

**ANNUAL PERFORMANCE CONTRACT BY AND BETWEEN THE CITY OF MADISON AND  
OVERTURE CENTER FOUNDATION, INC. (DRAFT 11-15-18)**

This Annual Performance Agreement (this "Agreement") is entered into as of this \_\_\_\_ day of December, 2018, by and between the CITY OF MADISON, a municipal corporation (the "City") and OVERTURE CENTER FOUNDATION, INC., a Wisconsin non-profit corporation ("OCF").

**WITNESSETH:**

**WHEREAS**, Overture Development Corporation ("ODC") is the owner of the Overture Center for the Arts (the "Overture Center") and leases the Overture Center to OCF; and

**WHEREAS**, OCF may become the owner and is the operator of the Overture Center facility; and

**WHEREAS**, the interest of the long-term success of the Overture Center is shared by ODC, OCF, the City and residents of Madison; and

**WHEREAS**, the City and 201 State Foundation, Inc. ("201 State") entered into a Structural Agreement dated as of December 31, 2010 (the "Structural Agreement") which sets forth the terms and conditions regarding: the transfer of Overture Center operations to 201 State; the governance structure; City support for the Overture Center (both in terms of operations and capital expenditures); and an annual performance contract to be entered into between the City and 201 State; and

**WHEREAS**, 201 State changed its name to Overture Center Foundation, Inc., and OCF has assumed all of 201 State's obligations under the Structural Agreement; and

**WHEREAS**, the fiscal year for the City is from January 1 through December 31 of each year and the fiscal year for OCF is from July 1 through June 30 of each year; and

**NOW, THEREFORE**, in consideration of the foregoing, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and subject to the covenants and agreements contained in this Agreement, it is hereby agreed as follows:

**ARTICLE I  
ANNUAL PERFORMANCE TERMS**

1. Annual Performance Contract: Subject to the terms and conditions hereof and the terms of the Structural Agreement, OCF and the City enter into this annual contract that sets forth the City's financial support for OCF, and that establishes measurable performance standards for OCF, as the City does with other grant recipients from the City. The City's grant shall be used solely for the operations and capital expenditures of the Overture Center. The grant will be for calendar year 2019 ("Grant Period") subject to annual appropriation by the City. OCF applied for a grant on or before August 1, 2018 and will do so on or before August 1 for each subsequent calendar year. This Annual Performance Contract will be attached to the grant request. Unless terminated earlier as provided herein, this Agreement shall automatically terminate effective December 31, 2019.

2. Performance Terms: OCF agrees to abide by the following terms and conditions and provide the following documentation to the City:

- (a) OCF will develop a revised and updated strategic plan. The updated strategic plan will be drafted and provided to the City on or before June 30, 2019 (Whenever this Agreement states that OCF is to provide something to the City, it will be provided to the Mayor's Office, the Common Council, the Room Tax Commission and the Madison Arts Commission (MAC)). If OCF is unable to meet this date, OCF will inform the City, in writing, of the reason(s) why and a proposed new date for submission of the updated strategic plan.
- (b) OCF will prepare an Annual Community Report within 90 days of the close of its fiscal year, and will invite the public to a meeting on the report, encouraging community input. OCF will prepare performance projections for 2019 based on the most recent OCF Annual Community Report and OCF's Annual Commitment to Arts, Educational and Community Budget Report (whenever this Agreement states "Annual Community Arts Budget Report," it is referring to OCF's Commitment to Arts, Educational and Community Budget Report). The baseline for establishing goals and measuring performance shall be based on the Annual Community Arts Budget Report for OCF's fiscal year 2018-2019, as set forth in Section (2)(h) herein.
- (c) During 2019, OCF shall set up segregated accounting to keep track of any amounts received from the City, shall keep a record of where those amounts are spent, and shall provide information to the City demonstrating that the City grant was used for operations and capital expenses as required by the Structural Agreement.
- (d) OCF will operate the Overture Center in a financially sound manner measured as follows:
  - (i) OCF will generate earned and contributed revenue which together with the City subsidy, as described in Section 4 below, will result in sound financial operations, as detailed below.
  - (ii) The annual audited financial statements, prepared in accordance with GAAP, shall contain an unqualified opinion as to going concern status. Such records will be available for City review as described in the Structural Agreement.
  - (iii) The annual audited financial statements shall contain positive unrestricted net assets when adjusted for the amount invested in capital assets (also called expendable net assets, i.e., excluding the assets and liabilities associated with capital assets).
  - (iv) The annual audited financial statements shall not indicate a carry-forward operating deficit that is greater than 5 percent of expendable net assets as defined above, or 5 percent of the current year's budget, whichever is larger.
  - (v) In the event OCF does not achieve the financial standards outlined in 2 (c) (i) through (iv) above, OCF will provide the City a plan to remedy the issue, and will provide evidence of progress on that plan by June 30, 2019.

- (vi) These financial performance standards will be in effect beginning July 1, 2012, which is the first full fiscal year of OCF operation.
- (e) OCF will prepare balance sheets and audited financial statements in accordance with GAAP within 90 days of the closing of its fiscal year and will provide copies to the City in a timely manner. Such records will be available for City review as described in the Structural Agreement.
- (f) OCF's commitment to create a capital reserve fund will be measured as follows:
  - (i) Pursuant to the Structural Agreement and under the initial Annual Performance Contract, OCF agreed to use its best efforts to accumulate a capital reserve fund of \$1,000,000 by June 30, 2014. OCF will continue efforts to create a capital reserve fund of \$5,000,000 by June 30, 2019.
  - (ii) Since January 1, 2012, OCF has expended \$4,772,293 for capital improvements for the Overture Center, which has hampered OCF's ability to fully fund the capital reserve fund. From 2012 through June 30, 2018, OCF designated the aggregate amount of \$2,170,000 in a Board Designated Reserve that could be used for this purpose. In addition, unrestricted net assets that could be used as a capital reserve total \$1,742,000.
  - (iii) OCF has used its best efforts to meet its obligations for a capital reserve fund.
  - (iv) OCF will continue to use its best efforts to fully fund a capital reserve fund in the amount of \$5,000,000 by June 30, 2019. To that end, OCF intends to embark on a capital campaign to, among other things, meet this requirement.
- (g) An updated plan for fundraising shall be developed and provided to the City on or before October 15, 2019. If OCF is unable to meet this date, OCF will inform the City, in writing, of the reason(s) why and a proposed new date for submission of the updated plan for fundraising.
- (h) OCF's commitment to arts, educational and community programming, including free or reduced cost programs and outreach will be measured as set forth in this paragraph (recognizing that in some cases it may not be feasible to obtain such information, and some data cannot be generated at all, e.g. for attendees at non-ticketed events, group ticketing or all resident company programs). In future years, OCF shall provide this data in its Community Arts Budget Report and information to the City on or before September 30 of each year, including September 30, 2019.
- (i) OCF will establish goals and objectives for total budgeted arts, educational, and community programming for 2018-2019, and will provide that information, along with actual results compared to budgeted amounts to the City. OCF will provide to the City as part of the 2018-19 report the amounts used for arts, educational, and community programming, identifying, where feasible, each program supported with City funds.

(ii) The Annual Community Arts Budget Report for fiscal year 2018-2019 will identify the number of programs delivered and the number of people reached through events presented or co-presented by OCF and its resident companies, identifying, where feasible, the number of citizens of Madison attending the programs. The data from this initial annual report will be used to create a baseline for establishing goals and measuring performance in subsequent years.

(iii) The Annual Community Arts Budget Report for fiscal year 2018-2019 will identify the number of free or reduced cost programs delivered and the costs of providing such programs, where feasible, the number of citizens of Madison reached through such programs, where feasible, and the number of ticket subsidies provided to Madison citizens and the dollar value of such subsidies. The data from this Annual Community Arts Budget Report will be used to create a baseline for establishing goals and measuring performance in subsequent years.

(iv) The Annual Community Arts Budget Report for fiscal year 2018-2019 will identify the number of persons living within the City served for ticketed events and the amount spent for these events. Such data cannot be generated for attendees at non-ticketed events, group ticketing or all resident company programs. The data from this Annual Community Arts Budget Report will be used to create a baseline for establishing goals and measuring performance in subsequent years.

(v) The Annual Community Arts Budget Report for 2018-2019 will identify the total value of rent subsidy provided to local arts organizations (including resident companies) or artists for the use of Overture Center.

(vi) The Annual Community Arts Budget Report for 2018-2019 will identify the number of Madison-based artists contracted for services and the amount spent.

(vii) To the extent some of this information in (i) – (vi) above is not available by September 30, 2019, OCF will provide the information in the first quarter of 2020.

(i) OCF will prepare and provide to the City an updated plan for institutional marketing on or before October 15, 2019. If OCF is unable to meet this date, OCF will inform the City, in writing, of the reason(s) why and a proposed new date for submission of the updated plan for institutional marketing.

3. Annual Review: On at least an annual basis, the Madison Arts Commission, City staff and OCF staff will review progress toward the goals, objectives and standards set out in this Annual Performance Contract and subject to the terms of the Structural Agreement, and may modify the Annual Performance Contract on an annual basis as needed. The Annual Performance Contract shall be presented to the Common Council for approval prior to consideration of the City's Operating Budget. In order to accomplish this annual review, OCF commits to attending meetings of and reporting to the MAC Board or MAC representatives at least two (2) times in calendar 2019. OCF will also provide time for the MAC representatives to make a presentation at one of its regular meetings at least once during calendar 2019. In addition, to the extent data provided to MAC by OCF during 2018 is incomplete, OCF shall provide all available data requested by Spring, 2019.

4. Grant Payments: Subject to appropriation by the Common Council, and provided OCF is not in default hereunder, the City shall provide a grant to OCF in the amount of Two Million Dollars (\$2,000,000) (the "Grant"). The Grant shall be disbursed to OCF in two equal payments of \$1,000,000 on January 2, 2019 and September 2, 2019. OCF shall use the Grant solely to support the operations and capital expenditures of the Overture Center. The funds for this 2019 grant were approved by the City's Room Tax Commission. The City and OCF will discuss whether funding by the Room Tax Commission warrants any changes in this Agreement in the future.

5. Community Advisory Board: In accordance with the Structural Agreement, OCF will establish a Community Advisory Board (the "CAB") broadly representing the community in terms of culture, ethnicity, geography, age and socio-economic level. The CAB will meet at least quarterly to advise and make recommendations to OCF regarding free programming and educational outreach efforts, and such other matters related to the operation of Overture as the CAB determines. Recommendations from the CAB will be considered by the OCF Board at a public meeting. The CAB membership will include forty-five percent (45%) public membership appointed by the Mayor of Madison and confirmed by the Common Council provided that any vacancies on the CAB shall not be counted for the purpose of determining any quorum requirements that may apply to the CAB. OCF will provide CAB with copies of the Annual Community Arts Budget Report submitted to the City.

6. Resident Company Advisory Board: In accordance with the Structural Agreement, OCF will maintain its Resident Company Advisory Board (the "RCAB"). The RCAB may consider and make recommendations to OCF on all matters that impact the resident companies. Recommendations from the RCAB will be considered by the OCF Board at a public meeting.

7. Study of Performing Arts Venues: The City may perform a study of performing arts venues in the greater Madison area and the needs of promoters, performance companies, individual artists, arts educators and audiences. Should the City perform such a study or studies, OCF agrees to provide its cooperation to the City and any agents or contractors the City has engaged.

8. Future Contract Terms: The parties shall cooperatively work together to create language for the 2018-2019 Annual Performance Agreement in keeping with the terms of the Structural Agreement regarding establishing goals and measurable objectives for OCF's commitment to arts, educational and community programming, including free or reduced cost programs and educational outreach, and addressing within its annual report the results of its efforts, including identifying, adding to or modifying the performance terms in 2.(g) herein. Subject to the terms and conditions of the Structural Agreement and this Agreement, and recognizing that the grant provides support for all aspects of operations and capital expenditures, OCF will reasonably attempt to identify that portion of the City's subsidy that went towards arts, educational and community programming, the number of Madison citizens and artists involved in OCF programs, goals for reaching underserved populations of participants and artists, and allocating resources among the goals. The City and OCF will discuss during 2018-2019 the feasibility of restricting a portion of the grant from the City to be designated for certain uses.

9. Roles of the City, OCF, Room Tax Commission and MAC.

Since the Structural Agreement between the City and OCF was signed, the State of Wisconsin created new rules for the use of room tax funds collected by the City. Those room tax funds have, in part, supported the City's annual grant to OCF under this Agreement in the past. Now, a large portion of the room tax revenue is controlled by the newly created Room Tax Commission. As OCF is an eligible recipient of room tax revenue, the City intends that available room tax revenue funds controlled by the Room Tax Commission be the first source for the OCF grant each year. The following describes the roles of the various bodies:

(a). Subject to the terms and conditions hereof and the terms of the Structural Agreement, the City of Madison will continue to appropriate funds for a grant to OCF in its annual budget process, and will continue to be the party entering into the Annual Performance Agreement with OCF. The Annual Performance Agreement is approved by the Common Council.

(b) The City intends that the first source of funds to be appropriated for the OCF grant come from available room tax funds controlled by the Room Tax Commission of the City of Madison. Since the City does not control this designation by the Room Tax Commission, that portion of the grant will be determined by the Room Tax Commission. The balance of the City's grant shall be subject to appropriation by the Common Council and may be sourced from any other available City funds. Regardless of the source of funds, the ultimate responsibility for the City grant remains with the Common Council in its annual budget process under the terms and conditions of this Agreement and the Structural Agreement.

(c) OCF will continue to report to the Madison Arts Commission (MAC) as its primary contact at the City. All written reports, including the annual audit, should be shared with the Common Council, the Mayor's office, the Finance Department and the Room Tax Commission.

10. Meetings and Records. As a private corporation, OCF is not subject to Wisconsin Open Meetings Law. The terms of the Structural Agreement and this Agreement shall not subject OCF to the Wisconsin Open Meetings Law.

**ARTICLE II  
INSURANCE AND INDEMNIFICATION**

1. Indemnification. OCF shall be liable to and hereby agrees to indemnify, defend and hold harmless the City, its officers, officials, agents and employees against all loss or expense (including liability costs and reasonable attorney's fees) by reason of any and all claims, demands, liabilities and causes of action of whatsoever kind or nature related to the Overture Center, its financing, operation, administration, repair or maintenance occasioned in whole or in part by any act or omission of OCF and/or its tenants, agents, contractors, subcontractors, invitees or employees, which may now or hereafter be made against them, whether caused by or contributed to by the City or its agents or employees.

2. Insurance. On or before January 1, 2019, OCF shall insure against the following risks to the extent stated below. OCF shall not allow any contractor or subcontractor to commence work funded by this Agreement until the insurance required below has been obtained and corresponding certificates of insurance have been submitted to and approved by the City's Risk Manager.

#### Commercial General Liability

OCF shall procure and maintain during the life of this Agreement, Commercial General Liability insurance including, but not limited to bodily injury, property damage, personal injury, and products and completed operations (unless determined to be inapplicable by the Risk Manager) in an amount not less than \$1,000,000 per occurrence. This policy shall also provide contractual liability in the same amount. OCF's coverage shall be primary and list the City of Madison, its officers, officials, agents and employees as additional insureds. OCF shall require all its contractors funded by this Agreement (if any) to procure and maintain insurance meeting the above criteria, applying on a primary basis and listing the City of Madison, its officers, officials, agents and employees as additional insureds.

#### Worker's Compensation

OCF shall procure and maintain during the life of this Agreement statutory Workers' Compensation insurance as required by the State of Wisconsin. OCF shall also carry Employers Liability limits of at least \$100,000 Each Accident, \$100,000 Disease – Each Employee, and \$500,000 Disease – Policy Limit. Contractor shall require all contractors and subcontractors funded by this Agreement (if any) to procure and maintain such insurance, covering each contractor and subcontractor.

**Acceptability of Insurers.** The above-required insurance is to be placed with insurers who have an A.M. Best rating of no less than A- (A minus) and a Financial Category rating of no less than VII.

**Proof of Insurance, Approval.** OCF shall provide the City with certificate(s) of insurance showing the type, amount, class of operations covered, effective dates, and expiration dates of required policies prior to the effective date of this Agreement. OCF shall provide the certificate(s) to the City's representative upon execution of the Agreement, or sooner, for approval by the City Risk Manager. OCF shall provide copies of additional insured endorsements or insurance policies, if requested by the City Risk Manager.

OCF shall give the City thirty (30) days advance written notice of cancellation, non-renewal or material changes to any of the above-required policies during the term of this Agreement.

3. Governmental Immunity and Limits of Liability. The provisions of this Article II shall not be deemed to waive or limit in any way the City's governmental immunity or limits of liability.

### **ARTICLE III DEFAULT AND REMEDIES**

1. Events of Default. Any one or more of the following is an Event of Default hereunder:
  - (a) Failure by the City to pay any portion of the Grant, and the nonpayment continues for thirty (30) days after the City receives written notice of such nonpayment;

- (b) Nonperformance or breach by OCF of any covenant, term or condition in this Agreement and any addendum or amendment hereto and such nonperformance or breach continues for a period of thirty(30) days after OCF receives written notice of such nonperformance or breach;
- (c) The sale, lease for a term of more than five (5) years, or other transfer of any kind or nature of the Overture Center, or any part thereof, without the prior written approval of the City;
- (d) OCF becomes insolvent or the subject of state insolvency proceedings, fails generally to pay its debts as they become due or makes an assignment for the benefit of creditors; or a receiver, trustee, custodian or other similar official is appointed for, or takes possession of any substantial part of the property of OCF; or
- (e) The Structural Agreement between the City and OCF is terminated for any reason.

2. Remedies. Upon the occurrence of an Event of Default, the nondefaulting party may, at its option and in addition to all other rights and remedies which it may have at law or in equity, including the specific performance hereof, have the cumulative right to immediately terminate this Agreement and all rights of the defaulting party hereunder. No remedy conferred upon or reserved by either party is intended to be exclusive of any other available remedy or remedies, but shall be in addition to every other remedy now or hereafter existing at law or in equity or by statute.

#### **ARTICLE IV CITY ORDINANCES**

1. Nondiscrimination. In the performance of its obligations under this Agreement, OCF agrees not to discriminate against any employee or applicant because of race, religion, marital status, age, color, sex, handicap, national origin or ancestry, income level or source of income, arrest record or conviction record, less than honorable discharge, physical appearance, sexual orientation, gender identity, political beliefs, or student status. OCF further agrees not to discriminate against any subcontractor or person who offers to subcontract on this Agreement because of race, religion, color, age, disability, sex, sexual orientation, gender identity or national origin.

2. Workforce Utilization. OCF agrees that, within thirty (30) days after the effective date of this Agreement, OCF will provide to the City of Madison Affirmative Action Division certain workforce utilization statistics, using a form to be furnished by the City.

If the Agreement is still in effect, or if the City enters into a new agreement with OCF within one year after the date on which the form was required to be provided, OCF will provide updated workforce information using a second form, also to be furnished by the City. The second form will be submitted to the City Affirmative Action Division no later than one year after the date on which the first form was required to be provided.

OCF further agrees that, during the term of this Agreement, for at least twelve (12) months after the effective date of the Agreement, it will notify the City of Madison Affirmative Action Division of each of its job openings at facilities in Dane County for which applicants not already employees of



OCF are to be considered. The notice will include a job description, classification, qualifications, and application procedures and deadlines. OCF agrees to interview and consider candidates referred by the Affirmative Action Division if the candidate meets the minimum qualification standards established by OCF, and if the referral is timely. A referral is timely if it is received by OCF on or before the date stated in the notice.

3. Affirmative Action. OCF shall comply with the Affirmative Action Articles of Agreement attached hereto as Exhibit B.

4. Living Wage. If at any time during the term of this Agreement OCF either: (a) loses its non-profit status or converts to a for-profit entity; or (b) passes any of the Grant in an amount exceeding \$100,000 through to a for-profit entity, OCF shall ensure that all OCF employees and any employees employed by a contractor of OCF who work at least twenty hours a week at the Overture Center are paid a living wage as defined in Section 4.20, Madison General Ordinances. The living wage rate for 2015 is \$12.62 per hour.

5. Equal Benefits. Subject to the provisions of any collective bargaining agreement, OCF shall comply with the provisions of Exhibit C attached hereto and shall ensure that its employees are provided equal benefits in accordance with the applicable provisions of Section 39.07, Madison General Ordinances.

6. Accessibility. OCF shall comply with the provisions of Exhibit A attached hereto and shall ensure that the Overture Center will be accessible to persons with physical disabilities, and that the Overture Center is in compliance with Madison General Ordinance Section 39.05 and the American with Disabilities Act, where applicable.

## **ARTICLE V MISCELLANEOUS PROVISIONS**

1. Early Termination. This Agreement shall automatically terminate upon the failure of the City to provide the Grant or upon the termination of the Structural Agreement.

2. No Waiver; Approvals. The failure by one party to require performance of any provision of this Agreement will not affect that party's right to require performance of any provision of this Agreement at any time thereafter, nor shall a waiver of any breach or default of this Agreement constitute a waiver of any subsequent breach or default or a waiver of the provision itself.

3. Governing Law. This Agreement is being delivered and accepted within the State of Wisconsin, and shall be deemed to be a contract governed by the laws of the State of Wisconsin and shall be interpreted, construed, and enforced in accordance with the laws of the State of Wisconsin without regard to the principles of conflicts of laws.

4. Jurisdiction. The parties hereby consent to the exclusive jurisdiction of any state or federal court situated in Dane County, Wisconsin, and waive any objection based on *forum non conveniens*, with regard to any actions, claims, disputes or proceedings relating to this agreement, the collateral, any other document, or any transactions arising therefrom, or enforcement and/or interpretation of any of the foregoing.

5. Waiver of Jury Trial. The parties hereby jointly and severally waive any and all right to trial by jury in any action or proceeding relating to the agreement and related documents, the obligations thereunder or any transaction arising therefrom or connected thereto. The parties each represent to the other that this waiver is knowingly, willingly and voluntarily given.

6. Severability. Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be prohibited by or invalid under applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

7. Entire Agreement; Amendments. This Agreement and the Exhibits attached hereto and the Structural Agreement contain the entire understanding of the parties with respect to the subject matter hereof, and supersede all other understandings, oral or written, with respect to the subject matter hereof. No amendment, modification, alteration, or waiver of the terms of this Agreement or consent required under the terms of this Agreement shall be effective unless made in a writing, which makes specific reference to this Agreement and which has been signed by the party against which enforcement thereof is sought. Any such amendment, modification, alteration, waiver or consent shall be effective only in the specific instance and for the specific purpose for which given.

8. Counterparts; Headings. This Agreement may be executed in several counterparts, each of which shall be deemed to be an original, but such counterparts shall together constitute but one and the same agreement. A duplicate copy of this Agreement, signed by all parties shall be valid and binding as if one original of the Agreement was signed by all parties. A photographic, facsimile (fax), or carbon copy of the signature(s) of the undersigned will be deemed to be equivalent to the original hereof and/or may be used as a duplicate original. The descriptive headings in this Agreement are inserted for convenience of reference only and shall not affect the construction of this Agreement. All pronouns and any variations thereof shall be deemed to refer to the masculine, feminine, neuter, singular or plural as the identity of the person or persons may require.

9. Notices. All communications or notices required under this Agreement shall be deemed to have been given on the date when deposited in the United States mail, postage prepaid, and addressed as follow (unless and until any of such parties advises the other in writing of a change in such address): (a) if to the OCF, with the full name and address as shown in this Agreement below; and (b) if to the City, with the full name and address of the City as shown in this Agreement below, to the attention of the officer of the City executing the form of acceptance of this Agreement.

**Overture Center Foundation, Inc.:**

Attn: President and CEO  
Overture Center Foundation, Inc.  
c/o Overture Center for the Arts  
201 State Street  
Madison, WI 53703

With a copy to:  
Attorney Laura S. Peck  
Axley Brynelson, LLP  
P.O. Box 1767

Madison, WI 53701-1767

**City of Madison:**

Finance Director  
City of Madison  
210 Martin Luther King Jr. Blvd., Room 406  
Madison, WI 53703

With a copy to:  
City Attorney  
City of Madison  
210 Martin Luther King Jr. Blvd., Room 401  
Madison, WI 53703

Dated as of the first day above written.

**CITY OF MADISON**

By: \_\_\_\_\_  
Paul R. Soglin, Mayor

Attest: \_\_\_\_\_  
Maribeth Witzel-Behl, Clerk

Approved:

Approved as to Form:

\_\_\_\_\_  
David P. Schmiedicke, Finance Director

\_\_\_\_\_  
Michael P. May, City Attorney

**OVERTURE CENTER FOUNDATION, INC.**

By: \_\_\_\_\_

By: \_\_\_\_\_

Execution of this Annual Performance Contract by the Mayor and Clerk was authorized by File No. \_\_\_\_\_, Enactment Number RES-18-\_\_\_\_\_, adopted on \_\_\_\_\_, 2018.

**EXHIBIT A**  
**Nondiscrimination Based on Disability**

**NONDISCRIMINATION BASED ON DISABILITY.**

OCF hereby makes the following assurances to the City:

OCF assures and certifies that it will comply with section 39.05 of the Madison General Ordinances, "Nondiscrimination Based on Disability in City Facilities and City-Assisted Programs and Activities," and agrees to ensure that any subcontractor who performs any part of this Agreement complies with Sec. 39.05, where applicable. This includes but is not limited to assuring compliance by OCF and any subcontractor with section 39.05(4) of the Madison General Ordinances, "Discriminatory Actions Prohibited."

OCF may not, in providing any aid, benefit or service, directly or through contractual, licensing or other arrangements, violate the prohibitions in Section 39.05(4), listed below:

Discriminatory Actions Prohibited: OCF assures that, in providing any aid, benefit, or service, it shall not, directly or through contractual, licensing, or other arrangements, on the basis of disability:

1. Deny a qualified person with a disability the opportunity to participate in or benefit from the aid, benefit, or service;
2. Afford a qualified person with a disability an opportunity to participate in or benefit from the aid, benefit, or service, or the City facility, that is not equal to that afforded others;
3. Provide a qualified person with a disability with a City facility or an aid, benefit, or service that is not as effective as that provided to others;
4. Provide different or separate City facilities, or aid, benefits, or services to persons with a disability or to any class of persons with disabilities unless such action is necessary to provide qualified persons with a disability with City facilities, aid, benefits, or services that are as effective as those provided to others;
5. Aid or perpetuate discrimination against a qualified person with a disability by providing significant assistance to any agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the recipient's program;
6. Deny a qualified person with a disability the opportunity to participate as a member of planning or advisory boards; or
7. Otherwise limit a qualified person with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service from a recipient, or by others using City facilities.

OCF shall post notices in an accessible format to applicants, beneficiaries, and other persons, describing the applicable provisions of Sec. 39.05 of the Madison General Ordinances, in the manner prescribed by section 711 of the Civil Rights Act of 1964 (42 USCA Sec 2000e-10).

**EXHIBIT B**  
**Affirmative Action Articles of Agreement**

For the purposes of this Exhibit B, the word "Contractor" shall mean OCF, its contractors and subcontractors.

ARTICLE I

Contractor shall take affirmative action in accordance with the provisions of this Agreement to insure that applicants are employed, and that employees are treated during employment without regard to race, religion, color, age, marital status, disability, sex, sexual orientation, gender identity or national origin and that the employer shall provide harassment-free work environment for the realization of the potential of each employee. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation and selection for training including apprenticeship insofar as it is within the control of the contractor. Contractor agrees to post in conspicuous places available to employees and applicants notices to be provided by the City setting out the provisions of the nondiscrimination clauses in this contract.

ARTICLE II

Contractor shall in all solicitations or advertisements for employees placed by or on behalf of the Contractor state that all qualified or qualifiable applicants will be employed without regard to race, religion, color, age, marital status, disability, sex, sexual orientation, gender identity or national origin.

ARTICLE III

Contractor shall send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding a notice to be provided by the City advising the labor union or workers representative of the Contractor's equal employment opportunity and affirmative action commitments. Such notices shall be posted in conspicuous places available to employees and applicants for employment.

ARTICLE IV

(This Article applies to non-public works contracts.)

Contractor agrees that it will comply with all provisions of the Affirmative Action Ordinance of the City of Madison including the contract compliance requirements. Contractor warrants and certifies that, of the following two paragraphs, paragraph A or B is true (check one):

- A. It has prepared and has on file an affirmative action plan that meets the format requirements of Federal Revised Order No, 4, 41 CFR part 60-2, as established by 43 CFR 51400 November 3, 1978, including appendices required by City of Madison ordinances or it has prepared and has on file a model affirmative action plan approved by the Madison Common Council \_\_\_\_\_.
- B. Within thirty (30) days after the effective date of this Agreement, it will complete an affirmative action plan that meets the format requirements of

Federal Revised Order No. 4, 41 CFR Part 60-2, as established by 43 CFR 51400, November 3, 1978, including appendices required by City of Madison ordinance or within thirty (30) days after the effective date of this contract, it will complete a model affirmative action plan approved by the Madison Common Council \_\_\_\_\_.

#### ARTICLE V

(This Article applies only to public works contracts.)

#### ARTICLE VI

Contractor will maintain records as required by Section 39.05(9)(f) of the Madison General Ordinances and will provide the City's Affirmative Action Officer with access to such records and to persons who have relevant and necessary information, as provided in Section 39.05(9)(f). The City shall keep all such records confidential, except to the extent that public inspection is required by law.

#### ARTICLE VII

In the event of Contractor's or subcontractor's failure to comply with the Equal Employment Opportunity and Affirmative Action provisions of this contract or Sections 39.02 and 39.05 of the Madison General Ordinances, it is agreed that the Issuer at its option may do any or all of the following:

- A. Cancel, terminate or suspend the Agreement in whole or in part.
- B. Declare the Contractor ineligible for further Issuer contracts until the Affirmative Action requirements are met.
- C. Recover on behalf of the Issuer from the prime contractor 0.5 percent of the contract award price for each week that such party fails or refuses to comply, in the nature of liquidated damages, but not to exceed a total of five percent (5%) of the contract price, or five thousand dollars (\$5,000), whichever is less. Under public works contracts, if a subcontractor is in noncompliance, the City may recover liquidated damages from the prime contractor in the manner described above. The preceding sentence shall not be construed to prohibit a prime contractor from recovering the amount of such damage from the noncomplying subcontractor.

#### ARTICLE VIII

(This Article applies to public works contracts only.)

#### ARTICLE IX

Contractor shall allow the maximum feasible opportunity to small business enterprises to compete for any subcontracts entered into pursuant to this Agreement. (In federally funded contracts the terms "DBE, MBE, and WBE" shall be substituted for the term "small business" in this Article.)

**Exhibit C**  
**Equal Benefits Requirement**

Subject to the terms and provisions of any existing collective bargaining agreement, for the duration of this Agreement, OCF agrees to offer and provide benefits to employees with domestic partners that are equal to the benefits offered and provided to married employees with spouses, and to comply with all provisions of Sec.39.07, Madison General Ordinances as applicable. If a benefit would be available to the spouse of a married employee, or to the employee based on his or her status as a spouse, the benefit shall also be made available to a domestic partner of an employee, or to the employee based on his or her status as a domestic partner. "Benefits" include any plan, program or policy provided or offered to employees as part of the employer's total compensation package, including but not limited to, bereavement leave, family medical leave, sick leave, health insurance or other health benefits, dental insurance or other dental benefits, disability insurance, life insurance, membership or membership discounts, moving expenses, pension and retirement benefits, and travel benefits.

Cash Equivalent. If after making a reasonable effort to provide an equal benefit for a domestic partner of an employee, OCF is unable to provide the benefit, OCF shall provide the employee with the cash equivalent of the benefit.

Proof of Domestic Partner Status. OCF may require an employee to provide proof of domestic partnership status as a prerequisite to providing the equal benefits. Any such requirement of proof shall comply with Sec. 39.07(4), MGO.

Notice Posting, Compliance. OCF shall post a notice informing all employees of the equal benefits requirements of this Agreement and the complaint procedure. OCF agrees to produce records upon request of the City, as required by Sec. 39.07, MGO.

Subcontractors. This provision also applies to employees of contractors hired by OCF who expend at least twenty (20) hours a week at the Overture Center for the Arts. This provision is not applicable to employees of touring companies or organizations, individual artists (local or otherwise) and resident performing companies performing in the Overture Center.