

**OPERATING AGREEMENT
BETWEEN THE CITY OF MILWAUKEE AND MILWAUKEE MARATHON LLC
FOR STAGING OF 2019 MILWAUKEE MARATHON**

This Agreement is made and effective as of the ____ day of _____, 2019 (“Effective Date”), by and between the City of Milwaukee, Wisconsin, a municipal corporation, (“City”), acting through its Commissioner of Public Works (“Commissioner”) and Chief of Police, or designee, and Milwaukee Marathon LLC, a Wisconsin limited liability company, d/b/a The Milwaukee Marathon, whose address is, 45 Bromfield St., Suite 801, Boston, MA 02108 (“Company”) (collectively, “Parties”).

WHEREAS, Company filed an electronic special event application (“Initial Application”) to stage on April 6, 2019, a marathon, half-marathon, and 5K distance-running event named the 2019 Milwaukee Marathon (“the Event”); and

WHEREAS, The City has entered into operating agreements with previous organizers for the staging of the 2015 through 2017 versions of the Event; and

WHEREAS, As with the 2015 through 2017 Milwaukee Marathons, the Event’s route is proposed to be entirely within the geographic boundaries of the City; and

WHEREAS, The staging of the Event requires significant City resources, particularly Milwaukee Police Department (“MPD”) and Department of Public Works (“DPW”) resources relating to traffic control before, during and after the Event; and

WHEREAS, DPW does not have sufficient traffic control equipment needed for the Event; and

WHEREAS, By Resolution 141123, adopted on November 25, 2014, the Common Council found that City taxpayers should not bear the costs of City services provided to support the Event, but, rather, that the City should fully recover those costs from the event organizer; and

WHEREAS, The Commissioner of Public Works (“Commissioner”) is authorized to approve or deny special event permit applications according to the criteria set forth in MCO §§ 105-55.5-2-c-1 to c-11; and

WHEREAS, The Commissioner has determined that in the absence of an Operating Agreement, a special event permit would not meet the criteria in § 105-55.5-2-c-1 because the Event is of such a size or nature requiring the diversion of so great a number of police officers, ambulances or other emergency services as to deny reasonable emergency services to the city as a whole; and

WHEREAS, The Commissioner has determined that in the absence of an Operating Agreement, a special event permit would not meet the criteria in § 105-55.5-2-c-2 because the time, route, size and nature of the Event will unreasonably disrupt the safe and orderly use of any street or any public, or material portion thereof, which is ordinarily subject to great congestion or traffic at the proposed time, or substantially interrupt the safe and orderly movement of other traffic; and

WHEREAS, By letter dated October 30, 2018, the Commissioner notified Company that the Initial Application was denied on the basis of the Commissioner's aforementioned determinations; and

WHEREAS, Pursuant to City of Milwaukee Common Council Resolution No.181369, adopted on _____, the proper City officials are authorized to execute this Agreement.

NOW, THEREFORE, In consideration of the mutual covenants and agreements contained herein, the Parties mutually agree as follows:

I. COMPANY RESPONSIBILITIES

A. Permit Application. No later than January 30, 2019, Company shall submit a complete permit application ("Application") containing all information required in MCO § 105-55.5-2-b. Company shall also submit the following information as part of its Application:

1. Organizational Capacity. Company shall provide evidence of its capability to organize and stage a large, successful marathon, including its possession of sufficient funding and staffing for safe and efficient staging of the Event, including, but not limited to:

a. Identification of the race management company selected for the Event, along with a copy of the executed contract between Company and the selected race management company;

b. Identification of Event sponsors;

2. Routes. Company shall provide a detailed map of the proposed route for the marathon, half-marathon, and 5K ("Routes"), which shall be subject to the satisfaction of the Commissioner. The Commissioner shall have the authority to modify the Routes, time, and place of the Event to facilitate crowd control in the interest of relieving congestion and promoting public safety, pursuant to § 105-55.5-2-c. Company shall make no changes to the Routes without the approval of the Commissioner. Failure to finalize the Routes to the satisfaction of the Commissioner by March 1, 2019 shall be grounds for denial of the Application.

3. Traffic Control Plan. Company shall provide a detailed traffic control plan ("Traffic Control Plan"), satisfactory to the Commissioner, including, but not limited to:

a. A timeline of street closures;

b. Access and exit plans for properties within the boundaries of the Routes;

c. Identification of the type and location of all traffic control signs and barricades along the proposed Routes; and

d. Identification, including contact information, of the entity that will implement the traffic control plan.

4. Security Plan. Company shall provide a detailed description of the provisions it will make for security during the Event, satisfactory to the Commissioner and the Chief of the Milwaukee Police Department (“Chief of Police”).

5. Emergency Plan. Company shall provide a detailed description of the provisions it will make for first aid and emergency medical treatment during the Event, satisfactory to the Commissioner, the Chief of Police, and the Chief of the Fire Department (“Fire Chief”).

6. Notification Plan. Company shall submit a detailed notification plan, which shall include, but not be limited to, provisions to notify by mail all property owners at least one block in each direction of the Routes and all those within the boundaries of the Routes. Such notification shall be performed no later than 15 days before the Event. Company shall publicize the Event throughout the city, particularly in the aldermanic districts in which the Event will be held, and shall provide Company’s contact information along with information to alert residents and motorists along the Event Routes of street closings, detours, and potential delays.

7. Clean Up Plan. Company shall provide a detailed description of the provisions it will make for Event clean-up, satisfactory to the Commissioner and the Chief of Police.

8. Mitigation of Impacts on Lakefront Properties. Company shall provide written proof that it has met and conferred with affected Lakefront entities, including Discovery World Museum, Milwaukee Art Museum, Milwaukee World Festivals, Inc, and Harbor House, concerning the Application and efforts to mitigate the impacts of the Event on the Lakefront entities.

9. Permits. Company shall provide proof that it has obtained all necessary permits or approvals from all other governmental authorities, including Milwaukee County. If such permits have not been obtained as of the filing of the Application, Company shall include in its Application a report on the status of such approvals. Failure to obtain the permits or approvals by March 1, 2019 shall be grounds for denial of the Application.

B. Payment for City Services. To ensure full cost recovery by the City, Company unconditionally and irrevocably agrees to pay the City without defense, set-off, counterclaim or delay, for City staff time and expenses relating to the staging of the Event, except where refunds are specifically provided for in this Agreement.

1. Payment for Police Services. Except as expressly stated otherwise in this Agreement, Company shall pay the City for MPD services pursuant to the terms of the Extra-Duty Employment Statement of Intent and Extra Duty Letter of Agreement, which are attached to and made a part of this Agreement as Exhibits A and B, respectively.

a. Prior to filing its Application, Company shall submit a complete Extra-Duty Employment Statement of Intent form to MPD.

b. Prior to filing its Application, Company shall execute an Extra-Duty Letter of Agreement with MPD.

c. Notwithstanding Paragraph 20 of the Extra-Duty Letter of Agreement, by March 1, 2019, MPD shall invoice Company for the estimated police resources and equipment relating to the staging of the Event (“MPD Estimate”), as determined by MPD. Payment in full is required by March 11, 2019. If the MPD Estimate is not paid in full by March 11, 2019, this Agreement shall be terminated and the Commissioner shall revoke any special event permit issued pursuant to this Agreement.

d. Notwithstanding Paragraph 18 of the Extra-Duty Letter of Agreement, payment for police services shall be based upon the contractual wages of the assigned officer(s) at the time of the Event.

e. Post-Event Reconciliation.

(i) If MPD’s actual expenses exceed the MPD Estimate, Company shall pay the remaining balance within 60 days of invoice by MPD.

(ii) If MPD’s actual expenses are less than the MPD Estimate, MPD shall reimburse Company for the balance of the overpayment within 60 days of receipt of the Event.

f. Refund of MPD Estimate.

(i) If, after payment of the MPD Estimate, the City terminates this Agreement prior to the Event, or otherwise denies approval of the Application or issuance of a special event permit, the City shall refund the MPD Estimate.

(ii) Notwithstanding Paragraph 14 of the Extra-Duty Letter of Agreement, if Company cancels the Event, Company shall provide 10 working days written notice of Event cancellation. If Company provides 10 working days written notice of cancellation, the City shall refund the MPD Estimate. If Company fails to provide 10 working days written notice of cancellation, the City shall refund the MPD Estimate minus an Administrative Fee provided for in the Extra-Duty Letter of Agreement, the amount to be determined by MPD, which amount shall not exceed \$1,000.00.

2. Payment for DPW and Other (Non-MPD) City Services.

a. By March 1, 2019, DPW shall invoice Company for the costs of DPW and other (non-MPD) City resources and equipment relating to the staging of the Event, as determined by DPW and according to the fee schedules set forth in MCO, ch. 81. Payment in full is required by March 11, 2019. If the DPW costs are not paid in full by March 11, 2019, this Agreement shall be terminated and the Commissioner shall revoke any special event permit issued pursuant to this Agreement.

b. If, following payment of the DPW costs, Company requests additional DPW services or equipment, Company shall pay those costs within five (5) days of invoice by DPW.

c. If, after payment of DPW costs, the City terminates this Agreement prior to the Event, or otherwise denies approval of the Application or issuance of a special event permit, the City shall refund the amounts paid for DPW costs. If Company provides 10 working days written notice of cancellation, the City shall refund the amounts paid for DPW costs, except for a \$50 permit processing fee, pursuant to MCO § 105-55.5-2-g.

C. Traffic Control Equipment. Company shall provide all traffic control signs and barricades identified in the Traffic Control Plan approved by the Commissioner, with such signs and barricades meeting any specifications established by the City through the approved Traffic Control Plan. By March 11, 2019, Company shall provide a copy of the executed contract between Company and the entity supplying the traffic control signs and barricades. If Company provides written notice, on or before March 11, 2019, demonstrating its inability to procure all necessary traffic control barricades, as determined by the City, then the City shall supplement, at Company's expense, the traffic control barricades in an amount not to exceed 150 barricades.

D. Indemnification. In case any action in court, claim, or proceeding before an administrative agency is brought against the City or any of its officers, agents, or employees for the negligent acts, errors and omissions of the Company during the performance of any of the covenants, acts, matters, or things by this Agreement undertaken, or for injury or damage caused in whole or in part by the negligence of Company, its officers, agents and employees, arising from, in connection with, or as a consequence of granting a special event permit for the Event, Company shall defend, indemnify, and save harmless the City and its officers, agents, and employees from all losses, damages, costs, expenses, judgments, or decrees arising out of such action. The City shall tender the defense of any claim or action at law or in equity to Company or the Company's insurer, and upon such tender, it shall be the duty of Company or Company's insurer to defend such claim or action without cost or expense to the City or its officers, agents, or employees.

E. Insurance.

1. **General Requirements.** Company shall submit with the Application a certificate(s) of insurance acceptable to the City stating that the issued insurance policies meet the requirements as outlined below. In addition, Company shall submit with the Application written documentation evidencing that a fully-executed, complete copy of this Agreement has been provided to the underwriter of the issued insurance policies. If such certificate(s) and documentation are not received, the City has the authority to declare this Agreement terminated.

All policies shall state that the City shall be afforded a 30-day written notice of cancellation, non-renewal or material change by any insurers providing the coverage required by City for the duration of this Agreement. Insurance companies must be acceptable to the City and must have a current A.M. Best rating of A-VIII or better. All policies shall be written on an occurrence form. If subcontractors are used, each must meet all requirements in sections 1 and 2.

2. Minimum Insurance Requirements. Minimum insurance requirements are as follows:

a. **Workers' Compensation and Employer's Liability:**

| | |
|---------------------------|-------------------------|
| Workers' Compensation | Statutory Coverage |
| Bodily Injury by Accident | \$100,000 each accident |
| Bodily Injury by Disease | \$500,000 policy limit |
| Bodily Injury by Disease | \$100,000 each employee |

(i) Employer's Liability at limits noted above or higher limits if needed to meet Umbrella underlying insurance requirements.

(ii) Coverage shall be modified to include a Waiver of Subrogation Endorsement in favor of City including its directors, officers, agents, employees and volunteers.

b. **Commercial General Liability:**

| | |
|---|-----------------------------|
| Commercial General Liability | \$1,000,000 each occurrence |
| General Aggregate | \$3,000,000 aggregate |
| Personal & Advertising Injury Limit | \$1,000,000 each occurrence |
| Products - Completed Operations Aggregate | \$3,000,000 aggregate |
| Medical Expense | \$ 10,000 each person |

(i) Coverage shall be equivalent to ISO form CG0001 or better, as determined by the City.

(ii) The City shall be added as an additional insured using ISO form CG2026 or its equivalent.

(iii) Coverage shall be modified to include a Waiver of Subrogation Endorsement in favor of the City including its directors, officers, agents, employees and volunteers.

(iv) The policy shall include independent contractors (owners/contractors protective) and contractual liability.

(v) Coverage shall apply on a primary and non-contributory basis and the policy shall contain the following wording, or substantially similar terms, as determined by the City:

"If you have agreed in a written contract that this policy will be primary and without right of contribution from any insurance in force for an Additional Insured for liability arising out of your operations, and the contract was executed prior to the bodily injury, property damage, personal injury or advertising injury, then this insurance will be primary over, and we will not seek contribution from, such insurance."

(vi) Coverage shall apply to the risks associated with or arising out of this Agreement.

c. Auto Liability:

| | |
|-----------------------|---------------------------|
| Combined Single Limit | \$1,000,000 each accident |
| Medical Expense | \$ 10,000 each person |

(i) If Company owns or has any long-term leased vehicles, coverage must be for Any Auto (Symbol 1). If there are no owned or long term leased vehicles, then coverage must be for Hired and Non-Owned Auto Liability (Symbols 8 and 9).

(ii) Coverage shall be modified to include a Waiver of Subrogation Endorsement in favor of the City including its directors, officers, agents, employees and volunteers.

(iii) The City of Milwaukee shall be added as an additional insured.

(iv) Coverage shall include contractual liability for risks assumed in this contract.

(v) Coverage shall apply to the risks associated with or arising out this contract.

(vi) If Federal or State government(s) require a Motor Carrier filing, such filing shall be made available to City upon request.

d. Umbrella (Excess) Liability:

| | |
|-----------------------------|----------------------------|
| Umbrella (excess) Liability | \$5,000,000 per occurrence |
| | \$5,000,000 aggregate |

(i) The Umbrella Liability insurance shall provide coverage excess of Company's Workers' Compensation and Employer's Liability, Commercial General Liability and Auto Liability Coverages, including the amendments stated above.

e. Professional Liability (if providing professional services such as medical).

| | |
|-----------------------|---------------------------|
| Combined Single Limit | \$1,000,000 each accident |
| | \$3,000,000 aggregate |

(i) Coverage must remain in effect for a period of not less than two years beyond the termination date of this Agreement.

(ii) If a claims-made form is used and a change of insurer occurs during the term of this Agreement, continuity of coverage must be maintained by either retaining the original retroactive date or exercising the extended reporting period endorsement option from the expired policy for a period of not less than two years, if the replacement insurer will not preserve the original retroactive date.

(iii) Coverage shall be modified to include a Waiver of Subrogation Endorsement in favor of City including its directors, officers, agents, employees and volunteers.

II. CITY RESPONSIBILITIES

A. Permit Application Review. The Commissioner shall grant or deny the Application by March 11, 2019. Issuance of a special event permit by the City shall be contingent upon Company satisfying its obligations under this Agreement.

B. City Services. If the Commissioner issues a special event permit, the City shall provide the following Event support:

1. The City, acting through MPD, shall provide police services pursuant to the terms of this Agreement and the Extra-Duty Letter of Agreement, as modified by this Agreement.

2. The City, acting through its DPW, shall provide Company with parking meter hooding; and temporary parking signs, which Company shall pay for pursuant to paragraph I.B.2:

III. GENERAL PROVISIONS

A. Term of Agreement. This Agreement is effective as of the above-referenced Effective Date and terminates upon performance of the Parties' obligations under this Agreement.

B. Disclaimer. The City is in no way holding itself out as a sponsor, partner, organizer, or promoter of the Event and this Agreement shall not be construed to create such status. Company shall make no representations to that effect. Company is prohibited from identifying the City as a sponsor, partner, organizer, or promoter in any promotional materials and shall not use the City logo or seal in any materials to promote the Event.

C. Notices. All notices shall be in writing and deemed served upon depositing the same in the U.S. Postal Service as "Certified Mail, Return Receipt Requested," addressed as follows:

To Company at:
Milwaukee Marathon LLC
45 Bromfield Street, Suite 801
Boston, MA 02108
Attn: Nate Spector

To City (DPW) at:
Department of Public Works
841 N. Broadway, Room 501
Milwaukee, WI 53202
Attn: Commissioner

To City (MPD) at:
Milwaukee Police Department
Tactical Planning & Logistics
749 W. State Street
Milwaukee, WI 53233
Attn: Sgt. Richard Yerkes

D. Assignability. This Agreement shall be binding upon the Parties, but neither this Agreement nor any of the rights, interests, or obligations hereunder shall be assigned, sublet, or transferred by Company without the prior written consent of the City. If the City gives such consent, the terms and conditions of this Agreement shall bind the party to whom the Agreement is assigned, sublet, or transferred.

E. Records. Records shall be maintained by Company in accordance with requirements prescribed by City with respect to all matters covered by this Agreement. Except as otherwise authorized, such records shall be maintained for a period of seven years after termination of this Agreement. In addition, both parties understand that the City is bound by the Wisconsin Public Records Law, and as such, all of the terms of the Agreement are subject to and conditioned on the provisions of Wis. Stat. §§ 19.21-39. Company acknowledges that it is obligated to assist the City in retaining and producing records that are subject to the Wisconsin Public Records Law and that failure to do so shall constitute a material breach of this Agreement. Company shall agree to cause others under its control to cooperate with the City if any of them receive a request under Wisconsin's Public Records Law for this Agreement or for any record relating to, or produced or collected under this Agreement which is subject to the Public Records Law.

F. Audit. At any time during normal business hours and as often as the City may deem necessary, there shall be made available to the City for examination all of Company's records with respect to all matters covered by this Agreement and Company shall permit the City to audit, examine, and make excerpts or transcripts from such records, and to make audits of all contracts, invoices, and materials relating to all matters covered by this Agreement.

G. Conflict of Interest.

1. Interest in Agreement. No officer, employee or agent of the City who exercises any functions or responsibilities in connection with the carrying out of any of the matters to which this Agreement pertains shall have any personal interest, direct or indirect, in this Agreement.

2. Interest of Other Local Public Officials. No member of the governing body of the City and no other public official of the City who exercises any functions or responsibilities in the review or approval of the carrying out of this Agreement shall have any personal interest, direct or indirect, in this Agreement.

3. Interest of Company and Employees. Company covenants, acknowledges, and agrees that no person who exercises any functions or responsibilities in connection with the Agreement has any personal financial interest, direct or indirect, in this Agreement. Company further covenants and acknowledges that it has no interest and shall not acquire any interest, direct or indirect, that would conflict in any manner or degree with its performance under this Agreement. Company further covenants that, in the performance of its obligations under this Agreement, no person having any such conflicting interest shall be employed.

H. Discrimination Prohibited.

1. In all hiring or employment made possible by or resulting from this Agreement there will not be any discrimination against any qualified employee or qualified applicant for employment because of race, color, religion, sexual orientation, sex, national origin or ancestry, age, disability, lawful source of income, marital status, gender identity or expression, past or present membership in the military service, or familial status, or based upon affiliation with or perceived affiliation with any of these protected categories. This requirement shall apply to but not be limited to the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, lay-off or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. There shall be posted in conspicuous places available to employees and applicants for employment, notices required or to be provided by federal or state agencies involved setting forth the provisions of the clause.

2. No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity made possible by or resulting from this Agreement. The City and each employer will comply with all requirements imposed by or pursuant to the regulations of the appropriate federal agency effectuating Title VI of the Civil Rights Act of 1964.

3. Company agrees it will comply with all applicable requirements of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101, et seq.

4. Company shall cause the foregoing provisions to be inserted in all subcontracts, if any, for any work covered by this Agreement so that such provisions will be binding upon each subcontractor, provided that the foregoing provisions shall not apply to Agreements or subcontracts for standard commercial supplies or raw materials.

I. Notice of Breach and Right to Cure. If Company fails to comply with any of the terms or provisions of this Agreement, it shall cure or remedy such breach within five (5) working days of receipt of notice of breach from the City. If Company fails to cure the breach within five (5) working days, the City may immediately terminate this Agreement and revoke any special event permit issued pursuant to this Agreement.

J. Termination for Public Safety. The City may terminate this Agreement and revoke any special event permit issued pursuant to this Agreement, effective immediately, at any time for reasons of public safety as deemed necessary by either the Commissioner or the Chief of Police or his designee. The Parties agree and acknowledge that the City shall in no way be responsible for legal or equitable damages alleged by Company in consequence of termination under this section, provided that the City shall refund payments made for police services and DPW costs under the terms of Section I.B.

K. Choice of Law and Venue. This Agreement shall be governed by the laws of the State of Wisconsin, without regard to the principles of conflict of law. Any litigation relating to the formation, interpretation, or alleged breach of this Agreement must be brought in the state and federal courts having jurisdiction in Milwaukee County, Wisconsin and Company consents to the jurisdiction of such courts.

L. Severability. If any term or provision of this Agreement shall to any extent be declared invalid or unenforceable, then the remainder shall not be affected, and each term and provision shall be valid and be enforced to the fullest extent permitted by applicable law.

M. Entire Agreement/Amendment. This Agreement sets forth all of the covenants, provisions, agreements, conditions, and understandings between the Parties and there are no covenants, promises, agreements, conditions, or understandings, either oral or written, other than are herein set forth. This Agreement may not be modified orally or in any other manner other than by agreement, in writing, signed by the Parties.

N. Waiver. The City shall not be deemed to have waived any of its respective rights hereunder unless the City shall have signed such waiver in writing.

O. Counterparts. This Agreement may be executed in one or more counterparts, all of which shall be considered to be one and the same agreement, and shall become effective on the date indicated after one or more counterparts have been signed by each of the parties and delivered to the other party.

IN WITNESS WHEREOF, The Parties have executed this Agreement the day and year as set forth above.

CITY OF MILWAUKEE

MILWAUKEE MARATHON LLC

By: _____
Commissioner of Public Works

By: _____
Bradford Scudder
Senior Vice President

By: _____
Chief of Police (or Designee)

Approved as to form, execution, and content this ____ day of _____, 2019.

Assistant City Attorney

1047-2018-2303:254919v2

EXHIBIT A

Milwaukee Police Department
Extra-Duty Employment Statement of Intent

EXHIBIT B

Milwaukee Police Department
Extra-Duty Letter of Agreement