

**MEMORANDUM OF UNDERSTANDING
FOR THE CITY AUDITORIUM
BETWEEN THE CITY OF COLORADO SPRINGS AND
COLORADO SPRINGS COMMUNITY CULTURAL COLLECTIVE AT CITY AUDITORIUM**

This **MEMORANDUM OF UNDERSTANDING** (“Agreement”) is made and entered into this 1st day of September, 2021 (“Effective Date”) by and between the City of Colorado Springs, a home rule city and Colorado municipal corporation (“City”), and the Colorado Springs Community Cultural Collective at City Auditorium, a Colorado nonprofit corporation, located at 127 ½ East Bijou, Suite 1, Colorado Springs Colorado, 80903 (“CSCCC”). The City or CSCCC may be individually referred to as a “Party” or may be collectively referred to as “Parties.”

WHEREAS, the City made a Request for Proposals, in accord with the Procurement Rules and Regulations, for the operation and management of the City Auditorium located at 221 East Kiowa St., Colorado Springs, CO 80903; and

WHEREAS, the City selected CSCCC’s proposal as the highest ranked offer, but identified areas of CSCCC’s proposal, imperative to the successful operation of the City Auditorium, which lacked adequate specificity; and

WHEREAS, to address the areas imperative to the successful operation of the City Auditorium, the City proposed and CSCCC agreed to a period of due diligence during which the Parties will seek to determine the viability of CSCCC’s proposal (“Due Diligence Period”); and

WHEREAS, the COVID-19 pandemic necessarily delayed the Parties’ ability to enter into this Agreement, however, now the Parties would like to move forward with the Due Diligence Period as outlined in this Agreement; and

WHEREAS, the Parties intend that only the successful completion of the Due Diligence Period, as defined herein, will result in the Parties’ moving forward with the design phase and a final award agreement; and

WHEREAS, in the Mayor’s presentation to City Council regarding allocation of the funds received from the Federal Government under the American Recovery Plan, the Mayor included the allocation of \$2.5 million to support this project; and

WHEREAS, if the Parties are satisfied with the probable success of this project at the end of the Due Diligence Period, the City anticipates seeking City Council’s approval for the transfer of the City Auditorium to CSCCC subject to terms and rights which remain to be negotiated.

NOW THEREFORE, in consideration of the mutual covenants and promises set forth below, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

Section 1 General Information

In its proposal for the City Auditorium, CSCCC presented to the City an ambitious plan to make significant repairs to the City Auditorium while also greatly improving and expanding the functionality of the building for CSCCC's purposes (the "Project"), attached hereto as **Exhibit A**. The cost to realize CSCCC's proposal is projected at approximately \$53,000,000. Private donations and tax credits are anticipated to make up a large part of the required budget. To ensure that CSCCC is able to raise the funds needed to deliver on its proposal, the Parties believe that this Agreement is a necessary preliminary step before additional City resources will be committed to the Project.

This Agreement requires that CSCCC successfully complete and provide proof of completion to the City for each of its obligations herein. The City will determine, in its sole discretion, whether the obligations have been fulfilled. Failure by CSCCC to fulfill its obligations by the end of the Due Diligence Period constitutes a material breach and shall be grounds for the City to terminate the Agreement. Successful completion of the Due Diligence Period is defined as the successful completion of all CSCCC's obligations prior to the expiration or termination of this Agreement.

The Parties acknowledge and agree that this Agreement does not make any representations related to the transfer of any real property interests. If the Parties decide to pursue a transfer of real property as a part of the final award agreement, the Parties must comply with the *City of Colorado Springs Procedure Manual for the Acquisition and Disposition of Real Property Interests, Revised 2021*. Additionally, the Parties agree that only after the successful completion of the Due Diligence Period will the Parties, subject to negotiations, enter into the final agreement. No representations or promises regarding the final award agreement have been made.

Section 2 CSCCC Due Diligence Period Obligations

CSCCC is solely responsible for the costs associated with the completion of its obligations under this Agreement. CSCCC acknowledges and agrees that the City is not obligated to contribute any funds toward expenses incurred by CSCCC in the execution of this Agreement. The Due Diligence Period consists of two milestones: the first six-month milestone, and the second one-year milestone.

A. FIRST MILESTONE.

1. **FUNDING.** For this period, CSCCC must identify the sources of \$5 million of the total funds in support of the Project ("Funding") and must develop a timeline for achieving full funding of the Project ("Funding Timeline"). CSCCC shall provide to the City the pledge agreements, letters of intent, or proof of actual donation to substantiate funder support.
2. **TIME PERIOD:** CSCCC has six months from the Effective Date of this Agreement to complete this milestone. However, if the City, in its sole discretion, determines it is appropriate to extend the time allotted for this milestone, the Parties may agree to an extension by amending this Agreement in writing.
3. **BUSINESS PLAN.** CSCCC shall prepare a business plan that explains the vision as well as the necessary components that illustrate the feasibility and sustainability of the proposed use of the City Auditorium. Elements of the business plan must include a marketing strategy as well as an operational and management summary. CSCCC's plans must demonstrate the potential for a high degree of success for the proposed capital funding strategy and the operational sustainability of the proposed use.
4. **TAX CREDIT APPLICATIONS:** Prepare and submit the New Markets Tax Credit and Historic Tax Credit applications.
5. **SCHEMATIC DESIGN PHASE:** Begin preparing schematic design package. Obtain and provide to the City the construction cost estimate based on the schematic design.

B. SECOND MILESTONE.

1. **FUNDING.** CSCCC must provide proof to the City of the total fundraising requirement of FIFTY THREE MILLION DOLLARS (\$53,000,000.00) as proposed by CSCCC.
2. **TIME PERIOD:** CSCCC has one year from successful completion of the first milestone to complete this milestone. However, if the City, in its sole discretion, determines it is appropriate to extend the time allotted for this milestone, the Parties may agree to an extension by amending this Agreement in writing.
3. **FINANCIAL STATEMENT.** CSCCC shall develop a pro forma financial statement including a projected balance sheet, income statement and statement of cash flows. These statements will illustrate the feasibility and sustainability of the

operation once capital improvements have been completed and the operation is fully underway.

4. **PROGRAMMING/USE.** CSCCC shall describe the programs and services to be offered with a breakdown by percent of use for private or oriented toward a unique user group versus use oriented toward the general public. CSCCC shall correlate the use with the design to illustrate which spaces will be open for general public use and which areas will be used for a single, defined purpose.
5. **PUBLIC ENGAGEMENT.** CSCCC shall engage stakeholders and the general public in an outreach process to ensure community awareness of the Project. CSCCC shall include opportunities for input and feedback on the proposed uses and renovations of the facility. A minimum of two public meetings and an online survey shall be accomplished during the Due Diligence Period. The City will make available the City Auditorium for use by CSCCC for the public engagement process.
6. **MONITORING REPORTS.** CSCCC shall provide to the City a progress report every two months during the Due Diligence Period. Reports shall be submitted by the last day of each bi-monthly time period during the Due Diligence Period via email to Kim King at:

Kim.King@coloradosprings.gov.

Any hardcopy or large documents should be mailed to:
Kim King
Parks, Recreation and Cultural Services
1401 Recreation Way, MC 1200
Colorado Springs, CO 80905

Section 3 City Due Diligence Period Obligations

- A. **MONITORING.** City will receive, review and respond in a timely manner to progress reports provided by CSCCC in accord with this Agreement.
- B. **ACCESS TO BUILDING.** During the First Milestone, the City will provide CSCCC with reasonable access to the City Auditorium subject to availability. During the Second Milestone, the City will facilitate exclusive access to the City Auditorium for CSCCC after appropriate waivers and indemnifications have been executed between the Parties.

Section 4 General Provisions

- A. APPROPRIATIONS.** This Agreement is expressly made subject to the limitations of the Colorado Constitution and Section 7-60 of the Charter of the City of Colorado Springs. Nothing herein shall constitute, nor be deemed to constitute, the creation of a debt or multi-year fiscal obligation or an obligation of future appropriations by the City Council of Colorado Springs, contrary to Article X, § 20, Colo. Const., or any other constitutional, statutory, or charter debt limitation. Notwithstanding any other provision of this Agreement, with respect to any financial obligation of the City which may arise under this Agreement in any fiscal year after the year of execution, in the event the budget or other means of appropriation for any such year fails to provide funds in sufficient amounts to discharge such obligation, such failure (i) shall act to terminate this Agreement at such time as the then-existing and available appropriations are depleted, and (ii) neither such failure nor termination shall constitute a default or breach of this Agreement, including any sub-agreement, attachment, schedule, or exhibit thereto, by the City. As used herein, the term “appropriation” shall mean and include the due adoption of an appropriation ordinance and budget and the approval of a Budget Detail Report (Resource Allocations) which contains an allocation of sufficient funds for the performance of fiscal obligations arising under this Agreement.
- B. CHOICE OF LAW.** This Agreement is subject to, and shall be interpreted and performed under, the laws of the State of Colorado, and the Charter, City Code, Ordinances, Rules and Regulations of the City of Colorado Springs. CSCCC and the City ensure that their employees, agents, and officers are familiar with, and comply with, applicable federal, state, and local laws and regulations as now written or in the future amended.
- C. CORA.** CSCCC acknowledges that the City is subject to the Colorado Open (Public) Records Act, C.R.S. § 24-72-201 et seq.
- D. ENTIRE AGREEMENT.** This Agreement, together with all appendixes attached, constitutes the entire Agreement between the Parties, and all other representations or statements made, verbal or written, are merged herein, and this Agreement may be amended only in writing, and executed by duly authorized representatives of the Parties.
- E. EXECUTION IN COUNTERPARTS.** This Agreement may be executed in any number of counterparts and each of such counterparts shall for all purposes be deemed to be an original; and all such counterparts, or as many of them as the Parties shall preserve undestroyed, shall together constitute one and the same instruments.
- F. GOVERNMENTAL IMMUNITY.** Nothing in this Agreement shall be interpreted to limit or prevent the protections afforded to the City under the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, et seq.

- G. HEADINGS.** The headings of the several articles and sections of this Agreement are inserted only as a matter of convenience and for reference and do not define or limit the scope or intent of any provisions of this Agreement and shall not be construed to affect in any manner the terms and provisions or the interpretation or construction of the Agreement.
- H. NO INDEMNIFICATION.** Each party agrees to be responsible for its own liability incurred as a result of its participation in this Agreement. In the event any claim is litigated, each party will be responsible for its own expenses of litigation or other costs associated with enforcing this Agreement. No provision of this Agreement shall be deemed or construed to be a relinquishment or waiver of any kind of the applicable limitations of liability provided to the City by the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, *et seq.* and Article XI of the Colorado Constitution. This indemnification clause shall survive the termination or expiration of this Agreement.
- I. INTEGRATION AND INTERPRETATION.**
- a. Amendment: No amendment or modification of the Agreement shall be valid unless expressed in writing and executed by the parties in the same manner as the execution of this Agreement.
 - b. Integration: The entire Agreement consists of the Request For Proposal and CSCCC Response. This is a completely integrated Agreement and contains the entire Agreement between the parties. Any prior written or oral agreements that are different from the terms, conditions, and provisions of this Agreement shall be of no effect and shall not be binding upon either party.
 - c. Binding Effect: This Agreement and its provisions shall be binding upon and to the benefit of the parties and their respective successors or assignees.
- J. LICENSES AND PERMITS.** It shall be the responsibility of the CSCCC, at its expense, all necessary licenses and permits to complete the Project, in accordance with Federal, State, and Local laws, regulations, and ordinances. Typical permits and fees include, but are not limited to, Excavation/Boring Permits, Concrete Construction Permits, Fugitive Dust Permits, Regional Building Permits, Pavement Degradation fees, as well as Traffic Control and Barricade Plans to be approved by the City Traffic Division for all work within public rights-of-way and easements (i.e. curb and gutter, sidewalks, pedestrian ramps, and cross pans).
- K. NOTICES.** Any notice provided in accord with this Agreement will be in writing and will be sent by: delivery service, or mailed by certified mail, postage prepaid and return receipt requested to either Party's address as shown ("Notice"). Notice will be effective upon the

date received and acknowledged by signature of the Party that receives Notice. Either Party may change its address to which any Notice is to be delivered under this Agreement by giving Notice as provided herein.

If to Parks: City of Colorado Springs
Parks, Recreation and Cultural Service
1401 Recreation Way
Colorado Springs, CO 80905
Attn: Recreation and Administration Manager

If to CSCCC: 127 ½ East Bijou Street, Suite 1
Colorado Springs, CO 80903

- L. **TERM.** This Agreement commences upon the Effective Date stated above and shall expire on February 28, 2023, unless mutually agreed upon in writing by the Parties.
- M. **TERMINATION.** If CSCCC fails to meet either milestone in the time allotted during the Due Diligence Period, or commits any material breach of this Agreement, the City may terminate this Agreement by written notice. CSCCC may terminate this Agreement for any reason by written notice. Written notice of termination shall be served in accord with the Notice requirements of this Agreement and shall state the effective termination date.
- N. **THIRD PARTY BENEFICIARY.** It is specifically agreed between the parties that this Agreement is not intended by any of its terms, provisions, or conditions to create in the public or any individual member of the public a third party beneficiary relationship, or to authorize any person not a party to this Agreement to maintain suit for personal injuries or property damage pursuant to the terms, conditions or provisions of this Agreement. In requiring insurance under this Agreement, the City specifically does not waive or intend to waive any protection, immunity, or other provision of the Colorado Governmental Immunity Act, C.R.S. § 24-10-101 et seq., as now written or amended in the future.
- O. **NONWAIVER.** The City's failure to insist on performance of any of the terms or conditions herein or to exercise any right or privilege or the City's waiver of any breach hereunder shall not thereafter waive any other terms, conditions, or privileges, whether of the same or similar type.

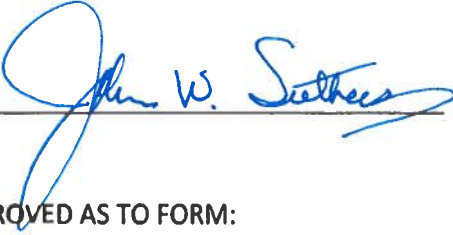
SIGNATURES ON FOLLOWING PAGE

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the day and year first above written.

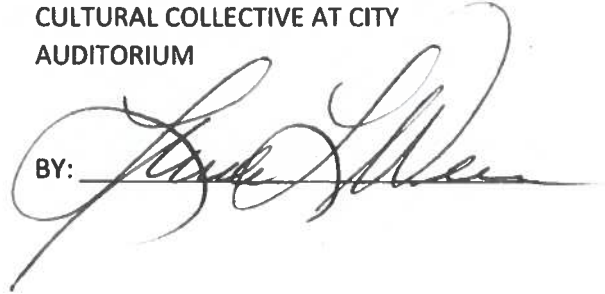
CITY OF COLORADO SPRINGS

COLORADO SPRINGS COMMUNITY
CULTURAL COLLECTIVE AT CITY
AUDITORIUM

BY:



BY:



APPROVED AS TO FORM:

Lisa O'Boyle