

**THIRD AMENDMENT TO THE USE AGREEMENT FOR THE
MORTON H. MEYERSON SYMPHONY CENTER**

This THIRD AMENDMENT TO THE USE AGREEMENT FOR THE MORTON H. MEYERSON SYMPHONY CENTER ("Amendment"), is executed on October 1, 2004 by and between the City of Dallas, a Texas municipal corporation ("City") and the Dallas Symphony Association, Inc., a Texas nonprofit corporation ("Association").

WITNESSETH:

WHEREAS, the City and the Association entered into the Use Agreement for the Morton H. Meyerson Symphony Center on September 18, 1985, as amended ("Agreement");

WHEREAS, the City and the Association desire to amend this Agreement in certain respects;

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the City and the Association do hereby agree as follows:

1. Section 3(a) of the Agreement is hereby amended to read as follows:

The term of this Agreement is for a period beginning on the date the Association takes beneficial occupancy of any portion of the symphony center, pursuant to written authorization from the City's Director of Public Works, and continuing for an initial term of twenty (20) years, and thereafter for a first automatic renewal term ending on August 31, 2019, and continuing after the first automatic renewal term for so long thereafter as the Association uses the symphony center for the various activities as contemplated in Section 2 hereof, unless earlier cancelled, as provided herein. At the end of the first automatic renewal term (and any subsequent renewal terms), unless written notice to the contrary is given by either party hereto at least ninety (90) days prior to the expiration date of the term in question, this Agreement shall be automatically renewed for a period of ten (10) additional years; provided, the foregoing shall not limit the initial or first automatic renewal terms of this Agreement as otherwise established in this Section.

2. Section 4(b) of the Agreement is hereby amended by adding the following sentences:

The City shall provide the Association with a written notice of any request that the City received from any third party to use the concert hall on any date that the Association

put on "hold" (the "Challenge Notice"). The Association shall have twenty (20) business days from its receipt of such Challenge Notice to notify the City by written notice that the Association has decided to change the status of such date from "hold" to "confirmed" under this Section 4(b).

3. Section 6 of the Agreement is hereby amended by adding the following paragraph:

(f) If the City decides to hire a third party to manage the symphony center, the Association may submit a bid or a proposal for the management contract as may be required by the City. If the Association decides not to bid for the management contract prior to the City's advertisement for bids or proposals of the contract, the Association may participate in the selection process by reviewing the bid specifications and recommending its choices to the City.

4. Section 9 of the Agreement is hereby amended to read in its entirety as follows:

The City shall provide and pay for all water, gas and electricity (collectively as "utilities"), used in the symphony center. The Association shall pay for its own telephone services. Notwithstanding the foregoing, for the period from June 1, 2004 to May 31, 2009, the Association shall be responsible annually for 15% of the utilities' costs, multiplied by the actual number of dates the Association uses the concert hall, divided by 365; for the period June 1, 2009 to May 31, 2015, the Association shall be responsible annually for 25% of the utilities' costs, multiplied by the actual number of dates the Association uses the concert hall, divided by 365; and for the period June 1, 2015 to May 31, 2019, the Association shall be responsible annually for 35% of the utilities' costs, multiplied by the actual number of dates the Association uses the concert hall, divided by 365. If the Agreement is renewed in accordance with the terms of the Agreement beyond June 1, 2019, the Association agrees to be responsible annually for 50% of the utilities' costs, multiplied by the actual number of dates the Association uses the concert hall, divided by 365.

5. Section 10(a)(2) and (3) are hereby amended to read in their entirety as follows:

(2) Maintenance, repair and replacement of the heating, ventilation, and cooling system in the symphony center; and

(3) Maintenance, repair and replacement of symphony center grounds and structure in reasonably good condition and in compliance with applicable laws.

6. Section 10 is further amended by adding the following paragraph:

(c) The City is responsible for the maintenance, repair and replacement of music stands and chairs which were originally purchased by the Association and given to the City.

7. Section 13(a) of the Agreement is hereby amended so that the second sentence will be read as follows:

The insurance shall be evidenced by delivery of executed certificates of insurance to the Assistant Director, Risk Management, 1500 Marilla, 6A-South, Dallas, TX 75201 and the General Manager, the Meyerson Symphony Center, 2301 Flora Street, Dallas, TX 75201.

8. Section 13(a)(1) is hereby amended to read in its entirety as follows:

Workers' Compensation with statutory limits; Employers Liability with minimum limits for bodily injury: a) by accident, \$100,000 per each accident b) by disease, \$100,000 per employee with a per policy aggregate of \$500,000. This requirement may be waived or modified by the City, if the Association should become a qualified self-insurer under the laws of the State of Texas.

9. Section 13(a)(2) is hereby amended to read in its entirety as follows:

Commercial General Liability Insurance including, but not limited to, Premises/Operations, Personal & Advertising Injury, Products/Completed Operations, Independent Contractors and Contractual Liability with minimum combined bodily injury (including death) and property damage limits of \$500,000 per occurrence, \$500,000 general aggregate. Additional coverage shall include: Fire Legal Liability limit of \$500,000. If this insurance is written on a claims-made form, coverage shall be continuous (by renewal or extended reporting period) for not less than twenty-four (24) months following completion of the contract and acceptance by the City. Coverage, including any renewals, shall contain the same retroactive date as the original policy applicable to this contract.

10. Section 13(a)(3) is hereby amended to read in its entirety as follows:

Business Automobile Liability Insurance covering owned, hired, and non-owned vehicles, with a minimum combined bodily injury (including death) and property damage limit of \$500,000 per occurrence.

11. Section 13(b)(2) is hereby amended to read in its entirety as follows:

Each policy must require that 60 days before the cancellation, non-renewal, or any material change in coverage, a notice thereof shall be given to the City by certified mail to: Assistant Director, Risk Management, 1500 Marilla, 6A-South, Dallas, TX 75201 and the General Manager, the Meyerson Symphony Center, 2301 Flora Street, Dallas, TX 75201.

12. Section 13(d) is hereby amended to read in its entirety as follows:

The Association shall use its best efforts for security precautions necessary for the protection of its property. The City shall be liable for any damage to or loss of Association's property used or stored on, in, or about the symphony center, arising from negligence of the City or its agents and employees. However, the City shall not be responsible for any damage or loss not arising from the negligence of the City or its agents and employees. The City shall require its contractors, lessees and licensees to indemnify, defend and hold harmless both the City and the Association for any damage or loss of the City's property or the Association's property at the symphony center, arising out of or in connection with the use of the symphony center by the City's contractors, lessees or licensees.

13. Section 14 is hereby amended to read in its entirety as follows:

The Association shall promptly comply with all governmental orders and directives for the correction, prevention and abatement of nuisances caused by the Association, its officers, agents, employees, representatives, licensees, lessees or contractors in or upon or connected with the symphony center and shall pay for the costs of compliance.

14. Section 15(a) is hereby amended by deleting the third sentence and adding the follow two sentences in its place:

The Association shall require its contractors to carry sufficient insurance for all construction projects in accordance with the City's minimum insurance requirements for construction projects as stated in the

attached and incorporated **Exhibit D**. The City will notify the Association in writing if these insurance requirements change.

15. Section 16(a) is hereby amended so that the last sentence will be read as follows:

However, the provisions of this section are not for the benefit of any third parties and do not provide any rights to any third party that is not a party to this Agreement.

16. Section 16(b) is hereby amended so that the entire paragraph will be read as follows:

The City shall be responsible for its acts of negligence causing injuries to persons (including death) or damage to property, including portions of the symphony center; and to the extent authorized by law and without waiving any governmental immunity available to the City, the City shall indemnify, defend and hold harmless the Association, its officers and employees, from and against any claims or lawsuits arising out of such negligent acts. However, the provisions of this section are not for the benefit of any third parties and do not provide any rights to any third party that is not a party to this Agreement.

17. Section 22 of the Agreement is hereby amended to change the addressees for notification as follows:

If intended for the City, to

Director, Office of Cultural Affairs
City of Dallas
1925 Elm Street
Suite 500
Dallas, Texas 75201

If intended for the Association, to:

Dallas Symphony Association, Inc.
Morton H. Meyerson Symphony Center
2301 Flora Street
Schlegel Administrative Suites
Dallas, Texas 75201-2497
Attention: President

18. Section 36 is hereby amended by deleting (j) in its entirety.


19. Section 38 is hereby amended by deleting (c)(iii) in its entirety and renumbering (c) (iv) as (c)(iii).
20. All other terms, provisions, conditions and obligations of the Agreement between the City and the Association shall remain in full force and effect, and the Agreement, the first two amendments and this third amendment shall be construed together as a single contractual agreement.

EXECUTED this the 1st day of October, 2004 by the City, signing by and through its City Manager, duly authorized to execute same by Resolution No. 04-2437, adopted by the City Council on August 25, 2004 and by the Association, acting through its duly authorized officials.

"CITY":

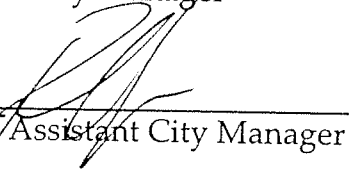
APPROVED AS TO FORM:
MADELEINE B. JOHNSON
City Attorney

BY:


Assistant City Attorney

CITY OF DALLAS
Mary K. Suhm
Interim City Manager

BY:

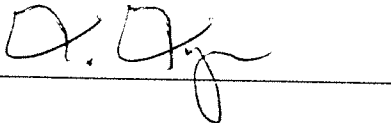

Assistant City Manager

"ASSOCIATION":

ATTEST:

Dallas Symphony Association, Inc.
A Texas non-profit corporation

BY:



BY:

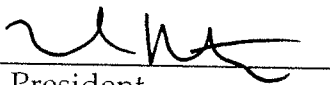

President

Exhibit D
Construction Insurance Requirements

Prior to the commencement of renovation of existing buildings/improvements or construction of any permanent building/improvement, DALLAS SYMPHONY ASSOCIATION, INC. (Association) shall require Association's contractor to purchase and maintain, until final completion and acceptance of all work, insurance coverage written by companies approved by the State of Texas and acceptable to the City in the following types and amounts:

1. **Workers' Compensation** with statutory limits; **Employers Liability** with minimum limits for bodily injury: a) by accident, \$100,000 per each accident b) by disease, \$100,000 per employee with a per policy aggregate of \$500,000.
2. **Business Automobile Liability Insurance** covering owned, hired, and non-owned vehicles, with a minimum combined bodily injury (including death) and property damage limit of \$500,000 per occurrence.
3. **Umbrella Liability Insurance** following form and applies in excess of the primary liability coverage required in #1, #2, and #4 with a minimum limit of \$3,000,000 per occurrence.
4. **Commercial General Liability Insurance** including, but not limited to, Premises/Operations, Personal & Advertising Injury, Products/Completed Operations, Independent Contractors and Contractual Liability with minimum combined bodily injury (including death) and property damage limits of \$500,000 per occurrence, \$500,000 products/completed operations aggregate, \$1,000,000 general aggregate. Policy shall include: Underground, Explosion & Collapse hazards (i.e., not excluded); Amendment of Aggregate Limit per Project Endorsement (i.e., CG2503). Completed Operations coverage must remain in force for one (1) year after completion of contract.

The City of Dallas shall be named as an additional insured by using endorsement CG2026 or broader.

5. **All Risk Installation Floater Insurance**, covering materials and supplies needed for additions, renovations or remodeling of an existing building, with an insured value equal to 100% of the contract cost. Covered perils shall include, but not be limited to, Fire, Extended Coverage, Vandalism & Malicious Mischief, Theft and Transit. The City of Dallas will be shown as a joint named insured, as their interest may appear as property owner.

Note: If the insurance described in #3 or #4 above is written on a claims-made form, coverage shall be continuous (by renewal or extended reporting period) for not less than twenty-four (24) months following completion of the contract and acceptance by the City. Coverage, including any renewals, shall contain the same retroactive date as the original policy applicable to this contract.

All insurance contracts shall contain and state, in writing, the following required provisions:

- a. Name the City of Dallas and its officers, employees and elected representatives as additional insureds to all applicable coverages as their interest may appear as property owner.
- b. State that coverage shall not be canceled, nonrenewed or materially changed except after thirty (30) days written notice by certified mail to: Office of Cultural Affairs, Attention: Hector Campos, General Manager, 2301 Flora, Suite 100, Dallas, Texas 75201.
- c. Waive subrogation against the City of Dallas, its officers and employees, for bodily injury (including death), property damage or any other loss.
- d. Provide insurance is primary insurance as respects the City, its officers, employees and elected representatives.

August 25, 2004

WHEREAS, on September 18, 1985, Resolution 85-3068, the City Council authorized a long term use agreement with the Dallas Symphony Association, Inc. (DSA) which stated the terms and conditions under which DSA would utilize and occupy the Morton H. Meyerson Symphony Center (MSC), as well as the City's responsibilities for the operation and management of the MSC.

WHEREAS, the first amendment approved on July 20, 1995, Resolution 95-1717, formalized the use and operations for the Lay Family organ, including a commission payment to the City for use of the organ by non-DSA user organizations. Further, the Use Agreement established and formalized the donor recognition procedures used by the DSA/City staff for placement of identification markers in the Meyerson Symphony Center. It also required the Symphony Center Manager and the Vice-President of Orchestra Operations to establish a policy governing the use and scheduling of the Choral Rehearsal Suite, subject to modification from time to time by mutual agreement of the Symphony Center Manager and the Director of the Orchestra Operations of the Association.

WHEREAS, the second amendment approved on January 13, 1999, Resolution 99-0183, provided for the DSA to design, construct and install improvements to the MSC to accommodate the equipment and fixtures necessary to enhance the broadcast, transmission, production, and recording of performances in the Center. It also outlined the terms and established formal procedures for the operation and management of the completed Broadcast Center, Education and Entertainment Facilities, Choral Office and Library Facilities and ownership of the Lighting Equipment.

WHEREAS, the City and DSA desire to amend the use agreement to extend the term of the agreement to August 31, 2019, to allow DSA's participation in the selection of a third party manager under certain conditions, to clarify the proportionate utility payments by either party, and to update insurance requirements.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That subject to approval as to form by the City Attorney, the City Manager, on behalf of the City of Dallas, is authorized to amend the use agreement with the Dallas Symphony Association, Inc., a Texas nonprofit organization ("DSA") for the Morton H. Meyerson Symphony Center ("MSC") upon such terms as the City Manager may deem to be in the best interest of the City of Dallas, including without limitation the terms specified below.

SECTION 2. That the use agreement is extended to August 31, 2019.

SECTION 3. That DSA may participate in the selection process for a third party manager of the MSC if DSA decides not to bid for the management contract prior to the City's advertisement for bids or proposals for the contract.

SECTION 4. That DSA's share of utilities payments be specified so that for the period from June 1, 2004, to May 31, 2009, DSA shall be responsible annually for 15% of the utilities' costs, multiplied by the actual number of dates DSA uses the concert hall, divided by 365; and for the period June 1, 2009 to ~~May 31, 2019~~ May 31, 2015, DSA shall be responsible annually for 25% of the utilities' costs, multiplied by the actual number of dates DSA uses the concert hall, divided by 365; for the period from June 1, 2015 to May 31, 2019, DSA shall be responsible annually for 35% of the utilities' costs, multiplied by the actual number of dates DSA uses the concert hall, divided by 365. If the Agreement is renewed in accordance with the terms of the Agreement beyond June 1, 2019, DSA agrees to be responsible annually for 50% of the utilities' costs, multiplied by the actual number of dates DSA uses the concert hall, divided by 365.

SECTION 5. That the insurance requirements be updated to reflect the current requirements by the City.

SECTION 6. That this resolution shall take effect immediately from and after its passage in accordance with the provisions of the Charter of the City of Dallas, and it is accordingly so resolved.

Distribution
Office of Cultural Affairs

APPROVED BY
CITY COUNCIL

AUG 25 2004

Shirley Geis
City Secretary

APPROVED *Betty W...* HEAD OF DEPARTMENT APPROVED *[Signature]* CITY CONTROLLER APPROVED *[Signature]* CITY MANAGER

CATEGORY: MISCELLANEOUS
AGENDA DATE: August 25, 2004
COUNCIL DISTRICT(S): 14
DEPARTMENT: Office of Cultural Affairs
CMO: Ramiro Salazar, 670-7801
MAPSCO: 45G

SUBJECT

Authorize the third amendment to the use agreement with the Dallas Symphony Association, Inc. ("DSA") for the Morton H. Meyerson Symphony Center to extend the term of the agreement to August 31, 2019, to allow DSA'S participation in the selection of a third party manager under certain conditions, to clarify the proportionate utility payments by City and DSA, and to update insurance requirements- Financing: No cost consideration to the City

BACKGROUND

On September 18, 1985, Resolution 85-3068, the City Council authorized a long term use agreement with the Dallas Symphony Association, Inc. (DSA) which stated the terms and conditions under which DSA would utilize and occupy the Morton H. Meyerson Symphony Center (MSC), as well as the City's responsibilities for the operation and management of the MSC.

The first amendment approved on July 20, 1995, Resolution 95-1717, formalized the use and operations for the Lay Family organ, including a commission payment to the City for use of the organ by non-DSA user organizations. Further, the Use Agreement established and formalized the donor recognition procedures used by the DSA/City staff for placement of identification markers in the Meyerson Symphony Center. It also required the Symphony Center Manager and the Vice-President of Orchestra Operations to establish a policy governing the use and scheduling of the Choral Rehearsal Suite, subject to modification from time to time by mutual agreement of the Symphony Center Manager and the Director of the Orchestra Operations of the Association.

Vice-President

The second amendment approved on January 13, 1999, Resolution 99-0183, provided for the DSA to design, construct and install improvements to the MSC to accommodate the equipment and fixtures necessary to enhance the broadcast, transmission, production, and recording of performances in the Center. It also outlined the terms and established formal procedures for the operation and management of the completed Broadcast Center, Education and Entertainment

Facilities, Choral Office and Library Facilities and ownership of the Lighting Equipment.

BACKGROUND (continued)

The City and DSA desire to amend the use agreement, to extend the term of the agreement to August 31, 2019, to allow DSA'S participation in the selection of a third party manager under certain conditions, to clarify the proportionate utility payments by either party, and to update insurance requirements.

PRIOR ACTION/REVIEW COUNCIL, BOARDS, COMMISSIONS

On September 18, 1985, Resolution 85-3068, City Council authorized an agreement with the DSA, Inc. stating the terms and conditions to utilize and occupy the MSC and the City's responsibilities for the operation and management of the MSC

On July 20, 1995, Resolution 95-1717, City Council authorized a first amendment to formalize the use and operations for the Lay Family Organ

On January 13, 1999, Resolution 99-0183 City Council authorized a second amendment to provide for the DSA to design, construct and install improvements to the MSC

FISCAL INFORMATION

No cost consideration to the City

ETHNIC COMPOSITION

Dallas Symphony Association, Inc.

Board of Governors

African American Female	6	African American Male	4
Asian American Female	2	Asian American Male	2
European American Female	24	European American Male	74
Hispanic American Female	4	Hispanic American Male	1

ETHNIC COMPOSITION (continued)

Dallas Symphony Association, Inc.

Staff

African American Female	6	African American Male	1
Asian American Female	1	Asian American Male	5
European American Female	63	European American Male	73
Hispanic American Female	1	Hispanic American Male	2
Native America Female	1	Native America Male	0

OWNER(S)

Dallas Symphony Association, Inc.

Fred Bronstein, President

MAP

Attached.

RESOLUTION

August 25, 2004

WHEREAS On September 18, 1985, Resolution 85-3068, the City Council authorized a long term use agreement with the Dallas Symphony Association, Inc. (DSA) which stated the terms and conditions under which DSA would utilize and occupy the Morton H. Meyerson Symphony Center (MSC), as well as the City's responsibilities for the operation and management of the MSC.

WHEREAS, the first amendment approved on July 20, 1995, Resolution 95-1717, formalized the use and operations for the Lay Family organ, including a commission payment to the City for use of the organ by non-DSA user organizations. Further, the Use Agreement established and formalized the donor recognition procedures used by the DSA/City staff for placement of identification markers in the Meyerson Symphony Center. It also required the Symphony

Center Manager and the Vice-President of Orchestra Operations to establish a policy governing the use and scheduling of the Choral Rehearsal Suite, subject to modification from time to time by mutual agreement of the Symphony Center Manager and the Director of the Orchestra Operations of the Association.

WHEREAS, the second amendment approved on January 13, 1999, Resolution 99-0183, provided for the DSA to design, construct and install improvements to the MSC to accommodate the equipment and fixtures necessary to enhance the broadcast, transmission, production, and recording of performances in the Center. It also outlined the terms and established formal procedures for the operation and management of the completed Broadcast Center, Education and Entertainment Facilities, Choral Office and Library Facilities and ownership of the Lighting Equipment.

WHEREAS, the City and DSA desire to amend the use agreement, to extend the term of the agreement to August 31, 2019, to allow DSA'S participation in the selection of a third party manager under certain conditions, to clarify the proportionate utility payments by either party, and to update insurance requirements.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That subject to approval as to form by the City Attorney, the City Manager, on behalf of the City of Dallas, is authorized to amend the use agreement with the Dallas Symphony Association, Inc., a Texas nonprofit organization ("DSA") for the Morton H. Meyerson Symphony Center ("MSC) upon such terms as the City Manager may deem to be in the best interest of the City of Dallas, including without limitation the terms specified below.

SECTION 2. That the use agreement is extended to August 31, 2019.

SECTION 3. That DSA may participate in the selection process for a third party manager of the MSC if DSA decides not to bid for the management contract prior to the City's advertisement for bids or proposals for the contract.

SECTION 4. That DSA's share of utilities payments be specified so that for the period from June 1, 2004, to May 31, 2009, DSA shall be responsible annually for 15% of the utilities' costs, multiplied by the actual number of dates DSA uses the concert hall, divided by 365; and for the period June 1, 2009 to May 31, 2019, DSA shall be responsible annually for 25% of the utilities' costs, multiplied by the actual number of dates DSA'S uses the concert hall, divided by 365. If the Agreement is renewed in accordance with the terms of the Agreement beyond June 1, 2019, DSA agrees to be responsible annually for 50% of the utilities' costs, multiplied by the actual number of dates DSA uses the concert hall, divided by 365.

June 1, 2015
to
May 31, 2019
350%

SECTION 5. That the insurance requirements be updated to reflect the current requirements by the City.

SECTION 6. That this resolution shall take effect immediately from and after its passage in accordance with the provisions of the Charter of the City of Dallas, and it is accordingly so resolved.

Distribution
Office of Cultural Affairs