \$15.75 million provided the later of September 1, 2005 or completion of construction and the remaining \$5.25 million provided the later of September 1, 2006 or one year after the completion of construction. The Corporation shall use the interest from the endowment fund for a portion of operating expenses in accordance with its budget. Any of the Corporation's contributions not used for the Architect's and/or Contractor or CM's contracts shall be returned to the Corporation if the project is permanently abandoned or terminated.

The Foundation will advance up to a maximum Five Million Dollars (\$5,000,000) for the operation of the Corporation prior to the Facility's opening. All sums so advanced shall be credited against the Endowment Fund (\$21,000,000) of Private Funds which the Foundation has agreed to raise. The amount so advanced shall be deducted from the \$15,750,000 payment due to the Corporation on September 1, 2005 or completion of construction, whichever is later.

C.2.2 The Corporation shall appoint a committee which shall meet with the County construction management staff and with appropriate representatives of the Architect on a regular basis.

**D. CONSTRUCTION PHASE**

The Construction Phase shall commence upon the execution of a contract for the construction of the Facility and shall continue until the construction of the Facility is

substantially complete. The Construction Phase shall also include the procurement and installation by the County of fixtures, furnishings and equipment identified in the Building Program, even if such installation occurs after substantial completion of the Facility. These fixtures, furnishings and equipment may be procured under the construction contract or under separate contracts at the discretion of the County, and all such items procured by the County shall be the property of the County.

D.1. COUNTY RIGHTS AND OBLIGATIONS DURING CONSTRUCTION PHASE

D.1.1. The County shall have no financial obligation in connection with the design, construction and furnishing of the Facility in excess of the amount identified in the Final Financing Plan, to be adopted by the Board of County Commissioners as contemplated in the project bond documents. Unless the Corporation exercises its option to increase the available funding, the County shall have the right to take necessary steps to modify the Building Program or the approved plans and specifications of the Facility required, in the discretion of the County, in order to keep the cost of the Facility within the available funds; provided however, that as a prerequisite to any such modification, the County shall first provide the Corporation with a reasonable opportunity to recommend the appropriate modifications.

D.1.2. The County shall provide construction management services for its own benefit to ensure that the construction of the facility is in accordance with the plans and specifications prepared by the Architect. The cost of these services shall be reimbursed from the bond proceeds and other non-bond sources of funds to be issued by the County and shall be considered part of the County's cost of the Facility. No changes above the construction contract contingency allowance will be made to the plans and specifications without the prior reasonable opportunity for review and recommendation by the Corporation or its designated committee, however, no such review shall delay changes or change orders such that the County incurs additional cost of construction.

D.2. CORPORATION RIGHTS AND OBLIGATIONS DURING CONSTRUCTION PHASE

D.2.1. a) The Corporation shall further provide, during the Construction Phase, an additional \$5 million to the County in one installment within twenty (20) days of Board of County Commissioners approval, time being of the essence and an additional \$20 million to the County in one installment, at any time after the commencement of the Construction Phase, but in no event later than August 4, 2006, (or the date on which the Facility obtains a temporary certificate of occupancy for the use for which it is intended, whichever is later) time being of the essence. However, if the County receives additional funding as defined in Section D.2.1.B before August 4, 2006, from the State of Florida and/or the Federal Government, excluding Miami-Dade County Government ("Additional Governmental Funds"), the

Corporation shall be relieved of its responsibility to remit to the County, to the extent of such Additional Governmental Funds, these additional payments.

b)The Corporation shall also provide, during the Construction Phase, an additional \$1.383 million ("Additional Donor Funds") to the County for the following Owner Scope Additions to the construction of the Facility: 1) installation of compensating stage lifts for the Ballet/Opera House (\$1.135 million); and 2) the curved donors' walls at both the Ballet/Opera House and the Concert Hall (\$248,000). A payment of \$1.383 million in cash shall be provided to the County in one installment, on or before October 1, 2004, time being of the essence. However, if the County receives additional funding on or before October 1, 2004, from the State of Florida and/or the Federal Government, excluding Miami-Dade County Government ("Additional Governmental Funds"), the Corporation shall be relieved of its responsibility to remit to the County, to the extent of such Additional Governmental Funds, the Additional Donor Funds (originally in the amount of \$1.383 million).

c)The County shall use the additional \$25 million provided by the Corporation and the County's public funds to make the payments to the Contractor or CM in proportionate shares calculated from the remaining balance to be paid in the Contractor or the CM's contract, at the time the \$25 million is delivered to the County, and the County shall use the \$1.383 million provided by the Additional Donor Funds remitted by the Corporation and/or the Additional Governmental Funds to make payments to the Contractor or CM for the following change orders resulting from the Owner Scope Additions: 1) installation of compensating stage lifts for the Ballet/Opera House (\$1.135 million) and 2) the curved donors' walls at both the Ballet/Opera House and the Concert Hall (\$248,000). The County shall be obligated to initiate the change orders in a time frame consistent with the requirements of the construction schedules.

d) In the effort to complete the construction project and obtain an occupancy certificate by August 4, 2006, the Corporation has agreed to provide the County \$1.5 million per year beginning October 1, 2007 and continuing for a period of twenty (20) years. These payments shall be received by the County no later than October 1 of each year, time being of the essence, beginning October 1, 2007. The Corporation may elect to pay these annual payments from the Corporation's Endowment Fund, which shall be maintained at a minimum level of \$16 million during the term of this Agreement. In accordance with the County's Fiscal Year 2005-2006 Adopted Budget, the County has budgeted operational support to the Trust for its Annual Operating Budget in an estimated amount equal to \$5.344 million. The County Manager has recommended that the County provide operational support to the Trust for its Operating Budget in the amount of approximately \$11.054 million for Fiscal Year 2006-07 through Fiscal

Year 2009-10. The County and the Corporation are jointly and mutually committed to the success and financial stability of the future operations of the Performing Arts Center. To ensure this financial stability and operational success, the County, in consultation with the Corporation, will annually recommend funds to be set aside in a trust to be used solely for payment of operating expenses of the Corporation. These recommendations will be reviewed annually based on the operational needs of the Trust. All such recommendations are subject to approval by the Miami-Dade County Board of County Commissioners.

- D.2.1.A. For purposes of this Agreement Additional Donor Funds shall mean cash, or cash equivalents (cash equivalents are wire transfers or cashiers checks or any similar instruments that are treated by the banking industry as "cash equivalents" for purposes of receiving immediate credit for the deposit being made), equal to not less than One Million Three Hundred and Eighty-Three Thousand Dollars (\$1,383,000) for the following Owner Scope Additions to the construction of the Facility: 1) installation of compensating stage lifts for the Ballet/Opera House (\$1.135 million) and 2) the curved donors' walls at both the Ballet/Opera House and the Concert Hall (\$248,000).
- D.2.1.B. Additional Governmental Funds shall mean (i) cash or cash equivalents (cash equivalents are wire transfers or cashiers checks or any similar instruments that are treated by the banking industry as "cash equivalents" for purposes of receiving immediate credit for the deposit being made) received by Miami-Dade County Performing Arts Center Management Office on or before August 4, 2006 (or the date on which the Facility obtains a temporary certificate of occupancy for the use for which it is intended, whichever is later), or (ii) an approved and budgeted allocation of funds to the County in relation to the Facility made on or before August 4, 2006 (or the date on which the Facility obtains a temporary certificate of occupancy for the use for which it is intended, whichever is later), in each case from or by from the State of Florida and/or the Federal Government, excluding Miami-Dade County Government, that is not specifically restricted from being applied to the above Owner Scope Additions and additional payments referred to in Section D.2.1(a) of this Agreement. Furthermore, if these Additional Governmental Funds are received for application to other items included in the currently approved construction contract with the Contractor or the CM, the Project funds that are currently allocated for those items will be given as a credit against the Foundation's otherwise applicable obligations for the Additional Donor Funds (\$1,383,000) or additional payments referred to in Section D.2.1(a) of this Agreement. However, if Additional Governmental Funds are received for items not currently included in the approved construction contract with the Contractor or the CM, then those Additional Governmental Funds cannot be used as a credit against the Foundation's otherwise applicable

obligations for the Additional Donor Funds (\$1,383,000) or additional payments referred to in Section D.2.1(a) of this Agreement.

D.2.2 The Corporation shall appoint a committee called the "Construction Committee", which shall meet with the County construction management staff and with appropriate representatives of the Architect and the Contractor or CM on a regular monthly basis. The Corporation's participation in the construction process of the Facility shall not increase the cost of design and construction beyond the amount identified in the Final Financing Plan and shall not delay the construction schedule.

D.2.3. The County will include in the contract with the Contractor or CM a 5% contingency allowance. Changes within the contingency allowance will be subject to the sole approval of a committee designated by the Corporation, upon the recommendation of the Architect and the County's Project Director through a process that shall be outlined by the Corporation's Construction Committee and approved by the Corporation's Board of Directors. The above Owner Scope Additions in the amount of One Million Three Hundred and Eighty-Three Thousand Dollars (\$1,383,000) will not increase the above contingency allowance and will be subject to the requirements stipulated above in Section D.2.3.

## **E. OPERATIONS PHASE**

The Operations Phase shall commence upon substantial completion of the Facility and the completion of the installation of fixtures, furnishings and equipment identified in the Building Program and shall continue until termination of this Agreement.

### **E.1. COUNTY RIGHTS AND OBLIGATIONS DURING OPERATIONS PHASE**

E.1.1 The County shall at all times be the sole owner of the Facility and shall make structural repairs to the roof, structural skeleton and exterior walls of the Facility within an annual budgeted allocation recommended by the Corporation and adopted by the Board of County Commissioners in its sole discretion.

### **E.2. CORPORATION RIGHTS AND OBLIGATIONS DURING OPERATIONS PHASE**

E.2.1. The Corporation shall operate and manage the Facility on behalf of the County on an exclusive basis using the highest degree of professionalism. In connection with its management of the Facility, the Corporation shall conduct its business in accordance with the same requirements which are imposed by law upon the County by County or local charter or ordinance, or by state or federal statute, or by any rule, regulation or order; provided, however, that where any applicable provision of law for procurement or leasing would require action by the Board of County Commissioners or the County Manager, these responsibilities are hereby delegated to the Corporation. The Corporation shall not rely upon revenues from the County's general fund to operate and manage the Facility.

- E.2.2. The Corporation shall establish uniform rates for rental of spaces within the Facility, for temporary licenses to use spaces or equipment within the Facility, and for services to be performed within the Facility. Various classes of rates may be established, so long as the rates are assessed in a non-discriminatory manner within each class so as to provide access to the Facility for a wide spectrum of Miami-Dade County based performing arts groups. The Corporation shall make the Facility available to Miami-Dade County community-based arts groups at reduced rates. The County shall not be entitled to keep any revenues received by the Facility from the rental of spaces therein, the sale of tickets by the Corporation, revenues from concession sales, and any other revenue generated by the Corporation. The County shall not be entitled to any rental fees from the Corporation, nor shall the County establish any admission charges or fees. The Corporation shall establish ticket prices, concession sales rates, parking fees in facilities controlled by the Corporation and all other fees and rates incidental to the operation of the Facility consistent with sound management practice.
- E.2.3. The Corporation shall establish a booking policy in which various classes of rates, priorities and procedures may be established, so long as these rates, priorities and procedures are assessed in a non-discriminatory manner within each class. This booking policy will govern the priorities and procedures for the use of space and services within the Facility. In accordance with its booking policy, the Corporation shall establish a standard procedure for allocation of rehearsal and performance spaces among the Designated Artistic Organizations, as defined in the Articles of Incorporation of the Corporation. In accordance with its booking policy, the Corporation shall establish a standard procedure for allocation of space for other potential occupants or licensees of spaces within the Facility. The Corporation shall retain a master set of booking records.
- E.2.4. The Corporation shall schedule the spaces within the Facility, and establish policies for collecting and retaining rents, admissions, and fees, all in accordance with its uniform box office policy. The Corporation shall select vendors and concessionaires in accordance with the procedures imposed upon the County by County Ordinance, Charter or by state or Federal statute, rule, regulation or order. The Corporation shall provide all theater and property management, accounting, advertising, public relations and legal services required by the operations of the Facility; it shall obtain and pay all costs for utilities, water, sewer, trash and garbage collection, as well as all maintenance, security and janitorial services required by the Facility. It is the intent of the parties that the Corporation will have authority and responsibility over the day-to-day operation of the Facility and all activities occurring there, and that it shall use the revenue generated by the use of the Facility to pay the expenses associated with the operations of the Facility. The Corporation shall not rely upon revenues

from the County's general fund to operate and manage the Facility. The Corporation shall apply for available state, federal and private grant money to help pay for these expenses. The Corporation shall have the exclusive authority to determine space allocation and scheduling within the Facility. All contracts, licenses and agreements entered into by the Corporation in connection with the management of the Facility shall be in its own name.

- E.2.5. The Corporation shall establish a procedure for handling ticket sale revenues and other box office receipts which it may receive in contemplation of or arising from an event at the Facility in order to protect the ticket purchasers, the performers, the County and the Corporation. The Corporation shall provide insurance, a bond or other evidence of security for ticket sale revenues, if required by the County.
- E.2.6. The Corporation shall establish and shall follow a marketing plan to enhance and encourage use of the Facility. The marketing plan shall contain specific long and short-term goals for attracting audience support. At least once each year the Corporation shall present its then current marketing plan to the County and shall report on the results of its past marketing plans.
- E.2.7. The Corporation shall establish and shall follow a program plan to maximize the Corporation's ability to meet its goals and objectives for the use of the Facility. At least once each year the Corporation shall present its then current program plan to the County and shall report on the results of its past program plans.
- E.2.8. The Corporation shall be responsible for the collection of unpaid obligations due as a result of the use or operation of the Facility and the County shall have no responsibility therefore.
- E.2.9. The Corporation shall indemnify and save the County harmless from any and all claims, liability, losses and causes of action which may arise out of the fulfillment of the Agreement. The Corporation shall pay all claims and losses of any nature whatever in connection therewith, and shall defend all suits, in the name of the County when applicable, and shall pay all costs and judgments which may issue thereon.

The Corporation shall maintain in force the following insurance and shall furnish to Miami- Dade County, Department of Cultural Affairs, 111 N.W. 1st Street, Suite 625, Miami, Florida 33128, Certificate(s) of Insurance which indicate that insurance coverage has been obtained which meets the requirements as outlined below:

- A. Worker's Compensation Insurance for all employees of the Corporation as required by Florida Statute 440.

- B. Public Liability Insurance on a comprehensive basis including products liability and host liquor liability, in an amount not less than \$1,000,000 combined single limit per occurrence for bodily injury and property damage. Miami- Dade County must be shown as an additional insured with respect to this coverage.
- C. Automobile Liability Insurance covering all owned, non-owned and hired vehicles used in connection with the work, in an amount not less than \$500,000 combined single limit per occurrence for bodily injury and property damage.

The insurance coverage required shall include those classifications, as listed in standard liability insurance manuals, which most nearly reflect the operations of the Corporation.

All insurance policies required above shall be issued by companies authorized to do business under the laws of the State of Florida, with the following qualifications:

The Company must be rated no less than "B" as to management, and no less than "Class V" as to financial strength, by the latest edition of Best's Insurance Guide, published by A.M. Best Company, Oldwick, New Jersey, or its equivalent, subject to the approval of the County Risk Management Division. OR

The Company must hold a valid Florida Certificate of Authority as shown in the latest "List of All Insurance Companies Authorized or Approved to Do Business in Florida", issued by the State of Florida Department of Insurance and be members of the Florida Guaranty Fund.

Certificates will indicate that no modification or change in insurance shall be made without thirty (30) days written advance notice to the certificate holder.

The Corporation shall require that all users of the facility provide proof of insurance as agreed upon in advance by the County and the Corporation. The Corporation will be responsible for obtaining the required certificates of insurance from the user and insuring that all required coverages are maintained throughout the term of the agreement.

The Corporation shall also require all users of the facility to execute an indemnification agreement containing an obligation to pay and to defend claims, running in favor of both the Corporation and the County, on a form acceptable to the County's Director of Risk Management.

- E.2.10. The Corporation shall not rely upon revenues from the County's general fund to help pay for the programming, marketing, operation and improvement of the Facility. The Corporation shall apply for available state, federal and private grant money to help pay for these expenses.
- E.2.11. The Corporation shall not discriminate in the allocation of space, in the charges imposed or in any other respect arising out of this Agreement, on the basis of race, sex, national origin, religion, creed, age, or disability.

- E.2.12. The Corporation shall recommend appropriate repairs to the County as needed, within the scope of the County's obligation to repair and its budget. All other repairs and refurbishment and redecoration shall be the obligation of the Corporation. The Corporation may not alter or reconfigure the performance spaces or modify the structure without the approval of the County Manager.
- E.2.13. The Corporation shall be responsible for compliance with the requirements of copyright law and the requirements of all applicable sales and use taxes arising out of performances or events at the Facility and all other applicable taxes.

#### F. COVENANTS OF CORPORATION

The Corporation agrees that during the term of this Agreement it will abide by all of the following covenants:

- (a) Corporation will not discriminate in either its operations or employment practices and procedures on the basis of race, creed, national origin, religion, sex, or disability.
- (b) Corporation will conduct its meetings in accordance with the Florida Government in the Sunshine Statute to the same extent as if it were a government agency.
- (c) The Corporation's records will be open to public inspection in accordance with the Florida Public Records Act to the same extent as if it were a government agency.
- (d) Corporation's Board of Directors shall reflect the ethnic and cultural diversity of the Miami-Dade County community as provided in its Articles of Incorporation.
- (e) Corporation's Board of Directors shall each file annual Financial Disclosure Statements with the Clerk of the Board of County Commissioners on the same forms and at the same times as are required of County Commissioners by Florida Law.
- (f) Corporation will conduct its affairs in accordance with all applicable law, statutes, ordinances and regulations of Miami-Dade County, the State of Florida and the United States.
- (g) Corporation will not include the words "Knight-Ridder" or "Miami Herald" in the name of the Facility.

## **G. CORPORATION EVENTS OF DEFAULT**

Any of the following situations shall be an event of Default.

- (1) Failure to comply with the covenants set forth in Article F.
- (2) Failure to pay the sums required in Section C.2.1 by the times required.
- (3) A material failure to observe any other provision of this Agreement.
- (4) Failure to properly or adequately maintain and secure the Facility.
- (5) Failure to operate and market the Facility so as to appropriately maximize use of the Facility, including but not limited to, failure to book a sufficient number of events at the Facility and failure to provide adequate access to a wide spectrum of Miami-Dade County based performing arts organizations; provided, however, that the Corporation shall not be held responsible for hurricanes, Acts of God, civil insurrections or riots.
- (6) Failure of the Corporation to remain solvent or to operate the Facility in a fiscally responsible manner.

## **H. TERMINATION**

### **H.1. CORPORATION TERMINATION FOR CONVENIENCE.**

The Corporation may terminate this Agreement for its convenience upon 180 days prior written notice to the COUNTY.

### **H.2. COUNTY TERMINATION FOR DEFAULT BY THE CORPORATION.**

H.2.1. If an event of Default as set forth in Article G has occurred and the Corporation has not begun to cure the default within 15 days after the County furnishes written notice of the Default, then the County shall institute the Dispute Resolution Procedure described in the following paragraph. If a resolution satisfactory to the County Manager is not achieved as a result of the Dispute Resolution Procedure, then the County may terminate this Agreement upon 60 days prior written notice to the Corporation. The Corporation may appeal this termination, within fifteen days, to the Chief Judge of the 11th Circuit Court.

H.2.2. Notwithstanding any other provision of this Agreement, the County Manager may terminate the Agreement upon 15 calendar days prior written notice, without any liability or obligations to the Corporation if the Corporation fails to provide the County with \$22.2 million prior to execution of a contract for construction of the Facility as required in Section C.2.1.

H.3. DISPUTE RESOLUTION PROCEDURE.

There is hereby created a committee to be called the Miami-Dade County Performing Arts Center Trust Liaison Committee (the "Committee") consisting of an individual designated by the County Manager and the Chairperson of the Corporation. In the event the County sends to the Corporation notice of breach (other than a breach under H.2.2. above) or at the request of the Corporation, these two individuals will select a third person to join the Committee to resolve the dispute. The Committee will undertake such fact finding as it deems appropriate and shall mediate the dispute as it deems appropriate, making a recommendation within 20 days of the initial referral of the dispute to the Committee. This time limitation may be extended by a majority of the Committee, but in no event may it be extended beyond 180 days of the initial referral. The Committee shall act by a majority of its members.

H.4. EFFECT OF TERMINATION.

H.4.1. Upon termination, the Facility and all its fixtures, furnishings and equipment belonging to the County shall be returned to the care and custody of the County. All personal property and assets of the Corporation shall become the property of the County, solely upon the election of the County, in which case the County will assume all debts and obligations of the Corporation which were incurred in connection with the Corporation's obligations under this Agreement which comply with the requirements of Section A.9. and which are in effect on the date of termination; however, the County may not exercise its right under this section if its assumption of Corporation debt would require support from the County's general fund. All booking commitments made in accordance with the established booking policy of the Corporation and existing on the effective date of the termination shall be honored by the County following termination under this paragraph unless the County determines to close the Facility.

H.4.2. The County agrees that upon termination, the County will assume all rights, obligations and duties of the Corporation as a party to the Cooperation Agreement between the Corporation and the Performing Arts Center Foundation of Greater Miami (a copy of which Cooperation Agreement is attached hereto and incorporated herein as Exhibit "A") until the expiration of the then current term of this Agreement or of the Cooperation Agreement, whichever happens first, provided, however, that the County shall, at its sole discretion, determine appropriate mechanisms as it deems necessary to assume the responsibilities of the Corporation and its Committees, as set forth in the Cooperation Agreement. The County shall have the sole right to determine such mechanisms by which the Facility is to be operated, including but not limited to the right to operate the Facility itself, the right to engage the services of a management company for a fee to be paid to the County, or otherwise. The County may only close the Facility if the County cannot reasonably operate the Facility for reasons including, but not limited to, damage, destruction or other circumstances caused by weather, flooding, fire, riots, civil insurrection or Acts of God.

## I. NOTICES

When any notice is required to be given by this Agreement, it shall be delivered by certified mail, return receipt requested to the parties at the addresses listed below, or such other address as is furnished in writing to the other party:

To the County: Bill Johnson, County Manager  
Miami Dade County  
111 N.W. 1 Street, Suite 2920  
Miami, Florida 33128

copy to: County Attorney

To the Corporation: Chair/President, Performing Arts Center Trust, Inc.  
Secretary, Performing Arts Center Trust, Inc.  
1444 Biscayne Boulevard  
Suite 202  
Miami, Florida 33132

## J. ENTIRETY OF AGREEMENT

This Agreement along with the documents referenced herein is the entire agreement between the parties. No other documents or statements may modify the terms of this Agreement except for amendments adopted pursuant to the terms of this Agreement.

**K. AMENDMENT**

This Agreement may be amended by written document approved by the Corporation at a duly noticed and constituted meeting of its Board of Directors and approved by the Board of County Commissioners by Resolution duly adopted.

Furthermore, the parties agree to assure the greatest participation of minorities, local workers, and minority and local business in the construction and operation of the Facility.

IN WITNESS WHEREOF, the parties have set their hands and seals, and such of them as are corporations have caused these presents to be signed by their duly authorized officers as of the date first set forth above.

PERFORMING ARTS CENTER TRUST, INC.

(corporate seal)

By: *Peter D. Korman*  
Chair

ATTEST:

By: *JA*  
Secretary

Approved as to form and legal sufficiency

*RAP*  
County Attorney

MIAMI-DADE COUNTY, FLORIDA  
BY ITS BOARD OF COUNTY  
COMMISSIONERS

By: *Keith Johnson*  
County Manager

ATTEST:

HARVEY RUVIN, CLERK

By: \_\_\_\_\_  
Deputy Clerk

(SEAL)

*28*

**Attachment B**  
**AMENDED AND RESTATED**

**AMENDMENT NUMBER 5**  
**TO THE**  
**COOPERATION AGREEMENT BETWEEN THE**  
**PERFORMING ARTS CENTER FOUNDATION AND THE**  
**PERFORMING ARTS CENTER TRUST, INC.**

**COOPERATION AGREEMENT**

This Amendment Number 5 to the COOPERATION AGREEMENT ("Agreement") is made this \_\_\_\_\_ day of \_\_\_\_\_, 2006 by and between the Performing Arts Center Foundation of Greater Miami, Inc., a Florida not for profit corporation ("Foundation") and the Performing Arts Center Trust, Inc., a Florida not for profit corporation ("Corporation").

**W I T N E S S E T H**

WHEREAS, the Corporation and the County have entered into the Operating Management Agreement pursuant to which the Corporation will provide the Private Funds to supplement County funds for design, construction and endowment of the Facility; and

WHEREAS, the Corporation, pursuant to the Operating Management Agreement, will provide professional management services to the County in connection with the planning, design, construction and operation of the Facility; and

WHEREAS, the mutual objective of the parties to this Agreement is to develop an artistically and fiscally sound strategy to plan, design, construct and operate the Facility for the County; and

WHEREAS, the Foundation has declared its intent and commitment to raise the Private Funds in cooperation with the Corporation; and

WHEREAS, it is anticipated that the Residents will be primary users of the Facility; and

WHEREAS, the building program and the operating pro forma for the Facility will be reliant upon certain guaranteed levels of use of the Facility by the Residents; and

WHEREAS, the Corporation deems cooperation of the Foundation essential to the planning, design, construction and operation of the Facility; and

WHEREAS, the Corporation and the Foundation wish to set forth their understanding as to the manner in which the Foundation will raise the Private Funds and cooperate in the planning, design, construction and operation of the Facility.

NOW, THEREFORE, in consideration of the covenants and agreement herein set forth and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Foundation and the Corporation agree as follows.

## ARTICLE I - RECITALS

The above recitals are true and correct and are incorporated herein by this reference.

## ARTICLE II - DEFINITIONS

For purposes of this Agreement:

- 2.1 Agreement shall mean this Cooperation Agreement between the Foundation and the Corporation.
- 2.2 Construction Committee shall mean the committee appointed by the Corporation pursuant to Section 9.3 of this Agreement.
- 2.3 Construction Phase shall mean that period of time commencing upon the execution of a contract for the construction of the Facility and continuing until construction of the Facility is substantially complete.
- 2.4 Construction Fund shall mean the first Forty-Two Million Two Hundred Thousand Dollars (\$42,200,000) of the Private Funds which shall be utilized to supplement County Funds for the design and construction of the Facility; the Private Funds committed for the Construction Phase shall be utilized in proportionate shares to the County funds committed for the Construction Phase to make payments to the Construction Management Firm or Contractor, pursuant to the Operating Management Agreement.
  - 2.4.A. Additional Donor Funds shall mean cash or cash equivalents (cash equivalents are wire transfers or cashiers checks or any similar instruments that are treated by the banking industry as "cash equivalents" for purposes of receiving immediate credit for the deposit being made), equal to not less than One Million Three Hundred and Eighty-Three Thousand Dollars (\$1,383,000) for the following Owner Scope Additions to the construction of the Facility: 1) installation of compensating stage lifts for the Ballet/Opera House (\$1.135 million); 2) the curved donors walls at both the Ballet/Opera House and the Concert Hall (\$248,000).
  - 2.4.B. Additional Governmental Funds shall mean (i) cash or cash equivalents (cash equivalents are wire transfers or cashiers checks or any similar instruments that are treated by the banking industry as "cash equivalents" for purposes of receiving immediate credit for the deposit being made) received by Miami-Dade

County Performing Arts Center Management Office on or before August 4, 2006 (or the date on which the Facility obtains a temporary certificate of occupancy for the use for which it is intended, whichever is later), or (ii) an approved and budgeted allocation of funds to the County in relation to the Facility made on or before August 4, 2006 (or the date on which the Facility obtains a temporary certificate of occupancy for the use for which it is intended, whichever is later), in each case from or by the State of Florida and/or the Federal Government, excluding Miami-Dade County Government, that is not specifically restricted from being applied to the above Owner Scope Additions or additional payments referred to in Section 4.1 (C) and (D) of this Agreement. Furthermore, if these Additional Governmental Funds are received for application to other items included in the currently approved construction contract with the Contractor or Construction Manager, the Project funds that are currently allocated for those items will be given as a credit against the Foundation's otherwise applicable obligations for the Additional Donor Funds (1,383,000) or additional payments referred to in Section 4.1 (C) and (D) of this Agreement. However, if Additional Governmental Funds are received for items not currently included in the approved construction contract with the Contractor or Construction Manager, then those Additional Governmental Funds cannot be used as a credit against the Foundation's otherwise applicable obligations for the Additional Donor Funds (\$1,383,000) or additional payments referred to in Section 4.1 (C) and (D) of this Agreement.

- 2.5 County shall mean Miami-Dade County, Florida, a political subdivision of the State of Florida.
- 2.6 Design Phase shall mean that period of time commencing upon the execution of a design services agreement for the architectural and engineering design of the Facility and continuing until execution of a contract for the construction of the Facility; the Private Funds committed for the Design Phase shall be utilized in proportionate shares to the County funds committed for the Design Phase to make payments to the Architect, pursuant to the Operating Management Agreement.
- 2.7 Endowment Fund shall mean the fund created and maintained, pursuant to and in accordance with Section 4.2, Section 4.3 and Article V of this Agreement, utilizing the subsequent Twenty-One Million Dollars (\$21,000,000) of the Private Funds, less any credit to the Foundation by reason of its payments to the Corporation as set forth in paragraph 2.15 thereof.
- 2.8 Facility shall have the same meaning as the term Facility in Section A.3 of the Operating Management Agreement.
- 2.9 Final Endowment Date shall mean September 1, 2006, or one year beyond the completion of construction.

- 2.10 Foundation shall mean the Performing Arts Center Foundation of Greater Miami, Inc., a Florida not for profit corporation.
- 2.11 Management Committee shall mean that committee appointed by the Corporation in accordance with Article VII of this Agreement.
- 2.12 Operating Management Agreement shall mean the Operating Management Agreement between the County and the Corporation approved by the County on July 13, 1993 and any subsequent amendments to this Agreement.
- 2.13 Operations Phase shall mean that period of time commencing upon substantial completion of the Facility, including installation of fixtures, furnishings and equipment, and continuing until termination of the Operating Management Agreement.
- 2.14 Operating Policies shall mean those policies for operation of the Facility set forth in, reviewed and revised in accordance with Article X of this Agreement.
- 2.15 Private Funds shall mean cash, property and legally binding pledges with a value of not less than Sixty-Four Million Five Hundred and Eighty-Three Thousand Dollars (\$64,583,000). The first Forty-Three Million Five Hundred and Eighty-Three Thousand Dollars (\$43,583,000) of which shall be utilized to create the Construction Fund and the balance of which shall be utilized to create the Endowment Fund.

The Foundation will advance up to a maximum Five Million Dollars (\$5,000,000) for the operation of the Corporation prior to the Facility's opening. All sums so advanced shall be credited against the Endowment Fund (\$21,000,000) of Private Funds which the Foundation has agreed to raise. The amount so advanced shall be deducted from the payment due to the Corporation specified in paragraph 4.1.D of the \$15,750,000.

- 2.16 Residents shall mean the four (4) resident performing arts organizations in Miami-Dade County, Florida, i.e.: the Concert Association of Florida, the Florida Grand Opera, the Miami City Ballet, and the New World Symphony and those Additional Residents selected pursuant to Section 12.1 of this Agreement.
- 2.17 Selection Committee shall mean that committee appointed by the County in cooperation with the Corporation and the Foundation pursuant to Article VI of this Agreement.

### ARTICLE III - TERM

The initial term of this Agreement shall be concurrent with the term of the Operating Management Agreement. . In this Amendment Number 5 this Agreement shall be extended for twenty (20) years beginning March 1, 2006. Six months prior to the expiration of this extension the Corporation may exercise its option, in its sole discretion, to extend this Agreement for an additional ten (10) year term. This Amendment Number 5 supersedes the term of any renewal period otherwise in effect as of the date of its adoption. This Agreement may be terminated before the end of the initial or renewal terms pursuant to the provisions herein.

### ARTICLE IV -PRIVATE FUNDS OBLIGATION

#### 4.1 Foundation Commitment

In consideration of the matters contained herein, the Foundation agrees to solicit and raise the Private Funds in such manner and form so as to enable the Corporation to meet the funding obligation set forth in subsection C.2.1 of the Operating Management Agreement and as subsequently amended in this Agreement and the Operating Management Agreement in regard to increased payment amounts as specified below. In raising the Private Funds, the Foundation may accept gifts of cash, property or legally binding commitments from financially responsible persons ("Pledges").

Specifically, the Foundation will deliver to the Corporation the total amount of Sixty-Four Million Five Hundred Eighty-Three Thousand Dollars (\$64,583,000) in cash as follows:

- (A) Three Million Three Hundred Thirty Thousand Dollars (\$3,330,000) (a portion of the Construction Fund) prior to the Design Phase but in no event earlier than March 21, 1996. The Private Funds committed for the Design Phase shall be utilized in proportionate shares to the County funds committed for the Design Phase to make payments to the Architect, pursuant to the Operating Management Agreement.
- (B) Eighteen Million Eight Hundred Seventy Thousand Dollars (\$18,870,000) (the second installment of the Construction Fund) prior to the Construction Phase, but in no event earlier than March 1, 1999. The Private Funds committed for the Construction Phase shall be utilized in proportionate shares to the County funds committed for the Construction Phase to make payments to the Construction Management Firm or Contractor, pursuant to the Operating Management Agreement.
- (C) Five million (\$5,000,000) to the County in one installment within twenty (20) days of Board of County Commissioners approval, time being of the essence.

- (D) Twenty million (\$20,000,000) (the balance of the Construction Fund), at any time after the commencement of the Construction Phase, but in no event later than August 4, 2006 (or the date on which the Facility obtains a temporary certificate of occupancy for the use for which it is intended, whichever is later), time being of the essence. The \$20,000,000 of Private Funds committed for the Construction Phase shall be utilized in proportionate shares to the County funds committed for the Construction Phase to make payments to the Construction Management Firm or Contractor, pursuant to the Operating Management Agreement. This proportion will be calculated from the remaining balance to be paid in the contract to the Contractor or Construction Management Firm, at the time the \$20,000,000 is delivered to the County.
- (E) If the County receives Additional Governmental Funds, as defined in Section 2.4.B. of this Agreement, the Corporation shall be relieved of its responsibility to remit to the County, to the extent of such Additional Governmental Funds, the additional payments required in 4.1.C. and 4.1.D above.
- (F) Fifteen Million Seven Hundred Fifty Thousand Dollars (\$15,750,000) (a portion of the Endowment Fund) the later of September 1, 2005 or completion of the Construction Phase.
- (G) Five Million Two Hundred Fifty Thousand Dollars (\$5,250,000) (the balance of the Endowment Fund) the later of September 1, 2006 or one year after the completion of the Construction Phase.

The Foundation will further deliver to the Corporation the Additional Donor Funds for a total amount of One Million Three Hundred and Eighty-Three Thousand Dollars (\$1,383,000) in cash or cash equivalents on or before October 1, 2004 for the following Owner Scope Additions to the construction of the Facility: 1) installation of compensating stage lifts for the Ballet/Opera House (\$1.135 million) and 2) the curved donors walls at both the Ballet/Opera House and the Concert Hall (\$248,000). If the County receives Additional Governmental Funds, as defined in Section 2.4.B., the Corporation shall be relieved of its responsibility to remit to the County, to the extent of such Additional Governmental Funds, the Additional Donor Funds (originally in the amount of One Million Three Hundred and Eighty-Three Thousand Dollars (\$1,383,000)).

The Foundation, thirty (30) days prior to the commencement of the Construction Phase, and on August 1, 2004, August 1, 2005 and August 1, 2006 ("Report Dates") shall certify in writing to the Corporation the amount of cash, property and Pledges collected by each of the Report Dates and the fact that it is in compliance with the conditions of the above paragraph.

4.2 Private Funds Maintenance  
Until March 1, 1999, the Private Funds (including all cash, property and Pledges), except for those Private Funds already paid in cash to the Corporation pursuant to Section 4.1, shall be placed in an account or accounts established and controlled by the Foundation and/or held by the Foundation. The Private Funds shall thereafter be paid or delivered to and utilized by the Corporation in accordance with Section 4.1, Section 4.3 and Article V of this Agreement. Income earned, net of operating expenses, on the Private Funds shall be added to the principal amount of the Private Funds and shall be deemed to be principal.

4.3 Corporation Commitment  
In accordance with the schedule set forth in Section 4.1 above, the Corporation will deliver to the County the Construction Fund for the design and construction of the Facility. The subsequent Twenty-One Million Dollars (\$21,000,000) of the Private Funds shall create the Endowment Fund. The Endowment Fund shall be managed and used, as necessary, to operate the Facility in accordance with the Operating Management Agreement and Article V of this Agreement.

As noted in paragraph 2.15, any funds advanced to the Corporation by the Foundation for pre-opening Facility expenses, up to a maximum of Five Million Dollars (\$5,000,000), shall be deducted from the Endowment Fund.

4.4 Named Gift Opportunities  
Throughout the period ending one year after completion of the Construction Phase, the Foundation shall have the exclusive right and shall be permitted to use named gift opportunities, developed pursuant to Section 8.1 of this Agreement, as a method of raising the Private Funds. Such named gift opportunities shall include designation of the halls, interior theater spaces and all other parts of the Facility subject to guidelines developed by the Management Committee and approved by Corporation. Such named gift opportunities shall be subject to the requirements of Section 1(ii) of Miami-Dade Board of County Commissioner's Resolution No. 860-93 adopted on July 13, 1993.

#### **ARTICLE V - ENDOWMENT FUND**

5.1 Creation  
The Endowment Fund shall be created pursuant to Section 4.3 of this Agreement.

5.2 Management  
The Endowment Fund shall be managed by a joint committee of the Corporation and Foundation whose voting members shall be composed of the Chairmen of the Boards of Directors of the Corporation and Foundation plus no less than two (2) financial management professionals selected by the two Chairmen. The committee shall propose guidelines and recommendations for the investment and management of the Endowment Fund, and the recommendations of the committee

shall be subject to the approval of the Board of Directors of both the Corporation and the Foundation.

5.3

Utilization

Pursuant to Subsection C.2.1 of the Operating Management Agreement, income earned upon the Endowment Fund shall be used to pay a portion of the operating expenses for the Facility. The Corporation (in preparing budgets for the Facility and operating the same in accordance with the Operating Management Agreement) will use its best efforts to insure that the Facility is managed and operated in such a manner as to reserve such interest monies for shortfalls in revenues or increase in expenses. Interest monies not utilized in this manner shall be maintained as part of the Endowment Fund but not treated as principal for purposes of expenditures or distribution.

5.4

Distribution

Upon termination of this Agreement, the Endowment Fund shall be distributed in accordance with Section 11.3 hereof.

**ARTICLE VI - (EXECUTIVE DIRECTOR) SELECTION COMMITTEE**

6.1

Composition

The Foundation and the Corporation shall recommend to the County Manager that a Selection Committee shall be comprised of eight (8) members to formulate and present recommendations to the County Manager and the Corporation in regard to selection of the Corporation's Executive Director. Prior to such appointment, the Foundation and the Corporation shall recommend to the County Manager four (4) individuals to serve as members of the Selection Committee. Recommended members of the Selection Committee shall be selected in the following manner: the Foundation will select two (2) members of the Corporation's Board of Directors who are representatives of the Residents and the Corporation will select two (2) members of its Board of Directors who are not representatives of the Residents. The County Manager will select the remaining four (4) members without recommendations from the Corporation and/or the Foundation.

6.2

Purpose/Duty

The Selection Committee shall meet as necessary to formulate and present recommendations to the County and the Corporation in regard to selection of the Corporation's Executive Director. The County and the Corporation shall jointly select the Corporation's Executive Director in accordance with Section A.6 of the Operating Management Agreement.

## ARTICLE VII - MANAGEMENT COMMITTEE

- 7.1 Purpose/Duties  
The Management Committee shall meet as necessary, starting no later than April 1, 1996, and perform such duties as set forth throughout this Agreement. In addition, from time to time, the Management Committee shall recommend to Corporation the manager for the Endowment Fund and review guidelines and recommendations for maintenance of the Endowment Fund pursuant to Section 5.2 of this Agreement for Corporation approval.
- 7.2 Composition  
The Corporation shall appoint a Management Committee comprised of six (6) voting members. All members selected shall be members of the Corporation's Board of Directors. Three (3) members of the Management Committee shall be representatives of the Foundation as recommended by the Foundation who serve on the Corporation's Board of Directors and the Foundation may change its recommendations in its discretion from time to time. The Corporation's Executive Director shall serve as an ex-officio member of the Management Committee but shall have no vote. The County Manager shall appoint a County representative who shall serve as an ex officio member of the Management Committee but shall have no vote.
- 7.3 Terms of Office  
Members of the Management Committee shall serve for terms of up to three (3) years each, however, there shall be no limitation upon the number of terms which a member may serve.
- 7.4 Quorum  
A simple majority of the members of Management Committee shall constitute a quorum for the transaction of business.
- 7.5 Action  
The affirmative vote of a majority of the members of the Management Committee present at a meeting at which a quorum is present shall be the act of the Management Committee.

## ARTICLE VIII - DESIGN PHASE

- 8.1 Named Gift Opportunities  
During the Design Phase, the Foundation, subject to ratification by the Corporation, shall develop guidelines for named gift opportunities, which shall include designation of the halls, interior theater spaces, seating and all other parts of the Facility. After such guidelines are ratified by the Corporation, the Foundation shall (subject to ratification by the Corporation) contract with an entity(ies) to design, produce and install donor recognition signage in and about

the Facility. The contract entered into by the Foundation shall pay for such signage and the entity(ies) retained to design, produce and install donor recognition signage shall cooperate with the architect for the Facility and seek to develop signage consistent with the architect's overall Facility design, however, the Foundation shall have the right of final approval (subject only to Corporation ratification) of all donor recognition signage. All named gift opportunities shall be subject to the requirements of Section 1(ii) of Miami-Dade Board of County Commissioner's Resolution No. 860-93 adopted on July 13, 1993.

8.2 Construction Committee

The Corporation, pursuant to Subsections C.2.2 and D.2.1 and D.2.2 of the Operating Management Agreement, shall select a Construction Committee, which committee shall be comprised of six (6) members. The Construction Committee shall be comprised of members who are members of the Corporation's Board of Directors. At least three (3) of the members of the Construction Committee shall be members of the Corporation who are representatives of the Residents.

8.3 Design Review

The Construction Committee shall meet with the County's construction management staff and appropriate representatives of the Facility's architect to review the development of the Facility's design and to make recommendations in regard thereto.

### **ARTICLE IX - CONSTRUCTION PHASE**

During the Construction Phase, the Construction Committee shall meet as needed and perform the following duties:

9.1 Construction Review

The Construction Committee pursuant to Section D of the Operating Management Agreement and all its clauses, shall meet weekly with the County's construction management staff and with appropriate representatives of the Facility's architect to monitor the progress of construction of the Facility.

9.2 Design Changes

The Construction Committee, pursuant to Section D of the Operating Management Agreement and all its clauses, shall review any and all changes to the Facility's plans and specifications.

## ARTICLE X - OPERATIONS PHASE

10.1

### Priority Consideration

During the Operations Phase, the Management Committee shall meet at regular times and make recommendations to the Corporation and the Corporation shall operate and manage the Facility (including all public spaces, administrative areas, auditoriums, backstage areas and rehearsal areas) taking into priority consideration the needs of the Residents who are in compliance with their obligations to take a minimum number of dates pursuant to the Corporation's five year operating pro forma for the Facility. The minimum number of dates and the operating pro forma shall not be reconsidered by the Management Committee and the Corporation more frequently than annually, beginning the fifth (5th) year after the opening of the Facility. In the event of cancellation of any of the dates contracted to by a Resident during the period of fourteen (14) to seven (7) months before the actual date(s) and provided that the Corporation is unable to secure an alternate renter for this date during this period, the Resident must pay the committed amount of the rental in full. In the event of cancellation of any of the dates contracted to by a Resident within seven (7) months of the date, the Resident must pay the committed amount of the rental in full. If any Resident cancels more than twenty percent (20%) of their minimum number of contracted dates in a fiscal year, that Resident shall lose its preferential rental rate for the balance of that year. A cancellation of more than fifty percent (50%) of the minimum number of contracted dates in any fiscal year by any Resident will result in loss of Resident designation and all preferential benefits under this Agreement for the balance of that year and all of the subsequent year. Reinstatement of any suspended Resident as recommended by the Management Committee and approved by the Corporation shall occur upon the Resident's contractual renewal of its commitment to the established minimum number of dates for that year.

10.2

### Operating Policies

The Operating Policies in the attached "Exhibit A: Operating Policies" shall be observed, reviewed and, as necessary, revised by the Management Committee, as shall be necessary and consistent with the Operating Management Agreement and this Agreement, and present such proposed amendments or revisions to the Corporation for approval. If the Corporation does not approve a policy revision recommended by the Management Committee, the proposed revision will be referred to a dispute resolution committee consisting of one board member of the Corporation and one board member of the Foundation and a third party mutually approved by the Corporation and the Foundation. The dispute will be settled by a majority vote of this committee, and its decision shall be final and binding on both the Corporation and the Foundation. In the event that the parties are unable to mutually agree on a third party for the dispute resolution committee within five (5) days, then the parties shall jointly appeal to the American Arbitration Association to select a neutral third party to act as the chairman of the dispute

resolution committee, and the costs of the American Arbitration Association and the neutral third party shall be shared equally by both parties, regardless of the final determination made by the dispute resolution committee. All Operating Policies shall be established in recognition of the capital and operational fundraising and usage commitments of the Foundation and the Residents contained in this Agreement. In accordance with the Operating Management Agreement, these policies have been developed to insure access and maximize use of the Facility by a wide spectrum of Miami-Dade County based performing arts groups. Such groups include the Residents and the Resident's use of the Facility shall not be deemed a violation of Section G.5 of the Operating Management Agreement. The Management Committee shall establish a booking policy consistent with the provisions of this Section.

#### ARTICLE XI - TERMINATION

11.1

##### Foundation Option

This Agreement may be terminated at the option of the Foundation:

- (A) In the event, at anytime after the financial obligations under Section 4.1 are met, there exist two (2) or fewer Residents.
- (B) Upon failure of the County to approve and implement a building plan for the Facility as outlined in the Operating Management Agreement or upon cancellation of the Design or Construction Phase by the County.
- (C) Upon failure of the Corporation, during the Operations Phase, to provide the Foundation with documentation demonstrating that the Corporation has met its obligation, in accordance with the Operating Management Agreement, to secure, on an ongoing basis, sufficient public and private revenues to supplement earned revenue in order to cover the required cash needs for operation of the Facility unless such failure is attributable to the Residents' failure to meet their obligations under this Agreement.
- (D) Upon default of the Corporation in connection with any term of this Agreement, provided the Foundation has first given the Corporation notice of such default, has given the Corporation sixty (60) days (subsequent to the Corporation's receipt of such notice) within which to cure the default and the Corporation has failed to cure same.
- (E) Upon dissolution of the Corporation.

11.2

##### Corporation Option

This Agreement may be terminated at the option of the Corporation:

- (A) In the event, at anytime after the financial obligations under Section 4.1 are met, there exist two (2) or fewer Residents.

- (B) Upon failure of the Foundation to meet its commitment, as set forth in Section 4.1 of this Agreement.
- (C) Upon default of the Foundation in connection with any other term of this Agreement, provided the Corporation has first given the Foundation notice of such default, has given the Foundation sixty (60) days (subsequent to the Foundation's receipt of such notice) within which to cure the default and the Foundation has failed to cure same.

### 11.3 Disposition of Private Funds

- (A) In the event this Agreement is terminated in accordance with Subsections 11.1 (B) or (D) of this Agreement and the Construction Phase has not commenced, all Private Funds returned to the Corporation pursuant to the terms of the Operating Management Agreement, together with all interest thereon received by the Corporation, shall be the property of and shall be delivered to the Foundation within ninety (90) days. The parties hereto agree that the funds provided by the Foundation pursuant to Section 4.1(A) of this Agreement shall be utilized in proportionate shares to the County funds committed for the Design Phase to make payments to the Architect, pursuant to the Operating Management Agreement.
- (B) In the event this Agreement is terminated in accordance with Subsections 11.1 (B), (C), (D) or (E) of this Agreement during the Construction Phase or the Operations Phase all remaining Private Funds (including, but not limited to, the entire Endowment Fund) returned to the Corporation pursuant to the terms of the Operating Management Agreement, together with all interest thereon received by the Corporation, shall be the property of and shall be delivered to the Foundation within ninety (90) days. In the event any portion of the Private Funds or interest thereon has been spent by the Corporation or the County at the time of termination in accordance with Subsections 11.1 (B), (C), (D) or (E) of this Agreement, the Corporation shall deliver to the Foundation all unexpended Private Funds and all interest thereon received by the Corporation. The parties hereto agree that the Private Funds committed for the Construction Phase shall be utilized in proportionate shares to the County funds committed for the Construction Phase to make payments to the Contractor, pursuant to the Operating Management Agreement.
- (C) In the event this Agreement is terminated in accordance with Subsection 11.1 (A) or Subsections 11.2 (A), (B) or (C) of this Agreement, all Private Funds held by the Foundation, together with all interest thereon, shall be the property of and shall be delivered to the Corporation within ninety (90) days.

## ARTICLE XII - MISCELLANEOUS

12.1

### Residents

Each of the Residents are "Designated Primary Artistic Organizations" as defined in the Articles of Incorporation of the Corporation. The Corporation has the authority, with the approval of the County, to amend its Articles of Incorporation to add Designated Primary Artistic Organizations, which are hereinafter referred to as "Additional Designated Primary Artistic Organizations". The Corporation hereby agrees that Additional Designated Primary Artistic Organizations will only be added (and afforded the rights and privileges granted to the Residents hereunder) after transfer to the Endowment Fund of an amount of funds to be agreed upon by the Corporation and the Foundation; provided, however that any Additional Designated Primary Artistic Organizations or any Designated Primary Artistic Organizations substituted in place of any of the then existing Designated Primary Artistic Organizations will be given last priority among the then existing Designated Primary Artistic Organizations with respect to scheduling and booking privileges described in Section 10.2(A) of this Agreement.

12.2

### Anti-Lobbying

No member of the Board of Trustees or Board of Directors of the Foundation shall discuss any pending solicitation for commodities, services or construction in connection with the Facility with any County officer or employee, except in a public meeting which satisfies the requirements of Florida's Government in the Sunshine Law. In the event of a breach of this Section 12.2, as it relates to commodities, services and construction, the bid of the proposed provider shall be rejected by the County as non-responsive.

12.3

### Audit

On or before January 1 of each year during the term of this Agreement, the Corporation and the Foundation shall deliver to the other party a copy of its independent, audited financial statements for its preceding fiscal year.

12.4

Notices

All notices, demands or other communications given hereunder shall be in writing and shall be deemed to have been duly given only upon hand delivery thereof or upon the first business day after mailing by United States registered or certified mail, return receipt requested, postage prepaid, addressed as follows:

To the Foundation:     Executive Director  
                                  Performing Arts Center Foundation of Greater Miami  
                                  1444 Biscayne Boulevard, Suite 100  
                                  Miami, Florida 33132

To the Corporation:    Executive Director  
                                  Performing Arts Center Trust, Inc.  
                                  1444 Biscayne Boulevard  
                                  Miami, Florida 33132

or to such other address or such other person as any party shall designate, in writing, to the other for such purposes and in the manner set forth above.

12.5

Accuracy of Statements

No representation or warranty contained in this Agreement, and no statement delivered or information supplied to any party pursuant hereto, contains an untrue statement of material fact or omits to state a material fact necessary in order to make the statements or information contained herein or therein not misleading. The representations and warranties made in this Agreement will be continued and will remain true and complete in all material respects and will survive the execution of the transactions contemplated hereby.

12.6

Entire

Agreement

This Agreement sets forth all the promises, covenants, agreements, conditions and understandings between the parties hereto, and supersedes all prior and contemporaneous agreements, understandings, inducements or conditions, expressed or implied, oral or written, except as herein contained or as contained in the Operating Management Agreement.

12.7

Binding Effect

This Agreement shall be binding upon the parties hereto, their heirs, administrators, successors and assigns.

12.8

Amendment

The parties hereby irrevocably agree that no attempted amendment, modification, termination, discharge or change (collectively, "Amendment") of this Agreement shall be valid and effective, unless the parties shall agree in writing to such Amendment. Any Amendment which affects the payment of private funds shall be approved by the Board of County Commissioners on behalf of Miami-Dade County, Florida, which is a third party beneficiary to this Agreement.

- 12.9           No Waiver  
No waiver of any provision of this Agreement shall be effective unless it is in writing and signed by the party(ies) against whom it is asserted, and any such written waiver shall only be applicable to the specific instance to which it relates and shall not be deemed to be a continuing or future waiver.
- 12.10          Gender and Use of Singular and Plural  
All pronouns herein shall be deemed to refer to the masculine, feminine, neuter, singular or plural, as the identity of the party or parties, or their personal representatives, successors and assigns may require.
- 12.11          Counterparts  
This Agreement and any Amendment may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together will constitute one and the same instrument.
- 12.12          Title and Headings  
The title of this Agreement and the article and section headings contained in this Agreement are inserted for convenience only and shall not affect in any way the meaning or interpretation of the Agreement.
- 12.13          Governing Law  
This Agreement shall be construed in accordance with the laws of the State of Florida and any proceeding arising between the parties in any manner pertaining or related to this Agreement shall, to the extent permitted by law, be held in Miami-Dade County, Florida.
- 12.14          Further Assurances  
The parties hereto will execute and deliver such further instruments and do such further acts and things as may be reasonably required to carry out the intent and purposes of this Agreement.
- 12.15          Third Parties  
*Except as provided in Section 12.8* this Agreement is made solely and specifically among and for the benefit of the parties hereto, and their respective successors and assigns and no other person shall have any rights, interest or claims hereunder or be entitled to any benefits under or on account of this agreement as a third-party beneficiary or otherwise. In the event of third party claims brought against either the Foundation or the Corporation in connection with matters arising under this Agreement, each party will be responsible for its own acts and omissions. FOOY
- 12.16          Fiscal Year  
During the term of this Agreement, the Foundation shall maintain the same fiscal year as does the Corporation.

12.17

Severability

This Agreement is intended to be performed in accordance with, and only to the extent permitted by, all applicable laws, ordinances, rules, and regulations of the jurisdiction in which the parties do business. If any provision of this Agreement, or the application thereof to any person or circumstances shall, for any reason or to any extent, be invalid or unenforceable, the remainder of this Agreement and the application of such provision to other persons or circumstances shall not be affected thereby, but rather shall be enforced to the greatest extent permitted law.

12.18

Attorneys' Fees

In connection with any proceeding arising out of this Agreement, the prevailing party shall be entitled to recover costs and attorneys' fees, through all appeals, from the other party.

12.19

Remedies Not Exclusive

The remedies provided by this Agreement are non-exclusive. All parties retain all rights and remedies otherwise provided by law, except as provided by the Operating Management Agreement.

IN WITNESS WHEREOF, the Foundation and the Corporation have executed this Agreement on the date set forth above.

WITNESSES:

PERFORMING ARTS CENTER  
FOUNDATION OF GREATER MIAMI, INC.,  
a Florida not for profit corporation

Neysa G. Ziblich  
Grant of Equity Power

By: [Signature]  
\_\_\_\_\_, its  
Chairperson

PERFORMING ARTS CENTER TRUST,  
INC., a Florida not for profit corporation

[Signature]  
Jessie Randolph

By: [Signature]  
\_\_\_\_\_, its  
Chair

STATE OF FLORIDA            )  
  )  
COUNTY OF MIAMI-DADE    )

SS:

