

OFFICE OF THE CITY ATTORNEY
ROBERT E. SHANNON, City Attorney
333 West Ocean Boulevard, 11th Floor
Long Beach, CA 90802-4664

1 October 2010

2 SUPPLEMENTAL AGREEMENT
3 to Management Agreement 21667
4 (Terrace Theater Seat Replacement)

5 **21667**

6 THIS SUPPLEMENTAL AGREEMENT is made and entered into as of
7 November 16, 2010, pursuant to a minute order adopted by the City Council of the
8 City of Long Beach at its October 19, 2010 meeting by and between the CITY OF LONG
9 BEACH, a municipal corporation ("City") and SMG, a Pennsylvania joint venture ("SMG").

10 1. This Supplemental Agreement is made and entered into with
11 reference to the following facts and objectives:

12 1.1 City and SMG entered into a written Management Agreement
13 dated as of February 12, 1991, (as amended from time to time "Agreement") for
14 the management and operation of the Long Beach Convention and Entertainment
15 Center (City Clerk's Contract No. 21667).

16 1.2 Pursuant to the provisions of paragraph 5.3 of the Agreement,
17 SMG has recommended to City that Capital Improvements be made at an
18 estimated cost not to exceed Eight Hundred Fifty Thousand Dollars (\$850,000.00).
19 The recommended improvements are the replacement of 3,021 seats in the
20 Terrace Theater ("Facility Improvements"). City and SMG agree to use their best
21 efforts to complete the Facility Improvements for less than Eight Hundred Fifty
22 Thousand Dollars (\$850,000.00). In no event shall City be obligated to spend
23 more than Eight Hundred Fifty Thousand Dollars without further City Council
24 approval.

25 1.3 The parties intend by this Supplemental Agreement to set
26 forth all of their understandings and agreements relative to the purchase,
27 installation and payment for the Facility Improvements.

28 2. Facility Improvements.

2.1 "Plans" shall mean the plans, specifications, schedules and

1 related construction contracts for the Facility Improvements approved pursuant to
2 the applicable standards of the City. As of the date of this Supplemental
3 Agreement, the City standards for construction incorporate those set forth in the
4 Green Book, Standard Specifications for Public Works Construction (2003 edition),
5 of the Southern California Chapter of the American Public Works Association, as
6 modified by the City of Long Beach, California Amendments to Standard
7 Specifications for Public Works Construction (2003 edition), together with the City
8 of Long Beach Standard Plans (2003 edition).

9 To the extent that it has not already done so, SMG shall cause Plans
10 to be prepared for the Facility Improvements. SMG shall obtain the written
11 approval of the Plans in accordance with applicable ordinances and regulations of
12 the City. Copies of all Plans shall be provided by SMG to the City (in both printed
13 format and in an electronic format approved by the City) upon request therefor,
14 and, in any event, as built drawings (in both printed format and in an electronic
15 format approved by the City).

16 2.2 The Facility Improvements are to be constructed, acquired
17 and installed substantially in accordance with the approved Plans by a licensed
18 general contractor by or under the direct supervision of SMG. SMG shall perform
19 all of its obligations hereunder and shall monitor the performance of any applicable
20 general contractor to confirm that all operations with respect to the construction of
21 Facility Improvements are conducted in a good and workmanlike manner, with the
22 standard of diligence and care normally employed by duly qualified persons
23 utilizing their best efforts in the performance of comparable work and in
24 accordance with generally accepted practices appropriate to the activities
25 undertaken. SMG shall require the general contractor performing work in
26 connection with the Facility Improvements employ at all times adequate staff or
27 consultants with the requisite experience and applicable licenses and registrations
28 necessary to administer and coordinate all work related to the design, engineering,

1 acquisition, construction, testing, installation and inspection of the Facility
2 Improvements. SMG shall at all times employ adequate staff or consultants with
3 the requisite experience and licenses to discharge its obligations under this
4 Supplemental Agreement.

5 SMG shall, use its best efforts to obtain at least three independent
6 written bids for the Facility Improvements and that the contract is awarded to the
7 lowest responsible qualified bidder. City shall be entitled to be represented at the
8 time and place for the opening of the bids, but SMG shall not be delayed by the
9 absence of the City so long as the City was provided reasonable notice of the
10 opening of the bids. In the event SMG or SMG's contractor is unable to obtain
11 three independent written bids, SMG or SMG's contractor shall document its
12 attempts to secure the required bids and SMG shall submit said documentation to
13 City. SMG shall meet and confer with City regarding the awarding of contract.

14 From time to time at the request of the City and given reasonable
15 notice thereof, SMG shall meet and confer with the City regarding matters arising
16 hereunder with respect to the Facility Improvements and the progress in the
17 construction and acquisition of the same, and as to any other matter related to the
18 Facility Improvements or this Supplemental Agreement. SMG shall advise the City
19 in advance of any coordination and scheduling meetings to be held with
20 contractors relating to the Facility Improvements, in the ordinary course of
21 performance of an individual contract. City's designated representative shall have
22 the right to be present at such meetings, and to meet and confer with the
23 contractor if deemed advisable by the City to assist in resolving disputes and/or
24 ensure the proper completion of the Facility Improvements; provided that any
25 assistance or instruction by City is provided to SMG and not directly to any
26 contractors engaged by SMG.

27 2.3 Independent Contractor. In performing this Supplemental
28 Agreement, SMG is an independent contractor and not the agent or employee of

1 the City. The City shall not be responsible for making any payments to any officer
2 or employee of SMG or any contractor, subcontractor, agent, consultant,
3 employee or supplier selected by SMG.

4 2.4 Performance and Payment Bonds. SMG will require selected
5 installation contractors to comply with all applicable performance and payment
6 bonding requirements of the City with respect to the construction of the Facility
7 Improvements. All contractors providing work in connection with the construction
8 of the Facility Improvements shall provide a labor and materials and performance
9 bonds which name the City as an additional insured. SMG will not be required to
10 provide Performance and Payment Bonds as part of SMG's supervision of the
11 Facility Improvements.

12 2.5 Contracts and Change Orders. SMG shall be responsible for
13 entering into all contracts and any amendments (commonly referred to as "change
14 orders") required for the construction and installation of the Facility Improvements
15 and all such contracts and change orders shall be submitted to the City. Prior
16 approval of change orders by the City shall only be required for such change
17 orders, which in any way materially alter the quality or character of the Facility
18 Improvements. Within five (5) business days of receipt by the City of a contract or
19 change order that needs the prior approval of the City, the City shall either (i)
20 approve or deny such contract or change order (any such denial to be in writing,
21 stating the reasons for denial and the actions, if any, that can be taken to obtain
22 later approval), or (ii) notify SMG that it needs additional time (not to exceed an
23 additional five (5) business days) to approve or deny the contract or change order.
24 The City will use a good faith effort to grant approvals or provide denials on a more
25 expeditious basis in the event that SMG identifies in writing that the subject
26 contract or change order is needed to address an emergency or critical path
27 situation.

28 2.6 Time for Completion. SMG agrees that this Supplemental

1 Agreement is for the benefit of the City and SMG and, therefore, SMG represents
2 that it expects to complete the Facility Improvements under this Supplemental
3 Agreement no later than January 31, 2011. SMG agrees to use its good faith
4 efforts to complete the Facility Improvements by January 31, 2011. Any failure to
5 complete the Facility Improvements within said time period shall not, however, in
6 itself, constitute a breach by SMG of the terms of this Supplemental Agreement.

7 2.7 Inspection. SMG shall obtain all permits (including but not
8 limited to City construction, electrical, plumbing and/or mechanical permits),
9 approvals and consents required by law for the installation of the Facility
10 Improvements. The applicable departments of the City shall make or cause to be
11 made periodic site inspections of the Facility Improvements to be constructed,
12 acquired and or installed hereunder in accordance with customary inspection
13 practices of public agencies for similar public improvements. SMG agrees to pay
14 all inspection, permit and other similar fees of the City applicable to construction of
15 the Facility Improvements.

16 3. In addition to the foregoing, SMG shall include in any contract for the
17 Facility Improvements the following provisions:

18 3.1 The requirement for the contractor to defend and indemnify
19 the City, its officers and employees and SMG and its officers, directors, agents
20 and employees from all claims arising from contractor's acts or omissions.

21 3.2 The requirement that every contractor obtain and furnish SMG
22 with evidence of workers' compensation, automobile and commercial general
23 liability insurance of Sections 7.3 and 7.4 of the Standard Specifications for Public
24 Works Construction as amended by City. Contractor shall also obtain and furnish
25 SMG with evidence of an installation floater policy/fire policy. Such insurances
26 shall name City and SMG and their officers, directors, agents and employees as
27 additional insureds.

28 3.3 Promptly following the execution of this Supplemental

1 Agreement, SMG shall deliver to City the contractor's certificates of insurance and
2 required endorsements (or other evidence acceptable to the Risk Manager in the
3 Risk Manager's discretion) evidencing the insurance coverage required by this
4 Supplemental Agreement for approval as to sufficiency and form.

5 3.4 The requirement that all materials, products, parts and
6 equipment furnished shall be free from defects and imperfections and that all
7 workmanship shall be in accord with the best practices.

8 4. Payment.

9 4.1 City shall pay SMG for the Facility Improvements in the
10 manner described below, not to exceed Eight Hundred Fifty Thousand Dollars
11 (\$850,000.00). If SMG anticipates the Facility Improvement will exceed Eight
12 Hundred Fifty Thousand Dollars (\$850,000.00), then SMG shall immediately give
13 notice to City. SMG's failure to notify City shall be deemed a waiver of all of
14 SMG's claims for additional compensation relating to the Facility Improvement.
15 After receipt of this notice, City will notify SMG whether or not to proceed. The
16 parties recognize that any expenditure in excess of \$850,000.00 for replacement
17 of the Terrace Theater seats require City Council approval.

18 4.2 SMG has requested to receive regular payments. City shall
19 pay SMG in due course payments following receipt from SMG and approval by
20 City of invoices showing the services or tasks performed, the time expended (if
21 billing is hourly), and the name of the Facility Improvement. City shall pay all
22 undisputed portions of SMG's invoice. SMG shall certify on the invoices that SMG
23 or SMG's contractor has performed the services in full conformance with this
24 Agreement and is entitled to receive payment. Where billing is done and payment
25 is made on an hourly basis, the parties acknowledge that this arrangement is
26 either customary practice for SMG's profession, industry, or business, or is
27 necessary to satisfy audit and legal requirements which may arise due to the fact
28 that City is a municipality.

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1 5. Any notice, demand, request, consent, approval, or communication
2 that either party desires or is required to give to the other party or any other person shall
3 be in writing and either served personally or sent by prepaid first-class mail. Any notice,
4 demand, request, consent, approval, or communication that either party desires or is
5 required to give to the other party shall be addressed to the other party at the address set
6 forth below. Either party may change its address by notifying the other party of the
7 change of address. Notice shall be deemed communicated upon personal service or
8 forty-eight (48) hours from the time of mailing if mailed as provided in this paragraph.

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- 10 To City: City Manager
 13th Floor, City Hall
 333 West Ocean Boulevard
 Long Beach, California 90802

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 - 13 To City: Director, Department of Public Works
 9th Floor, City Hall
 333 West Ocean Boulevard
 Long Beach, California 90802
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 - 16 To City: Manager, Asset Management Bureau
 333 West Ocean Boulevard, Third Floor
 Long Beach, California 90802
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 - 18 To SMG: General Manager, SMG
 300 East Ocean Boulevard
 Long Beach, California 90802
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 - 20 To SMG: President, SMG
 300 Conshohocken State Road, Suite 450
 300 Four Falls Corporate Center
 West Conshohocken, Pennsylvania 19428
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25 6. This Supplemental Agreement contains or refers to all the
26 agreements of the parties with respect to the Facility Improvements and cannot be
27 amended or modified except by written agreement.

28 7. Compliance with Laws. SMG shall not with knowledge commit, suffer

1 or permit any act to be done in, upon or to the property or the Facility Improvements in
2 material violation of any law, ordinance, rule, regulation or order of any governmental
3 authority or any covenant, condition or restriction now or hereafter affecting the property
4 or the Facility Improvements.

5 8. Requests for Payment. SMG represents and warrants that (i) it will
6 not request payment from the City pursuant to this Supplemental Agreement for the
7 acquisition of any improvements that are not part of the Facility Improvements.

8 9. Financial Records. SMG covenants to maintain proper books of
9 record and account for the construction and installation of the Facility Improvements and
10 all costs related thereto. Such accounting books shall be maintained in accordance with
11 generally accepted accounting principles or other accounting basis consistently applied,
12 and shall be available for inspection by the City or its agent at any reasonable time during
13 regular business hours on reasonable notice.

14 10. Prevailing Wages. SMG covenants that, with respect to any
15 contracts or subcontracts for the construction of the Facility Improvements hereunder, it
16 will assure complete compliance with any applicable law or regulation for the payment of
17 prevailing wages for such construction, including but not limited to all applicable
18 requirements of the City's charter and municipal code. SMG acknowledges that
19 compliance includes, but is not limited to, the duty of each contractor and subcontractor
20 to keep an accurate payroll record in accordance with Division 2, Part 7, Article 2 of the
21 California Labor Code, and to furnish such records in a timely manner upon request by
22 SMG, the City or the California Department of Industrial Relations. Such compliance also
23 includes the duty of SMG to investigate, and, if substantiated, cause to be corrected, any
24 alleged violation of applicable prevailing wage rules, regulations of statutes, or if not
25 corrected to cooperate with the City to identify and impose such penalties as allowed by
26 applicable State or City law or regulation In furtherance of the foregoing, SMG agrees to
27 provide City, promptly following receipt of a written request therefor, with a certified
28 payroll for all work for which payment has been or is then being requested under this

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1 unenforceable by a court of competent jurisdiction, the remainder of this Supplemental
2 Agreement shall be given effect to the fullest extent possible.

3 21. Any waiver by either party of any breach by the other party of any
4 one or more of the covenants, conditions or agreements of this Supplemental Agreement
5 shall not be nor be construed to be a waiver of any subsequent or other breach of the
6 same or any other covenant, condition or agreement of this Supplemental Agreement,
7 nor shall any failure on the part of either party to require or exact full and complete
8 compliance by the other party with any of the covenants, conditions or agreements of this
9 Supplemental Agreement be construed as in any manner changing the terms hereof or to
10 prevent either party from enforcing any provision hereof.

11 22. In the performance of this Supplemental Agreement, SMG shall not
12 discriminate against any employee or applicant for employment because of race, religion,
13 national origin, color, age, sex, sexual orientation, gender identity, AIDS, HIV status,
14 handicap or disability. Consultant shall ensure that applicants are employed, and that
15 employees are treated during their employment, without regard to these bases. These
16 actions shall include, but not be limited to, the following: employment, upgrading,
17 demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of
18 pay or other forms of compensation; and selection for training, including apprenticeship.
19 SMG shall post in conspicuous places notices setting forth the provision of this
20 paragraph.

21
22 11-4, 2010

SMG, a Pennsylvania joint venture

By John F. TB

"SMG"

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24
25
26 11-16, 2010

CITY OF LONG BEACH, a municipal
corporation

By [Signature] Assistant City Manager
City Manager

"City"

EXECUTED PURSUANT
TO SECTION 301 OF
THE CITY CHARTER.

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The foregoing Supplemental Agreement is hereby approved this 9 day
of November 2010.

ROBERT E. SHANNON, City Attorney

By *Charles Parker*
Principal Deputy

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