



OFFICE OF THE COUNTY ATTORNEY

MITCHELL O. PALMER, County Attorney*
William E. Clague, Chief Assistant County Attorney
Sarah A. Schenk, Assistant County Attorney**
Christopher M. De Carlo, Assistant County Attorney
Pamela J. D'Agostino, Assistant County Attorney
Anne M. Morris, Assistant County Attorney
Katharine M. Zamboni, Assistant County Attorney
Alexandria C. Nicodemi, Assistant County Attorney
Douglas E. Polk, Jr., Assistant County Attorney

MEMORANDUM

DATE: March 9, 2020

TO: Michelle Stewart, Marketing Representative, Convention and Visitors Bureau
Monica Luff, Sr. Administrative Specialist, Convention and Visitors Bureau

THROUGH: Mitchell O. Palmer, County Attorney Approved by *M. Palmer 3-9-2020*

FROM: Alexandria C. Nicodemi, Assistant County Attorney Approved by *A. Nicodemi 3-9-2020*

RE: **RES Systems Photography Purchase License Agreement; CAO Matter No. 2020-0025**

This memorandum is in response to the above referenced Request for Legal Services in which you asked this office to review a draft License Agreement between Manatee County d/b/a Bradenton Area Convention and Visitors Bureau ("BACVB") and RES Systems, Inc. for the use of certain digital images in the marketing and promotion of tourism in Manatee County ("Agreement"). Attached to this memorandum is the revised Agreement. Please turn on "All Mark-up" within Microsoft Word to review the changes and comments made to the Agreement.

This Agreement originally had the Director of the BACVB as the signatory for this Agreement. The BACVB provided Resolution No. R-97-232 ("Resolution"), as the basis for such authority. However, this Resolution explicitly states that such authority "to sign two-party contracts with media and marketing companies is in accordance with the FY 1997/98 media and marketing plan which was approved by the Board of County Commissioners on July 1, 1997." Therefore, this office recommends this Agreement either: 1) go through the proper procedures as outlined in Section 2-26-45 of Manatee County's Procurement Ordinance or 2) schedule this matter as an agenda item for consideration by the Board of County Commissioners. Once the BACVB has made a decision on this matter, please amend the signature block accordingly.

* Board Certified in Construction Law

** Board Certified in City, County, & Local Government Law

**Michelle Stewart, Marketing Representative, Convention and Visitors Bureau
Monica Luff, Sr. Administrative Specialist, Convention and Visitors Bureau
March 9, 2020
Page 2**

I express no opinion as to the business judgment of entering into this Agreement. This concludes my response to the Request for Legal Services. If you have any further questions, comments, or concerns, please feel free to contact me.

**Copies to: Cheri Coryea, County Administrator
John Osborne, Deputy County Administrator
Karen Stewart, Deputy County Administrator
Elliott Falcione, Director, Convention and Visitors Bureau**

License Agreement
between
Bradenton Area Convention and Visitors Bureau
and
RES Systems, Inc.

This License Agreement (this "Agreement") is made effective as of January 31, 2020 ("Effective Date") by and between RES Systems, Inc., a Florida Corporation ("RES"), of 1404 3rd St. Circle E., Palmetto, Florida 34221 and Manatee County, a political subdivision of the State of Florida, d/b/a Bradenton Area Convention and Visitors Bureau ("BACVB"), with offices located at One Haben Blvd, Palmetto, Florida 34221.

WHEREAS, Manatee County has established the BACVB for the promotion of travel and tourism to, and events in, the County, as contemplated in Section 125.0104, Florida Statutes; and

WHEREAS, RES solely and exclusively owns and controls the right to certain digital images of Manatee County, a copy of each is described and attached in Schedule 1 hereto; and

WHEREAS, the BACVB desires to obtain a license to the digital images for the uses and purposes described herein, each on the terms and conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants, promises and representations contained herein, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

- 1. GRANT OF LICENSE.** Subject to the terms and conditions of this Agreement, RES hereby grants the BACVB an exclusive license to use the digital images of Manatee County, as further described in Schedule 1 attached hereto, ("Images") in perpetuity in all formats and media whether now known, existing, or hereafter discovered or developed, for the purpose of advertising, publishing, promoting, marketing, selling and otherwise commercializing tourism within Manatee County.

Without limiting the forgoing, RES acknowledges and agrees that the rights and license granted to BACVB under this Agreement, includes the BACVB's rights to: (a) modify, edit, combine with other materials (including, but not limited to, in combination or conjunction with RES's name or any other name, or no name), translate, include in collective works, and create derivative works of the Images in whole or in part); and (b) to reproduce, display (publicly or otherwise) and transmit the Images, in whole or in part, as provided by RES or for such purposes and uses as are permitted under this Section.

BACVB shall have the right (a) not to use or exploit the Images and (b) to exercise its rights under this license through any of its departments.

2. **OWNERSHIP.** BACVB agrees that, subject to the rights and licenses granted herein, RES, is and shall remain, the sole and exclusive owner of all right, title, and interest of the Images. Derivative works shall be assigned to RES by BACVB. RES shall not re-license, sublicense or otherwise allow the use of the Images to any other individual or entity.
3. **PAYMENT.** Subject to this Agreement and in full consideration of RES's timely delivery of the Images and grant of the rights and license hereunder, BACVB shall pay RES a one-time license fee in the amount of \$10,500.00 which shall be calculated as follows: \$750.00 per digital image x 14 images.
 - a. BACVB shall not be obligated to pay RES for any Image that is delivered late or does not substantially comply with the criteria for such Image as set forth in this Agreement.
 - b. Payment shall be made within 30 days after the BACVB's receipt and acceptance of the Images that RES has timely delivered and that comply with the criteria with such Images, or in the case of any Image late or does not comply, no later than the date of BACVB's initial publication.
4. **COPYRIGHT NOTICE ATTRIBUTION.** BACVB shall have the right, but not the obligation, to provide RES with the source of attribution of each Image, including applicable copyright notice, in connection with any publication of such Image. BACVB shall have no obligation to provide such attribution where, in BACVB's reasonable judgment, space does not reasonably permit such attribution or such attribution would be commercially disadvantageous, physically impractical, or contrary to custom or applicable law.
5. **DELIVERY OF LICENSE.** RES shall deliver Images to BACVB to the address set forth in Section 9, Notice, of this Agreement within 30 days of the Effective Date of this Agreement. Images shall be delivered to the BAVCB in the format and medium as set forth in Schedule 1 of this Agreement.
6. **MODIFICATIONS.** BACVB may modify or change the Images in any manner.
7. **MUTUAL REPRESENTATION AND WARRANTIES.** Each party represents and warrants that it has the full right, power and authority to enter into, perform and grant the rights and licenses it grants and required to grant, under this Agreement.
8. **LICENSOR REPRESENTATION AND WARRANTIES.** By providing the Images to the BACVB, RES, the licensor, hereby represents and warrants that:
 - a. The Images are RES's sole and original creation;
 - b. Licensor has not granted and will not grant any license, lien, security interest or other encumbrance in, to, or under the Images, and has not and will not

enter into any license, contract, or other obligation that could conflict or interfere with BACVB's receipt or exercise of its rights or license hereunder;

- c. RES is the sole, exclusive, legal, and beneficial owner of all right, title, and interest in and to the Images, including all copyrights and other intellectual property rights therein;
- d. RES is the record owner of the copyright registrations and applications for the Images and all such issued registrations are valid, subsisting and in full force and effect;
- e. There is no settled, pending, or to RES's knowledge, threatened litigation, opposition, or other claim or proceeding challenging RES's ownership of copyrights in or use of the Images or the validity, enforceability, or registration of such copyrights or any other intellectual property rights in or to the Images; and
- f. Neither the Images nor the medium on which they are delivered to BACVB have any material defects in the workmanship or contain any virus, malware, or other harmful code or routine.

9. NOTICES. All notices, comments, consents, objections, approvals, waivers, and elections which any party shall be required or requested or may desire to make or give under this Agreement shall be in writing and shall be given only by hand delivery for which a receipt is obtained, or certified mail, prepaid with confirmation of delivery requested, or facsimile transmission. All such communications shall be addressed to the applicable addresses set forth below or as any party may otherwise designate in the manner prescribed herein.

To the BACVB: Elliott Falcione, Director
Bradenton Area Convention and Visitors Bureau
P.O. Box 1000
Bradenton, FL 34206
(941) 729-9177
(941) 729-1820 (fax)
[EMAIL]

With a copy to: Manatee County Attorney's Office
1112 Manatee Avenue West, Suite 969
Bradenton, Florida 34205
ATTN: County Attorney

To RES: Rick Schwartz
[ADDRESS]
[PHONE]
[EMAIL]

- 10. ARBITRATION.** The parties will attempt to resolve any dispute arising out of or relating to this Agreement through friendly negotiations amongst the parties.
- 11. WARRANTIES.** Neither party makes any warranties with respect to the use, sale or other transfer of the Images by the other party or by any third party, and BACVB accepts the product "AS IS." RES shall not be liable for direct, indirect, special, incidental, or consequential damages, that are in any way related to the condition of the Images.
- 12. NON-EXCLUSIVE LICENSE TO LICENSOR.** As of the effective date, BACVB grants back to RES a non-exclusive royalty-free license to use the Images, including for the creation of derivative works. This license shall in no way limit BACVB's rights and public rights under this Agreement. RES shall not use or license the Images for any commercial purpose other than use on RES's personally owned websites that are used for the promotion of RES's artwork and fine art prints for sale by RES only.
- 13. TRANSFER OF RIGHTS.** This Agreement shall be binding on any successors of the parties. Neither party shall have the right to assign its rights or interests in this Agreement to any other party, unless the prior written consent of the other party is obtained.
- 14. TERMINATION AND DEFAULT.** This Agreement shall not expire and remain in effect in perpetuity. Either party may terminate this Agreement upon written notice to the other party if the other party materially breaches this Agreement and fails to cure such breach within 60 days after receiving written notice thereof.
- 15. EFFECT OF TERMINATION.** In the event of termination of this Agreement, all rights licensed under this Agreement shall revert back to RES and BACVB shall, within 120 days after such termination, stop the use and promotion of all Images in its control and possession. In the event that this Agreement is terminated due to RES sublicensing, leasing, or otherwise allowing the use of the Images by any other individual or entity, the BACVB shall be entitled to equitable relief, including but not limited to, the entire license fee, per Section 3 of this Agreement. Such payment shall be made within 120 days of termination.
- 16. ENTIRE AGREEMENT.** This Agreement contains the entire Agreement of the parties and there are no other promises or conditions in any other agreement whether oral or written. This Agreement supersedes any prior written or oral agreements between the parties.
- 17. RELATIONSHIP OF THE PARTIES.** The relationship between the RES and BACVB is that of independent contractors. Nothing contained in this Agreement shall be construed as creating any agency, partnership, joint venture, or other form of joint enterprise, employment, or fiduciary relationship between the parties, and

neither party shall have authority to contract for or bind the other party in any manner whatsoever.

- 18. INDEMNIFICATION.** To the extent permitted by law, and in the case of Manatee County d/b/a BACVB, subject to the dollar limitations set forth in Section 768.28, Florida Statutes, each party (an (or the) "Indemnifying Party") shall indemnify, defend, save and hold harmless the other party, and its officers, directors, members, partners, employees, agents, affiliates, successors, and permitted assigns (collectively, the "Indemnified Parties") from and against all third-party proceedings, claims, suits, demands, damages, losses, expenses, liabilities, or causes of action arising out of any negligent actions or omissions of Indemnifying Party, its agents, officers or employees in the performance of this Agreement.
- 19. AMENDMENT.** This Agreement may be modified or amended, if the amendment is made in writing and is signed by both parties.
- 20. SEVERABILITY.** It is understood and agreed by the parties hereto that if any part, term or provision of this Agreement is held to be illegal or in conflict with any law, the validity of the remaining portions or provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if the Agreement did not contain the particular part, term or provision held to be invalid.
- 21. DISCLAIMER OF THIRD-PARTY BENEFICIARIES.** This Agreement is solely for the benefit of the parties hereto, and no right, privilege, or cause of action shall by reason hereof accrue upon, to, or for the benefit of any third party, including without limitation any subcontractors of RES and any providers of promotional, advertising or other services, or goods, purchased by RES. Nothing in this Agreement is intended or shall be construed to confer upon or give any person, corporation, partnership, trust, private entity, agency, or other governmental entity any right, privilege, remedy, or claim under or by reason of this Agreement or any provisions or conditions hereof.
- 22. WAIVER OF CONTRACTUAL RIGHT.** The failure of either party to enforce any provision of this Agreement shall not be construed as a waiver or limitation of that party's right to subsequently enforce and compel strict compliance with every provision of this Agreement.
- 23. HEADINGS AND CAPTIONS.** The headings and captions of articles, sections, and paragraphs used in this Agreement are for convenience of reference only and are not intended to define or limit their contents, nor are they to affect the construction of or be taken into consideration in interpreting this Agreement.
- 24. APPLICABLE LAW; VENUE.** This Agreement shall be governed by the laws of the State of Florida. Venue for any action to enforce any of the provisions of this Agreement shall be in the Circuit Court of the Twelfth Judicial Circuit in and for Manatee County, Florida, or, to the extent any proceeding is removed to federal

court, the United States District Court for the Middle District of Florida, Tampa Division.

- 25. ATTORNEY FEES.** In the event of any litigation arising under the terms of this Agreement, each party shall be solely responsible for their own attorney's fees and costs in any dispute, litigation, dispute resolution proceeding, settlement negotiation or pre-litigation negotiation arising under this Agreement.
- 26. FORCE MAJEURE.** Neither party shall be considered in default in performance of its obligations hereunder to the extent that performance of such obligations or any of them is delayed or prevented by Force Majeure. Force Majeure shall include, but not be limited to, hostility, revolution, civil commotion, strike, epidemic, accident, fire, flood, wind, earthquake, hurricane, name windstorm, explosion, lack of or failure of transportation facilities, any law, proclamation, regulation, ordinance or other act of government, or any act of God or any cause whether of the same or different nature, existing or future; provided that the cause, whether or not enumerated in this Section, is beyond the control and without the fault or negligence of the party seeking relief under this Section.
- 27. VALIDITY.** Each of the parties represents and warrants to the other its respective authority to enter into this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the Effective Date by and through their duly authorized representatives.

**MANATEE COUNTY, a political subdivision
of the State of Florida**

By: its Board of County Commissioners

By: _____
Chairperson

**ATTEST: ANGELINA COLONNESO
CLERK OF THE CIRCUIT COURT AND COMPTROLLER**

By: _____
Deputy Clerk

RES Systems, Inc., a Florida Corporation

By: _____
Rick Schwartz, Principal