

**IMPORTANT NOTICE**

Selected cafés or restaurants of the 2011-2012 DOT pilot Pop-up Café program shall be required to endorse an agreement substantially similar to the attached maintenance agreement.

SAMPLE

## **PILOT POP-UP CAFÉ PROGRAM MAINTENANCE AGREEMENT**

This Agreement dated as of \_\_\_\_\_, 2011, between the New York City Department of Transportation (hereinafter referred to as “DOT”), acting by and through its Commissioner, whose address is 55 Water Street, New York, NY 10041 and \_\_\_\_\_ the corporation acting by and through its President, whose address is \_\_\_\_\_ (hereinafter referred to as the “Maintenance Partner”).

WHEREAS, the Maintenance Partner desire to purchase, install, maintain, repair and remove a temporary platform on Pearl Street in the Borough of Manhattan; and

WHEREAS, DOT approves of the Maintenance Partner’s temporary platform.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the parties agree as follows:

### **ARTICLE 1: TERM**

- 1.1 This Agreement shall be for an initial term of one hundred and twenty-four (124) days, commencing on July 15, 2010 and terminating on November 15, 2010 (the “Initial Installation Period”), unless terminated earlier as provided herein.
- 1.2 DOT, at its sole discretion, may renew this Agreement for an additional term of two hundred and forty (240) days, commencing on March 21, 2011 and terminating on November 15, 2011 (the “Second Installation Period”), unless terminated earlier as provided herein.
- 1.3 In order to effectuate the Second Installation Period, DOT shall provide the Maintenance Partner with written notice of its intent to renew this Agreement.

### **ARTICLE 2: PERMISSION GRANTED**

- 2.1 DOT hereby agrees to permit the Maintenance Partner, at its sole cost and expense, to purchase, install, maintain, repair and remove a temporary platform, as illustrated in Exhibit A, (the “Platform”).
- 2.2 DOT hereby agrees to permit the Maintenance Partner to install the Platform at the specific location on \_\_\_\_\_ Street in the Borough \_\_\_\_\_ as illustrated in Exhibit B (the “Location”).

### **ARTICLE 3: INSTALLATION AND REMOVAL**

- 3.1 The Maintenance Partner shall install the Platform in a safe, appropriate manner and in full compliance with the approved design illustrated in Exhibit A.
- 3.2 The Maintenance Partner shall oversee and ensure pedestrian traffic is appropriately managed during the installation and operation of the Platform.
- 3.3 The Maintenance Partner shall oversee and ensure that the installation and removal of the Platform shall be completed in a safe and appropriate manner.
- 3.4 The Maintenance Partner shall, on or before the termination of the Initial Installation Period, remove the Platform from the Location.
- 3.5 Upon appropriate notification by DOT, the Maintenance Partner shall reinstall the Platform, on or after the commencement of the Second Installation Period and remove the Platform and on or before the termination of the Second Installation Period

### **ARTICLE 4: MAINTENANCE**

- 4.1 Throughout the term of this Agreement, the Maintenance Partner shall assume, at their own expense, the responsibilities for the maintenance and repair in of the Platform. The Maintenance Partner shall ensure the Platform remain in a good, clean and safe condition in accordance with the terms of this Agreement. In addition, the Platform shall, at all times, be free of trip hazards.
- 4.2 The Maintenance Partner shall respond promptly to any request by DOT for repairs, replacements, modifications or adjustments to the Platform and immediately notify DOT of the status of any such request.
- 4.3 All repairs, maintenance and/or replacements of the Platform, in whole or in part, shall be undertaken by the Maintenance Partner.
- 4.4 The Maintenance Partner shall monitor, inspect, clean, repair, including resetting and/or replacement of damaged or missing portions of the Platform in its entirety.
- 4.5 The Maintenance Partner shall perform maintenance and replacement of the Platform in a timely manner and all costs thereof shall be borne by the Maintenance Partner.
- 4.6 The Maintenance Partner shall, at a minimum, remove litter on an hourly basis during the Platform's hours operation specified in Article 6 herein.
- 4.7 The timely repairing, replacement and/or reconstruction of the Platform shall, in all respects, conform to the original approved design illustrated in Exhibit A unless otherwise agreed to in writing by the Maintenance Partner and DOT.

- 4.8 The Contractor shall ensure that the gutter areas below and adjacent to the Platform are free of debris of any kind and that water flow is not affected by the Platform.

#### **ARTICLE 5: PLATFORM USAGE**

- 5.1 The maximum seating on the Platform shall accommodate at any one time is \_\_\_\_\_ adults. Such seating may include both chairs and benches. In addition, the Maintenance Partner may provide an appropriate amount of shade structures and tables for the Platform. Such chairs, benches shade structures and tables shall be of a safe, sturdy construction and be pre-approved by DOT.
- 5.2 The Maintenance Partner shall remove or secure on a daily basis the chairs and tables from the Platform at the end of the hours of operation specified in Article 6 herein.
- 5.3 As the Platform is a public space, the Maintenance Partner shall not prevent or restrict, in anyway, the general public from utilizing the Platform during hours of operation specified in Article 6 herein.
- 5.4 The Maintenance Partner shall clean the Platform on a daily basis. Such cleaning shall include, but not be limited to, chewing gum removal.
- 5.5 The Maintenance Partner shall not provide waiter/waitress service, or take orders or provide any services or sales on the Platform or at the chairs, benches and tables thereon. Employees of Maintenance Partner shall be permitted to bring pre-paid food or beverages to the Platform. Such pre-paid transactions shall be wholly performed within the Maintenance Partner's establishment.
- 5.6 The sale of alcohol or tobacco products on the Platform shall be strictly prohibited and result in the immediate termination of this Agreement.

#### **ARTICLE 6: HOURS OF OPERATION**

- 6.1 The Maintenance Partner shall strictly adhere to the maximum hours of operation:
- 6.1.1 Monday - 8:00 AM to Midnight;
  - 6.1.2 Tuesday - 8:00 AM to Midnight;
  - 6.1.3 Wednesday - 8:00 AM to Midnight;
  - 6.1.4 Thursday - 8:00 AM to Midnight;
  - 6.1.5 Friday - 8:00 AM to 1:00 AM Saturday;
  - 6.1.6 Saturday - 8:00 AM to 1:00 AM Sunday; and
  - 6.1.7 Sunday - Noon to Midnight.

- 6.2 Upon prior written approval of DOT, the Maintenance Partner may reduce the maximum hours of operation.

#### **ARTICLE 7: SUSPENSION OF PLATFORM USAGE**

- 7.1 DOT retains the unequivocal and exclusive right to immediately suspend, without prior notice, the Platform usage at the Location for any reason whatsoever and at any time whatsoever.

#### **ARTICLE 8: TERMINATION**

- 8.1 The Maintenance Partner expressly agree that DOT shall have the unconditional right to:
- 8.1.1 Rescind or terminate this Agreement for any reason whatsoever upon twenty-four (24) hours notice to the Maintenance Partner;
  - 8.1.2 DOT shall notify the Maintenance Partner via a Notice of Termination which shall specify a specific termination date and time; and
  - 8.1.3 If the Platform is already completed, immediately remove the Platform at its sole discretion and notify the Maintenance Partner that Platform has been removed.
- 8.2 If this Agreement is rescinded or terminated, as provided herein, all rights of the Maintenance Partner herein shall be terminated without any claim for damages against the City, DOT or its agents, employees, officers, or directors by reason of such termination.

#### **ARTICLE 9: LIMITATION**

- 9.1 Nothing in this Agreement shall be construed so as to limit in any way the DOT's right to perform any work or provide any service in connection with the Location which DOT may deem necessary or proper, including stopping the display of the Platform.

#### **ARTICLE 10: ASSIGNMENT**

- 10.1 Notwithstanding anything contained herein to the contrary, it is specifically understood and agreed that in the performance of the terms, covenants, and conditions of this Agreement, the Maintenance Partner or any subsequent mutually agreed upon assignee and any of its employees, agents, independent contractors, and sub-contractors, successors and assigns shall not be deemed to be acting as agents, servants, or employees of DOT or the City by virtue of this Agreement or by virtue of any approval, permit, license, grant, right or other authorization given by the DOT or the City or any of its officers, agents or employees pursuant to this Agreement, but shall be deemed to be performing services for the Maintenance Partner, and the Maintenance Partner shall be deemed solely responsible for all acts taken by them pursuant to this Agreement.

## **ARTICLE 11: OWNERSHIP**

11.1 The Maintenance Partner shall solely purchase and retain ownership of the Platform.

## **ARTICLE 12: PLATFORM MODIFICATION**

12.1 The Maintenance Partner shall not alter or modify the Platform without the express written permission of DOT. Necessary repairs or removal, undertaken pursuant to Article 3 and Article 4 herein shall not be considered alterations or modifications and shall not be subject to this requirement.

## **ARTICLE 13 SIGNAGE**

13.1 The DOT, at its sole cost and expense, shall provide appropriate signage for the Platform. Such signage shall be affixed by DOT in prominent locations and read: "This platform is public space and is not restricted to patrons of any particular business." The Maintenance Partner shall not, at any time, alter or remove such signage from the Platform. In addition, DOT reserves the exclusive right, at its sole discretion, to add further signage to the Platform at any time throughout the term of this Agreement.

## **ARTICLE 14: DAMAGE**

14.1 The Maintenance Partner understands and agrees that neither the City, nor DOT nor its employees shall be responsible for damage to the Platform or any loss thereof. It shall be the sole responsibility of the Maintenance Partner to ensure that the Platform is installed and maintained in such a manner as to prevent damage, loss or theft.

## **ARTICLE 15: COMPLIANCE**

15.1 The Maintenance Partner shall comply with all applicable provisions of federal, state and local laws, the New York City Charter, the Administrative Code of New York City and the applicable rules, directives and permit requirements, if any, of DOT in performing the services rendered and obligations required under this Agreement.

## **ARTICLE 16: REPRESENTATIONS**

16.1 The Maintenance Partner both warrant and represent that they have not:

16.1.1 Been asked to pay, nor offered to pay, nor has paid, any illegal consideration, whether monetary or otherwise in connection with the procurement of this Agreement; and

16.1.2 Employed any person to solicit or procure this Agreement, and has not made, and shall not make any payment or any agreement for the payment of any commission, percentage, brokerage, contingent fee or any other compensation in connection with the procurement of this Agreement.

## **ARTICLE 17: CONTACT INFORMATION**

17.1 Any notices to be given under this Agreement shall be in writing and delivered by hand or sent by certified mail, postage prepaid return receipt requested or via email to:

17.1.1 If to DOT:

**Name**

New York City Department of Transportation  
Office of the Commissioner  
55 Water Street, 9<sup>th</sup> Floor  
New York, NY 10041  
[nhaiman@dot.nyc.gov](mailto:nhaiman@dot.nyc.gov)

17.1.2 If to Maintenance Partner:

**Address and email.**

## **ARTICLE 18: INSURANCE**

18.1 The Maintenance Partner shall at all times maintain, at their sole cost and expense:

18.1.1 Commercial General Liability Insurance with limits of not less than one million dollars (\$1,000,000) combined single limit per occurrence, and two million dollars (\$2,000,000) aggregate, and naming the City and DOT as additional insureds; and

18.1.2 Commercial Automobile Liability Insurance covering all owned, non-owned, hired and borrowed vehicles of not less than one million dollars (\$1,000,000) for any one occurrence, and naming the City and DOT as additional insureds.

18.2 The Maintenance Partner shall also obtain and maintain a policy of Workers' Compensation Insurance, including disability benefits, Unemployment Insurance and Employer's Liability Insurance in compliance with the laws of the State of New York.

18.3 Prior to execution of this Agreement by the City, the Maintenance Partner shall deliver to DOT certificates of insurance (or certified copies of same) from an insurer authorized to do business in the State of New York. Said policies shall provide that no cancellation, termination, or alteration shall be made without thirty (30) days advance written notice to DOT. Failure to maintain or renew the required insurance coverages shall be deemed a material breach of this Agreement.

## **ARTICLE 19: SEVERABILITY**

19.1 Should any provision of this Agreement be deemed to be invalid or unenforceable by any Court of competent jurisdiction, such provision shall be severed from this Agreement and the remainder of this Agreement shall continue in full force and effect.

## **ARTICLE 20: FORUM PROVISION**

20.1 This Agreement shall be construed pursuant to the laws of the State of New York. Any dispute arising from this Agreement shall be adjudicated in the courts of the State of New York.

## **ARTICLE 21: CONFLICT OF INTEREST**

21.1 No officer, agent, employee, or representative of the City, DOT, the Maintenance Partner received any payment or other consideration for the making of this Agreement nor has any legal interest, directly or indirectly, in this Agreement.

## **ARTICLE 22: MODIFICATION**

22.1 This Agreement may not be modified or amended except by written amendments executed by all the parties hereto.

## **ARTICLE 23: INVESTIGATION CLAUSE**

23.1 The parties to this Agreement agree to cooperate fully and faithfully with any investigation, audit or inquiry conducted by a State of New York (the "State") or City of New York (the "City") governmental agency or authority that is empowered directly or by designation, to compel the attendance of witnesses and to examine witnesses under oath, or conducted by the Inspector General of a governmental agency that is a party in interest to the transaction, submitted bid, submitted proposal, contract, lease, permit, or license that is the subject of the investigation, audit or inquiry;.

23.2 If any person who has been advised that his or her statement, and any information from such statement, will not be used against him or her in any subsequent criminal proceeding refuses to testify before a grand jury or other governmental agency or authority empowered directly or by designation to compel the attendance of witnesses and to examine witnesses under oath concerning the award of or performance under any transaction, agreement, lease, permit, contract, or license entered into with the City, the State, or any political subdivision or public authority thereof, or the Port Authority of New York and New Jersey, or any local development corporation within the City, or any public benefit corporation organized under the laws of the State of New York or;

23.3 If any person refused to testify for a reason other than the assertion of his or her privilege against self-incrimination in an investigation, audit or inquiry conducted by a City or State governmental agency or authority empowered directly or by designation to compel the attendance of witnesses and to take testimony under oath, or by the Inspector General of the governmental agency that is an interested party in, and is seeking testimony concerning the award of, or performance under, any transaction, agreement, lease, permit, contract, or license entered into with the City, the State, or any political subdivision thereof or any local development corporation with the City, then;

23.4 The Commissioner or Agency Head whose agency is a party in interest to the transaction, submitted bid, submitted proposal, contract, lease, permit, or license shall convene a



- hearing, upon not less than five (5) days' written notice to the parties involved to determine if any penalties should attach for the failure of a person to testify.
- 23.5 If any non-governmental party to the hearing requests an adjournment, the Commissioner or Agency Head who convened the hearing may, upon granting the adjournment, suspend any contract, lease, permit, or license pending the final determination pursuant to paragraph (23.7) below without the City incurring any penalty or damages for delay or otherwise.
- 23.6 The penalties which may attach after a final determination by the Commissioner or Agency Head may include but shall not exceed:
- 23.6.1 The disqualification for a period not to exceed five (5) years from the date of an adverse determination for any person, or entity of which such person was a member at the time the testimony was sought, from submitting bids for, or transacting business with, or entering into or obtaining any contract, lease, permit or license with or from the City; and/or
- 23.6.2 The cancellation or termination of any and all such existing City contracts, leases, permits or licenses that the refusal to testify concerns and that have not been assigned as permitted under this Agreement, nor the proceeds of which pledged, to an unaffiliated and unrelated institutional lender for fair value prior to the issuance of the notice scheduling the hearing, without the City incurring any penalty or damages on account of such cancellation or termination; monies lawfully due for goods delivered, work done, rentals, or fees accrued prior to the cancellation or termination shall be paid by the City.
- 23.7 The Commissioner or Agency Head shall consider and address, in reaching his or her determination and in assessing an appropriate penalty, the factors listed in paragraphs (23.1) and (23.2) above. He or she may also consider, if relevant and appropriate, the criteria established in paragraph (23.3) and (23.4) above in addition to any other information which may be relevant and appropriate:
- 23.7.1 The party's good faith endeavors or lack thereof to cooperate fully and faithfully with any governmental investigation or audit, including but not limited to the discipline, discharge, or disassociation of any person failing to testify, the production of accurate and complete books and records, and the forthcoming testimony of all other members, agents, assignees or fiduciaries whose testimony is sought.
- 23.7.2 The relationship of the person who refused to testify to any entity that is a party to the hearing, including but not limited to, whether the person whose testimony is sought has an ownership interest in the entity and/or the degree of authority and responsibility the person has within the entity.
- 23.7.3 The nexus of the testimony sought to the subject entity and its contracts, leases, permits or licenses with the City.

23.7.4 The effect a penalty may have on an unaffiliated and unrelated party or entity that has a significant interest in an entity subject to penalties under (23.6) above, provided that the party or entity has given actual notice to the Commissioner or Agency Head upon the acquisition of the interest, or at the hearing called for in (23.4) above gives notice and proves that such interest was previously acquired. Under either circumstance the party or entity must present evidence at the hearing demonstrating the potential adverse impact a penalty will have on such person or entity.

23.8. Definitions.

23.8.1. The term “license” or “permit” as read herein shall be defined as a license, permit, franchise or concession not granted as a matter of right.

23.8.2 The term “person” as used herein shall be defined as any natural person doing business alone or associated with another person or entity as a partner, director, officer, principal, or employee.

23.8.3 The term “entity” as used herein shall be defined as any firm, the Maintenance Partner, corporation, association, or person that receives monies, benefits, licenses, or permits from or through the City or otherwise transacts business with the City.

23.8.2 The term “member” as used herein shall be defined as any person associated with another person or entity as a partner, director, officer, principal or employee.

23.9 In addition to and notwithstanding any other provision of this Agreement the Commissioner or Agency Head may in his or her sole discretion terminate this Agreement upon not less than three (3) days’ written notice in the event the Maintenance Partner fails to promptly report in writing to the Commissioner of Investigation of the City of New York any solicitation of money, goods, requests for future employment or other benefit or thing of value, by or on behalf of any employee of the City or other person, firm, corporation or entity for any purpose which may be related to the procurement or obtaining of this Agreement by the Maintenance Partner, or affecting the performance of this Contract.

**ARTICLE 24: EFFECTIVE DATE**

24.1 The provisions of this Agreement shall be effective upon the complete execution of this Agreement.

**ARTICLE 25: PERSONAL LIABILITY**

25.1 No officer, agent, or employee of DOT or the City shall be charged personally with any liability or held liable under any term or provision of this Agreement by reason of any breach or alleged breach thereof.

## **ARTICLE 26: INDEMNIFICATION**

- 26.1 The Maintenance Partner hereby agree to assume any and all risk of loss or damage to the Location or injury or death (including wrongful death) to any and all persons whatsoever arising out of or in connection with the Maintenance Partner's employees or its contractors', sub-contractors' or Architect's design or fabrication of the Platform. Except to the extent that damage may be caused by the sole negligent act of DOT, its employees or contractors, the Maintenance Partner further agrees to indemnify and hold harmless DOT and the City, its Commissioners, officers, agents and employees:
- 26.1.1 From and against any and all claims, suits and demands based upon any of the risks so assumed, whether just or unjust, fraudulent or not;
  - 26.1.2 For all reasonable expenses incurred by DOT and/or the City in the defense, settlement or satisfaction of any such claims; and
  - 26.1.3 For attorney fees and costs of suit.
- 26.2 The Maintenance Partner shall, if so requested by DOT or the City, at no cost or expense to DOT or the City, defend against such claims.
- 26.3 The Maintenance Partner shall defend, indemnify and hold harmless DOT and the City, its Commissioners, officers, agents and employees from and against any and all claims, suits, judgments, costs, and demands, whether just or unjust, fraudulent or not, to which the City may be subjected or which it may suffer or incur allegedly arising out of or in connection with any infringement by the Architect of any copyright or any other property or personal right of any third party by the Architect in connection with the Platform.

## **ARTICLE 27: TOTAL AGREEMENT**

- 27.1 This Agreement, together with Exhibit A and Exhibit B, contains all the terms, conditions and representations agreed upon by the parties and no other agreement, oral or otherwise, regarding the subject matter of this Agreement shall be deemed to exist or to bind the parties hereto, or to vary any of the terms contained herein, unless it is in the form of a written amendment.

## **ARTICLE 28: BINDING**

- 28.1 The provisions herein shall be binding on heirs, successors and assigns of the parties hereto.

## **ARTICLE 29: PLATFORM REVIEW**

- 29.1 Upon review and approval of the Platform design (Exhibit A) by DOT and its Traffic Division, the design and proposed installation methodology of the Platform shall be subject to an engineering review and certification by an engineering firm assigned and paid for by the Maintenance Partner.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be signed on the day and year first above written.

CITY OF NEW YORK  
DEPARTMENT OF TRANSPORTATION

\_\_\_\_\_  
Janette Sadik-Khan  
Commissioner

MAINTENANCE PARTNER

\_\_\_\_\_  
Name  
President

Approved as to form  
Certified as to legal authority

\_\_\_\_\_  
Acting Corporation Counsel