



AGENDA ITEM NO. 9:30am "A"

COUNCIL MEETING October 30, 2007

APPROVED BY

DEPARTMENT DIRECTOR

CITY MANAGER

October 30, 2007

FROM: ANDREW T. SOUZA, CITY MANAGER

SUBJECT: APPROVE FIRST AMENDMENT AGREEMENT TO THE MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN SMG AND THE CONVENTION CENTER AND VISITORS BUREAU (FCVB) FOR CHANGES TO ORGANIZATIONAL STRUCTURE AND IMPROVEMENTS IN SERVICE

KEY RESULT AREA

Resource Management

RECOMMENDATIONS

Staff recommends approval of the first amendment agreement to the between SMG and the Convention Center and Visitors Bureau.

EXECUTIVE SUMMARY

On December 14, 2006, a MOU was agreed upon by SMG and the FCVB as an interim steps to allow additional time to address and remedy various financial deficiencies and other matters that resulted in a breach of the original contract between SMG and FCVB dated February 15, 2004. The MOU also provided time to negotiate the First Amendment to the SMG/FCVB agreement.

The First Amendment to the agreement wherein the FCVB agrees to make certain changes, based on an independent audit of the FCVB operations, to its organizational structure and operations to provide improved services to the residence and visitors to the City and County of Fresno.

BACKGROUND

The agreement between the SMG and the City of Fresno was executed on or about January 1, 2004 and required SMG to use reasonable commercial efforts to enter into a subcontract with FCVB for services setting forth performance goals. A subcontract was completed on or around February 15, 2004 requiring, among other things, the FCVB achieve the same room night and event benchmarks that SMG must achieve under the management agreement. SMG was required to provide all funds appropriated to FCVB by the City. However, the agreement did not give SMG direct financial oversight of the FCVB.

On or about November 1, 2006, SMG notified FCVB of "Notice to Correct Financial Deficiencies". The notice stated that the FCVB breached the agreement by failing to provide SMG with an unqualified audit opinion by September 30, 2006. The letter also stated that failure to comply with the terms of the Notice Letter would terminate the agreement.

On December 14, 2006, a MOU was agreed to extend the termination date to allow additional time for addressing a remedy for the various financial deficiencies and other matters that resulted in a breach of the original contract between SMG and FCVB dated February 15, 2004. The MOU also provided the basis for time to negotiate the First Amendment to the SMG/FCVB agreement. The MOU required SMG to engage, and the FCVB pay for, an independent audit of all FCVB operations. On or about January 31, 2007, the operations audit provided complete and detailed recommendations for the FCVB improvement.

SMG and FCVB desire to execute this First Amendment to the Agreement wherein the FCVB agrees to make certain changes to its organizational structure and operations as defined by the independent audit to provide improved service to the residents of and visitors to the City and County of Fresno. The terms contained in this agreement shall supersede any and all terms and conditions contained in the current MOU. Details of the amendments are provided in the attached agreement.

FISCAL IMPACT

No fiscal impact

Attachments:

- Letter from SMG General Manager
- First Amendment to Agreement
- Original Agreement (Exhibit A)
- Notice of Deficiencies (Exhibit B)
- Memorandum of Understanding (Exhibit C)
- Operational Audit (Exhibit D)



FRESNO CONVENTION & Entertainment Center

RECEIVED

OCT 18 2007

CITY OF FRESNO
City Manager's Office

October 16, 2007

Andrew T. Souza
City Manager
Office of the City Manager
2600 Fresno St. Room 2064
Fresno, CA. 93721-3601

Re: First Amendment to the SMG/Fresno Convention & Visitors Bureau (FCVB) Agreement

Dear Andy:

I am forwarding to you the executed, but new, First Amendment to the SMG/FCVB Agreement for your review and placement on the next available City Council Meeting Agenda for discussion and approval.

The First Amendment represents the final step and closure of the Memorandum of Understanding (MOU) between SMG and the FCVB dated December 14, 2006. The MOU was an agreement between the parties, negotiated as an interim step to allow for additional time to address and remedy the various financial deficiencies and other matters that resulted in a breach of the original SMG/FCVB Agreement dated February 15, 2004. Further, the MOU provided for the basis and time to negotiate the First Amendment to the SMG/FCVB Agreement.

It should be noted, that as of the date of this correspondence, the FCVB has been successful in correcting all of the noted financial deficiencies. Further, in taking the necessary corrective actions to address the deficiencies, the overall financial condition of the organization has improved substantially. Additionally, the FCVB has been proactive in the development and implementation of many of the recommendations for improvement to its business model and organizational structure, as outlined in the Operations Audit, dated January 31, 2007, prepared by Marshall Murdaugh Marketing.

SMG and its local industry partner, the FCVB, are committed and ready to move the City of Fresno's convention, hospitality and tourism business forward with renewed vitality and desire to succeed.

If you have any questions please contact me.

Sincerely,

William C. Overfelt
General Manager/SMG
Fresno Convention & Entertainment Center

CC: John Adams, SMG Regional Vice President/Denver Convention Complex
Stan Oken, President/FCVB
Oran L. Cogdill, Executive Director/FCVB

10/19

**FIRST AMENDMENT TO AGREEMENT
(SMG – FRESNO CONVENTION & VISITORS BUREAU)**

THIS FIRST AMENDMENT TO AGREEMENT (the "First Amendment") is made and entered into this ___ day of July, 2007 (the "Effective Date"), by and between SMG, a Pennsylvania general partnership ("SMG"), and FRESNO CONVENTION AND VISITORS BUREAU, a California nonprofit corporation ("Bureau"). SMG and Bureau are at times collectively referred to herein as the "Parties" and singularly as a "Party."

RECITALS:

A. On or about January 1, 2004, SMG and the City of Fresno (the "City") entered into that certain management agreement (the "Management Agreement") obligating SMG to operate and perform specified sales and marketing services on behalf of the Fresno Convention & Entertainment Center, which includes the Saroyan Theatre, Selland Arena, the Robert A. Schoettler Convention Center, Exhibit Hall and the Ernest E. Valdez Exhibit Hall.

B. The Management Agreement also required SMG, within sixty (60) days of January 1, 2004, to use reasonable commercial efforts to enter into a subcontract with Bureau for services setting forth certain performance goals.

C. On or about February 15th, 2004, pursuant to the Management Agreement, SMG and Bureau entered into that certain subcontract for services to be provided to SMG by Bureau (the "Agreement"), attached hereto as Exhibit "A" and incorporated herein by this reference. The Agreement requires, among other things, that the Bureau achieve the same room night and event benchmarks that SMG must achieve under the Management Agreement. In exchange for such services, SMG is required to provide to Bureau in a timely fashion all funds appropriated to Bureau by the City. However, the Agreement does not give SMG direct operational or financial oversight of Bureau's day-to-day affairs.

D. On or about November 1, 2006, SMG sent to Bureau that certain letter regarding "Notice to Correct Financial Deficiencies" (the "Notice Letter"), attached hereto as Exhibit "B" and incorporated herein by this reference. More specifically, the Notice stated that Bureau breached the Agreement by failing to provide SMG with an unqualified audit opinion prepared by an independent certified public accountant by September 30, 2006. The Notice Letter also stated that if the Bureau's failed to comply with the terms of the Notice Letter, SMG would be forced to terminate the Agreement.

E. On or about December 14, 2006, the Parties entered into that certain Memorandum of Understanding (the "MOU"), whereby SMG agreed to extend the termination date of the Agreement if the Bureau agreed, *inter alia*, to renegotiate the Agreement. The MOU is attached hereto as Exhibit "C" and incorporated herein by this reference. The MOU also required SMG to engage, and the Bureau to pay for, an independent audit of all Bureau operations (the "Operations Audit"). As a result of this requirement, SMG retained the services of Marshall Murdaugh Marketing (the "Operation's Consultant") to perform a comprehensive

assessment of Bureau organizational structure and operations, as well as provide recommendations about how Bureau can improve the level of service it provides to the residents of and visitors to the City and County of Fresno. On or about January 31, 2007, the Operations Consultant delivered the Operation Audit complete with detailed recommendations for Bureau improvement. The Operations Audit is attached hereto as Exhibit "D" and incorporated herein by this reference.

F. The Parties desire to execute this First Amendment to the Agreement wherein Bureau agrees to make certain changes to its organizational structure and operations to provide improved service to the residents of and visitors to the City and County of Fresno. The terms contained in the Agreement and this First Amendment to the Agreement shall supersede any and all terms and conditions contained in the MOU.

NOW, THEREFORE, in consideration of the recitals set forth above, which are herein incorporated by this reference, and the mutual covenants and undertakings set forth herein, the mutual receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. Amendment to Section 1.8. The Parties agree that Section 1.8 shall be deleted in its entirety and the following shall be substituted in its place:

1.8. Board of Directors; Amendment to Bureau Bylaws.

(a) **Limitation on FCEC General Manager; Meeting Notice and Minutes.** The SMG General Manager of the Fresno Convention & Entertainment Center or his/her designee shall only serve as an *ex officio* member of the Bureau's Board of Directors. During the term of this Agreement, however, Bureau agrees that the General Manager of the Fresno Convention & Entertainment Center or his/her designee shall receive advanced written notice of, and an invitation to, all regular and special meetings of, and minutes for, the Bureau's Board of Directors as well as all standing and *ad hoc* committees of the Bureau.

(b) **Limitation on Size and Composition of Bureau Board.** The Bureau's Bylaws shall be revised to ensure that the Bureau's Board of Directors shall be comprised of a total of no less than seven (7) but no more than a twenty-one (21) voting members. The Bureau's Board of Directors may appoint, at their sole discretion, an advisory committee to provide nonbinding direction and advice to the Bureau's Board of Directors.

(c) **Change in Composition of Executive Committee.** The Bureau's Bylaws shall be revised to amend the composition of the Bureau's Executive Committee to the following five (5) members of the Board of Directors: The President, the Vice President, the Secretary/Treasurer, the Chair of Finance/Budget Committee, and the Bureau's immediate past President. At least one (1) member of the Executive Committee shall be City designee.

(d) **Bureau Board of Director Term Limits and Orientation.** The Bureau's Board of Directors shall serve no more than three (3) terms, unless the Director is appointed as a designee of the City of Fresno or the County of Fresno. Pursuant to the Bureau's Bylaws, Directors' terms shall not exceed three (3) years. Additionally, the Bylaws shall require Bureau's Board of Directors to develop and implement a member orientation program to educate new and existing members about Bureau policies and marketing efforts.

3. Addition of Section 3.9. The Parties agree that Section 3.9 shall be added to Article III. Section 3.9 shall state:

3.9. Personnel Reports. Within forty-five (45) days after the Effective Date of this First Amendment, Bureau shall submit to the General Manager of the Fresno Convention & Entertainment Center or his/her designee a draft employee handbook. Within five (5) days after receipt of the draft employee handbook, SMG shall provide to Bureau suggested modifications to such draft employee handbook. The employee handbook shall be approved and adopted by the Bureau Board of Directors within thirty (30) days of receipt of SMG's suggested modifications.

4. Amendment to Section 5.1: The Parties agree that Section 5.1 shall be deleted in its entirety and following shall be substituted in its place:

5.1. Conflicts of Interest. No member of the Bureau's Board of Directors shall make, participate in making, or in any way attempt to use his official position to influence the making of a Board decision in which he knows, or has reason to know, that he has a financial interest. A member of the Board of Directors has a financial interest in a decision if it is reasonably foreseeable that the decision will have a direct financial effect, distinguishable from its effect on the public at large or on the entertainment or hospitality industry generally, on the member of the Board of Director, his or her family, or any of the following:

(a) Any business entity in which the member of the Board of Directors has a direct or indirect investment worth \$2,000.00 or more or in which the member is a director, officer, partner, trustee, employee, or holds a position of management;

(b) Any real property in which the member of the Board of Directors has a direct or indirect interest worth \$2,000.00 or more;

(c) Any source of income of \$500.00 or more received by the member of the Board of Directors within 12 months prior to the time when the decision is made; or

A member of the Board of Directors who has a financial interest in a decision shall, immediately prior to the consideration by the Board of the matter, do all of the following:

- (a) Publicly identify the financial interest that gives rise to the conflict of interest;
- (b) Recuse himself or herself from discussing and voting on the matter; *and*
- (c) Leave the room until after the discussion vote, and *or* other disposition of the matter is concluded.

The member's absence from the discussion and abstention from the vote should be recorded in the minutes of the meeting. Approval of any action of the Board of Directors must be by a majority of disinterested members.

To avoid even the appearance of a conflict of interest, all contracts for goods or services let by the Bureau in the amount of \$2,000.00 or more shall be awarded following the issuance of a request for proposal(s) to outside vendors in order to provide a competitive opportunity and ensure that no member of the Board of Directors benefits from inside information.

If SMG determines, based upon reliable evidence, that any Bureau director, officer or employee has violated the conflict of interest provisions contained herein, SMG shall immediately notify the Bureau of the violation and provide the Bureau the opportunity to cure the violation by terminating the improper transaction and requiring the director, officer, or employee to disgorge all funds obtained directly or indirectly through the improper transaction by returning to them to the Bureau. If Bureau fails to cure within fifteen (15) days of such notice, SMG shall have the right to take any action it deems necessary, including, but not limited to, the termination of this Agreement.

5. New Article X: The Parties agree that Article X, entitled IMPLEMENTATION OF OPERATIONAL AUDIT RECOMMENDATIONS, shall be added to the Agreement as follows:

10.1. Within ninety (90) days after the Effective Date of this First Amendment, Bureau shall provide to SMG a plan and timeline to implement the major recommendations (described in the summary on pages 59-61) contained in the Operations Audit.

6. (Intentionally Deleted.)

7. Alternative Funding Sources. Bureau shall use its best efforts to identify and obtain new funding sources in addition to those funds currently provided to Bureau from the City (the "Alternative Funds"). Additionally, Bureau shall use its best efforts to obtain increased financial contributions to the Bureau from its members representing both private industry and government. No less than a majority of the Alternative Funds shall be used for marketing and advertising Fresno as a destination location for convention and tourism business. The Parties agree to meet on a periodic basis or as requested by SMG to discuss Bureau's progress in obtaining the Alternative Funds.

8. Counterparts. This First Amendment (either a duplicate copy or a copy of a facsimile thereof) may be executed in any number of counterparts and each such counterpart shall be deemed to be an original instrument, all of which together shall constitute one and the same instrument.

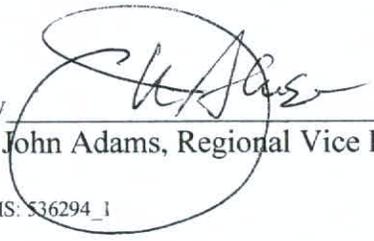
9. Remainder of Operating Agreement Still in Force. The Parties hereby agree that except as amended in this First Amendment herein, the Agreement, and each and all of its provisions, shall remain in full force and effect.

IN WITNESS WHEREOF, the Parties have executed this First Amendment at Fresno, California, the day and year first above written.

SMG, a Pennsylvania general partnership

FRESNO CONVENTION AND VISITORS
BUREAU, a nonprofit corporation

By



John Adams, Regional Vice President

By



10.5.07

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