

**CITY OF NAPLES  
LOWDERMILK PARK  
CONCESSION AGREEMENT**

This Agreement made the 5th day of March 2003 between the City of Naples and Russells Clambakes and Cookouts, hereinafter called the Contractor.

**WITNESSETH**

**WHEREAS**, the City of Naples by authority of the Charter of the City of Naples is vested with jurisdiction over and control of all aspects of management and operation of Lowdermilk Park of the use of the public for healthful recreation, and

**WHEREAS**, the City may grant the exclusive privilege of operating the retail sales and equipment rental concessions at Lowdermilk Park and to provide goods and services as hereinafter described, and

**WHEREAS**, such concessions will require investment by the contractor, and involve certain risks of financial loss, and

**WHEREAS**, the City being fully aware of these factors will adopt and pursue such policies with respect to this concession operation as will be an assurance of the security of such investment and of the reasonable opportunity for the Contractor to make a fair return on the investment.

**NOW THEREFORE**, in consideration of the premises and the mutual covenants and conditions herein contained, it agrees by the parties hereto as follows:

1. The City hereby grants to the Contractor, and the Contractor hereby accepts from the City the privilege to operate the following described concessions at Lowdermilk Park for the period stated herein and subject to all the terms and conditions set forth in this Agreement and as defined in the Request of Proposal Number 015-03, any addenda thereto, and the Proposal as submitted by the Contractor, all of which are incorporated by reference as if fully set forth herein. Unless approved by the City Council, this contractor may not sublease the concession operation.

2. It is agreed that in the event of a conflict between the terms and conditions of this Agreement and the terms and conditions of the Proposal, that the language of this Agreement shall prevail.

3. This Agreement shall commence upon execution and shall end on the 31<sup>st</sup> day of July 2006. **This Agreement may be extended, at the request of the City and with the concurrence of the Contractor, for two (2) one-year terms thereafter.**

4. The City hereby provides to the Contractor the concession building at Lowdermilk Park as designed upon execution of this Agreement.

5. The Agreement shall be for the sole purpose of operating concession facilities only at Lowdermilk Park.

6. The Contractor shall not carry on any other business on City property without specific written authority of the City Council of the City of Naples.

7. The Contractor shall be open for business to the public no later than thirty (30) days after the City obtains the Certificate of Occupancy for the new pavilion at Lowdermilk Park. Time is of the essence.

8. The Contractor is hereby authorized to conduct the following kinds of business and to provide the following kinds of services: **sale of food, snacks, soft drinks, souvenirs and gifts, sundries and clothing times, as specified and itemized in the Request for Proposal, number 015-03.** This business will be conducted in compliance with terms of this Agreement.

9. The Community Services Director is hereby designated as the Community Services Department's agreement manager and shall be responsible for insuring compliance with the terms and conditions of this Agreement, and shall conduct regularly scheduled performance inspections of the concession operations located at Lowdermilk Park and report all findings.

10. The Contractor shall, to the satisfaction of the Community Services Director or his authorized representative provide normal and routine daily maintenance of the facilities, designed to keep the premises and equipment in a good state or repair, free from hazardous conditions and deterioration, thus providing for the comfort and safety of visitors and patrons.

11. Contractor agrees to perform all necessary custodial service located within the storage and concession facilities at the Lowdermilk Park Concession. The City shall provide cleaning of public restrooms.

12. The City may, by amendment to this Agreement, authorize the Contractor to expand the services provided. Neither this Agreement, nor any part hereof, may be assigned or terminated

without prior written approval of the City and, if either assigned or terminated in whole or part, the Contractor shall first be required to pay to the City a processing fee of one hundred dollars (\$100.00). If contractor submits a request to terminate this Agreement before the termination date, in addition to the \$100.00 processing fee, the City may impose a penalty fee of five percent (5%) of the average monthly fee (average of the previous 12 monthly payments) for each month remaining in the current term of this Agreement. If, for any reason, new management for the concession is appointed, Contractor agrees to notify the City within three days. If the City does not approve the new management to succeed to this Agreement, the City may unilaterally cancel this Agreement after 30 days notice.

13. The Contractor accepts the facilities and space provided in this Agreement and is responsible for all concession sign maintenance and all interior modifications and maintenance, including entrance doors, windows and screens in the same conditions as upon delivery. The Contractor must obtain the City's written concurrence, in advance, for any renovation and proposed construction of new facilities, and then must pay for such construction, modifications or additions, which shall become City assets upon completion. Contractor agrees that construction of capital improvements is contingent upon, and may not begin prior to, City review and approval of design and construction plans, including material specifications. These capital improvements will be subject to all other terms and conditions of this Agreement upon completion.

14. The Contractor agrees to obtain and pay for all permits and licenses necessary for the conduct of the business and agrees to comply with all laws governing the responsibility of an employer with respect to persons it employs. Contractor shall be solely responsible for payment of any and all taxes levied on his operation. All required permits and licenses must be obtained and presented to the City prior to commencement of any operation by the Contractor.

15. Contractor agrees to provide copies of his current comprehensive general liability insurance policy and automobile liability policy covering the operations under this Agreement, to the City at the time this Agreement is executed by the Contractor. Limits of liability for bodily injury and property damage will be one million (\$1,000,000) each occurrence, combined single limit. Such insurance policy shall name the City of Naples as additional parties insured. The policy shall carry the "governmental immunity" endorsement (ISO # CG2414 11/85), which states: "It is agreed that in the event of any claim or suit against the insured for damages covered by this policy, the company will not deny liability by the use of a defense based upon governmental immunity,

unless the insured requests, in writing, that he be allowed to assert a governmental immunity defense." Additionally, the Contractor shall comply with all laws pertaining to workers' compensation insurance. No operations under this Agreement shall begin prior to compliance with this paragraph. Compliance with the foregoing shall not relieve the Contractor of his liability under this section or under any other portion of this Agreement.

16. The Contractor shall post with the City upon execution of this agreement, the following security in the amount of fifteen hundred dollars (\$1,500.00) to assure compliance with this Agreement: a performance bond issued by a surety company authorized to do business in Florida; a letter of credit from an approved Florida bank; a certified check; or other approved collateral. Such security shall be refundable at the termination of this Agreement if all terms and conditions of the Agreement accepted by the Contractor have been satisfied.

17. The Contractor agrees to comply with and document compliance with the minimum accounting requirements detailed in this report, and to establish and maintain such further records as may be prescribed by the City in the future to provide evidence that all terms of this Agreement have been and are being observed. The City shall have the right and authority to audit all records, documents, and books pertaining to the concession operation. Such audit will be conducted at locations and at a frequency determined by the City and communicated to the Contractor. The contractor agrees to provide any requested materials for the audit at the designated place within fifteen (15) days after the City notice is received. Such audits will be completed and provided to the City within 45 days of the end of the calendar year. The contractor agrees to provide the City with a monthly statement of gross sales.

The statement is to contain the total gross sales for the previous calendar month by point of sale and must be received no later than the 15th day of the following month. The Contractor agrees to provide the City, a profit and loss statement of the concession operation for each calendar year, or portion thereof, that this Agreement is in effect. The report will be submitted to the City within 45 days after the end of the calendar year, or the termination of this Agreement as applicable. All financial statements required herein will be submitted to the Community Services Director, who will serve as Agreement Manager for the City Lowdermilk Park concession operations. Both the monthly gross sales statements and the annual profit and loss statements will be based on source documents and books of original entry. Books of original entry and source documents shall be retained for a period of three (3) years, except that such records shall be retained until final

resolution of matters resulting from any litigation, claim, or audit that started prior to the expiration of the three (3) year retention period. The retention period commences from the date of submission of the annual profit and loss statement required above. This Agreement can be unilaterally canceled by the City should the Contractor refuse to allow public access to all documents, papers, letters, or other material made or received in conjunction with this Agreement, pursuant to the provisions of Chapter 119, Florida Statutes.

18. Any responsibility on the part of the City which requires annual appropriations are deemed executory only to the extent that funds are available for the purpose in question.

19. The Contractor must provide, install, and maintain, at his own expense, all equipment required to operate the concession. The Contractor shall have the right to use City equipment, furnishings, and fixtures that may be presently used in conjunction with the operations. If any of the equipment is lost, stolen or damaged, it shall be replaced or repaired at the cost and expense of the Contractor, ordinary wear and tear expected. Upon the expiration of the Agreement, the Contractor shall quietly and peacefully, redeliver said inventory to the City.

20. The Contractor shall have a neat and orderly operation at all times and shall be solely responsible for the necessary housekeeping services to properly maintain the premises. No signs or advertising shall be placed on the premises unless first approved by the City. There shall be no living quarters on the premises. The Contractor shall make available all areas of the premises under his control for examination at any time by the City Manager or his authorized representative.

21. The Contractor assumes all risks in the operation of this concession and shall be solely responsible and answerable in damages for accidents or injuries to persons or property, whether direct or indirect, arising out of the operation of this concession or arising by virtue of the carelessness, negligence, or improper conduct of the Contractor or any servant, agent or employee of the Contractor, and hereby covenants and agrees to indemnify and save harmless the City of Naples and their officers and employees from every such claim, suit, loss, damage or injury, which responsibility shall not be limited to the insurance coverage herein required.

22. The Contractor warrants that he has not employed or retained any company or person, other than a bona fide employee working solely for the Contractor to solicit or secure this Agreement and that he has not paid or agreed to pay any person,

company, corporation, individual, or firm, other than a bona fide employee working solely for the Contractor any fee, commission, percentage, gift, or other consideration contingent upon or resulting from the award of making of this Agreement. The Contractor shall have an experienced manager or managers overseeing the concession. Conduct of the employees of the Contractor shall be subject to reasonable regulation by the City.

23. The Contractor shall provide any security measures including electronic monitoring devices which may be required to protect his area and his equipment, supplies, materials, and facilities and the City shall not be responsible for security of the equipment, supplies materials or facilities used by Contractor.

24. The Contractor must obtain prior written approval from the City Manager or his authorized representative for any and all changes in operation of the concession as set forth in this Proposal.

25. The City shall provide all garbage, trash and rubbish receptacles within the confines of the area. Dumping of receptacles in and around exterior of concession stand and removal of trash, rubbish and garbage shall be the responsibility of the Contractor. The City will supply a dumpster for removal of trash at the City's expense.

26. Nothing herein contained shall create or be construed as creating a co-partnership between the City and the Contractor or to constitute the Contractor as agent of the City.

27. This Agreement is not intended nor shall it be construed as granting any rights, privileges or interest in any third party. The Contractor shall not, at any time during the tenure of the Agreement, sublet any part of this Agreement or assign any portion or part of it, except by virtue of written permission granted by the City Council of the City of Naples.

28. The Contractor must use a point-of-sale electronic cash machine and/or any other authorized electronic accounting control equipment permitted by the City of Naples Community Services Department for the proper control of cash payments. Cash register tapes must be maintained and made available upon demand during the entire term of the Agreement with the City of Naples. All accounting procedures must be approved by the City of Naples Finance Department. No other cash control equipment may be substituted and used in place of the equipment provided.

29. It is understood and agreed that no part, parcel, building, structure, equipment or space is leased to the Contractor; that he is a Contractor and not a lessee; that the

Contractor's right to operate the concession shall continue only so long as the concession operation complies with the terms and conditions of this Agreement.

30. The City will provide electricity used within the concession operation, as well as a phone from out City of Naples phone system. Any additional phone/fax lines are to be paid by Contractor to phone company.

31. The Contractor agrees to pay the City as compensation for this Agreement, a monthly concession fee of 18% of sales (less sales tax).

32. The monthly concession fee, plus the State use tax and any other fees due, must be submitted to the City along with the Monthly Report of Concession Gross Sales, to be received not later than 10 days after the end of each month. Late payments will result in liquidated damages being assessed in the amount of 1% of the concession fee due for each day the payment is late. If the concession fee and/or accumulated daily penalties are not received within five (5) days after the normal monthly payment deadline, then the City may take possession of the contractor's assets on property, may cancel this Agreement, and may begin procedures to collect the security paid to the City under terms of this Agreement.

33. It is expressly agreed that the City shall have a continuing lien on all personal property of the Contractor located at the Lowdermilk Park Pavilion concession and for all sums which may from time to time become due and unpaid to the City under this Agreement. In the event of default of payment by the Contractor, the City shall have the right to take possession of and retain the same until the full amount due shall be paid, or to sell the same at public auction, and after deducting the expense of such sale, apply the balance of the proceeds to such payment and if there should be any deficiency, to resort to any other legal remedy available to it.

34. The Contractor agrees not to remove from the Lowdermilk Park Pavilion, personal property brought thereon for the purpose of this Agreement, except such items as may be removed with the express permission of the City. Upon expiration of the term specified in paragraph 1(a) herein, and if the Contractor has made full payment under this Agreement and fully complied with the terms of this Agreement, all personal property shall be removed from the Lowdermilk Park Concession. Failure to do so may cause such personal property to be removed and stored at the cost and expense of the Contractor, and the City shall have a continuing lien thereon in the amount of the cost and expense of such removal and storage until all amounts due are paid. Further, the City may sell

such personal property and reimburse itself such costs and expense, plus the expense of sale.

35. The Contractor agrees to cooperate with the City in conducting surveys, providing reports of visitor contacts and responding to City inquiries about public usage of concession services.

36. The Contractor agrees that the concession facilities and premises may be inspected at any time by authorized representatives of the City or by any other state, county or municipal officer or agency having responsibilities for inspection of such operations. The Contractor agrees to undertake immediately the correction of any deficiency cited by such inspectors.

37. The Contractor hereby waives all claims for compensation for loss or damage sustained by reason of any interference, in the operation of this concession, including closure of the Lowdermilk Park Concession during emergencies, by any public agency or official; and any such interference shall not relieve the Contractor from any obligation herein.

38. The Contractor hereby waives all claims for loss or damage resulting from fire, water, tornado, hurricane, or other severe storms, civil commotion, riot, criminal activity, spoilage or disappearance; and the Contractor hereby waives all rights, claims and demands and forever releases and discharges the City and its officers and agents from all demands, claims, actions and causes of action arising from any of the aforesaid causes.

39. The Contractor agrees to provide the authorized services to the public throughout the daily hours the Lowdermilk Park concession is open, or as otherwise approved in writing by the agreement manager. Business hours shall be posted near the concession building. The contractor agrees to submit to the City for prior approval all proposed advertising signs, hours of operation, and if approved, shall install at Contractor's own expense.

40. The Contractor agrees to provide continuing training and evaluation of all employees assigned to the concession operation to ensure an appropriate level of proficiency, a public service orientation, and a good understanding and use of the principles of hospitality at the sole discretion of the City Manager or his designee. All concession employees will be required to wear a concession uniform shirt and name tag at all times while on duty at the Lowdermilk Park Pavilion. The Contractor agrees to replace any employee at the request of the City for cause. The concessionaire shall employ people to work at this facility who are literate, neat, clean, well-groomed and courteous. During the term of



Agreement the facilities shall be open and adequately staffed seven (7) days per week, with appropriate hours to serve the general public of the City of Naples, such determination to be at the sole discretion of the City Manager, or his designee.

41. The Contractor will not use, nor suffer or permit any person to use, the assigned concession facilities for any purpose in violation of any governmental rule or regulation now in effect or hereafter enacted or adopted.

42. The Contractor agrees that prices and fees charged for concession services will be consistent with those charged for similar services in the general vicinity of Lowdermilk Park. The City shall have the final right of approval for all such prices and fees, but said right shall not be arbitrarily or unreasonably exercised. All prices shall be reviewed quarterly by the Agreement Manager.

43. The Contractor agrees not to permit in the facility the use or storage of materials of any kind which are prohibited in the standard policies of fire insurance companies in the State of Florida.

44. Contractor shall develop and implement a solid waste reduction plan for solid waste generated by the concession operations, including use of recyclable materials. This plan shall include provisions for recycling of appropriate materials and reducing the amount of litter-generating materials used at the concession. The plan must be approved in writing, by the Agreement Manager, during the first 60 days of operations under this Agreement.

45. It is understood and agreed that the members constituting the City of Naples and its officers and agents are acting in a representative capacity and not for their own benefit; and that neither the Contractor nor any occupant shall have any claim against any such members, officers, or agents as individuals in any event whatsoever.

46. This Agreement shall not vest any right in the Contractor, and shall be deemed only the grant of a privilege to carry out the terms of this Agreement on City property. If the contractor fails to comply with any of the terms and conditions of this Agreement, the City may afford the contractor the opportunity to correct any default within a specified time but in no event longer than 30 days. Upon failure of the Contractor to bring the concession operations into compliance within the time limit specified, the City may terminate this Agreement and privilege after three (3) days receipt of notice in writing delivered or mailed to the Contractor's

address. If the City does not afford Contractor the opportunity to correct any defaults, the privilege shall terminate and the Contractor shall remove himself and all other parties who may be present upon or occupy any part of the premises. Continued occupancy of the premises after termination of the privilege shall constitute trespass by the contractor and may be prosecuted as such.

In addition, the Contractor shall pay to the City \$100.00 per day as liquidated damages for such trespass and holding over. Contractor shall not remove any personal property used in the performance of the terms and conditions of this Agreement until all financial obligations hereunder have been met.

47. There shall be no discriminating as to race, sex, color, creed, age or national origin in the operations referred to by this Concession Agreement; and further, there shall be no discrimination regarding any use, service, maintenance, or operation of the premises. All facilities located on the premises shall be made available to the public, subject to the right of the Contractor to establish and enforce rules and regulations to provide for safety, orderly operation and security of the facilities.

48. In connection with any litigation arising out of this Agreement, the prevailing party shall be entitled to the recovery of its cost at a reasonable attorney's fee.

49. The hours of operation of the concession will be, at a minimum, 8AM - 5PM January thru April and 9AM - 5PM May thru December. Any departure from this schedule must have prior approval of the City of Naples, Community Services Director.

50. This Agreement with appendixes represents the entire agreement of the parties and supersedes all previous agreements. Any alterations, variations, changes, modifications, or waivers of provisions of this Agreement shall be valid only when they have been reduced to writing, duly signed by each of the parties hereto, and attached to the original of this Agreement.

51. CONTRACTOR agrees not to employ or offer to employ any Elected Officer or City Managerial Employee of OWNER who in any way deals with, coordinates on, or assists with, the professional services provided in this Agreement, for a period of two (2) years after termination of all provisions of this Agreement. For purposes of this paragraph, the term "Elected Officer" shall mean any member of the City Council. For purposes of this paragraph, the term "City Managerial Employee" shall mean the City Manager, the Assistant City Manager, the City Clerk, and any City department head or director. In the event CONTRACTOR violates the provisions of this paragraph, CONTRACTOR shall be required to pay damages to OWNER in an amount equal to any and all compensation which is received by the former

Elected Officer or City Managerial Employee of OWNER from or on behalf of the contracting person or entity, or an amount equal to the former Elected Officer's or City Managerial Employee's last two (2) years of gross compensation from OWNER, whichever is greater.

**IN WITNESS WHEREOF**, the parties hereto have set their hands and seals the day and year first above written.

**ATTEST:**

**OWNER:**

**CITY OF NAPLES, FLORIDA,**  
a municipal corporation

By: \_\_\_\_\_  
Tara A. Norman, City Clerk

By: \_\_\_\_\_  
Kevin Rambosk, City Manager

Approved as to form  
and legal sufficiency:

By: \_\_\_\_\_  
Robert D. Pritt, City Attorney

**CONTRACTOR:**

**RUSSELLS CLAMBAKES AND COOKOUTS**

\_\_\_\_\_  
Witness for Contractor

By: \_\_\_\_\_  
(Signature of Owner/Agent)

\_\_\_\_\_  
Witness for Contractor